

TO
THE LEGAL PROFESSION
IN GRATEFUL RECOGNITION OF
THEIR WARM APPRECIATION AND SUPPORT

THE
CODE OF CIVIL PROCEDURE
(ACT V OF 1908)

WITH

EXHAUSTIVE, ANALYTICAL AND CRITICAL COMMENTARIES

BY

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Second Edition

VOLUME III

THE FIRST SCHEDULE ORDERS XXXI TO LI
FORMS, THE SECOND AND THIRD SCHEDULES
GOVERNMENT OF INDIA ACT, LETTERS PATENTS
AND OTHER APPENDICES

AND

GENERAL INDEX

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THE ALL INDIA REPORTER, LTD.

NAGPUR.

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PRINTED AT
THE ALL INDIA REPORTER PRESS
NAGPUR

THE CODE OF CIVIL PROCEDURE, 1908

(ACT V of 1908)

VOLUME III

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GENERAL INDEX

GOVERNMENT OF INDIA ACT, 1935.

[25 & 26 GEO V, CH 42]

An Act to make further provision for the government of India.

{2nd August 1935}

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows —

* * * * *

PART VII

FINANCE, PROPERTY, CONTRACTS AND SUITS

* * * * *

CHAPTER III

PROPERTY, CONTRACTS, LIABILITIES AND SUITS

* * * * *

176.—(1) The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this chapter, may, subject to any provisions which may be made by Act of the Federal or a Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed

Section 176
Suits and proceedings

(2) Rules of Court may provide that, where the Federation, the Federal Railway Authority, or a Province sue or are sued in the United Kingdom, service of all proceedings may be effected upon the High Commissioner for India or such other representative in the United Kingdom of the Federation, Authority or Province as may be specified in the rules

* * * * *

179.—(1) Any proceedings which, if this Act had not been passed, might have been brought against the Secretary of State in Council may, in the case of any liability arising before the commencement of Part III of this Act or arising under any contract or statute made or passed before that date be brought against the Federation or a Province, according to the subject-matter of the proceedings, or, at the option of the person by whom the proceedings are brought, against the Secretary of State, and any sum ordered to be paid by way of debt, damages or costs in any such proceed-

Section 179
Legal proceedings as to certain matters

ings, and any costs or expenses incurred in or in connection with the defence thereof, shall be paid out of the revenues of the Federation or the Province, as the case may be, or, if the proceedings are brought against the Secretary of State, out of such revenues as the Secretary of State may direct

The provisions of this sub-section shall apply with respect to proceedings arising under any contract declared by the terms thereof to be supplemental to any such contract as is mentioned in those provisions as they apply in relation to the contracts so mentioned

(2) If at the commencement of Part III of this Act any legal proceedings are pending in the United Kingdom or in India to which the Secretary of State in Council is a party, the Secretary of State shall be deemed to be substituted in those proceedings for the Secretary of State in Council, and the provisions of sub-section (1) of this section shall apply in relation to sums ordered to be paid, and costs or expenses incurred, by the Secretary of State or the Secretary of State in Council in or in connection with any such proceedings as they apply in relation to sums ordered to be paid in, and costs or expenses incurred in or in connection with the defence of, proceedings brought against the Secretary of State under the said sub-section (1)

(3) Any contract made in respect of the affairs of the Federation or a Province by or on behalf of the Secretary of State after the commencement of Part III of this Act may provide that any proceedings under that contract shall be brought in the United Kingdom by or against the Secretary of State and any such proceedings may be brought accordingly, and any sum ordered to be paid by the Secretary of State by way of debt, damages or costs in any such proceedings, and any costs or expenses incurred by the Secretary of State in or in connection therewith, shall be paid out of the revenues of the Federation or the Province, as the case may be

(4) Nothing in this section shall be construed as imposing any liability upon the Exchequer of the United Kingdom in respect of any debt, damages costs or expenses in or in connection with any proceedings brought or continued by or against the Secretary of State by virtue of this section, or as derogating from the provisions of sub-section (1) of the last preceding section

(5) This section does not apply in relation to contracts or liabilities solely in connection with the affairs of Burma or Aden, other than liabilities which are by this Act made liabilities of the Federation, or to contracts or liabilities for purposes which will, after the commencement of Part III of this Act, be purposes of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States

* * * * *

PART IX THE JUDICATURE

CHAPTER I.

THE FEDERAL COURT.

200.—(1) There shall be a Federal Court consisting of a Chief Justice of India and such number of other judges as His Majesty may deem necessary,

but unless and until an address has been presented by the Federal Legislature to the Governor-General for submission to His Majesty praying for an increase in the number of judges, the number of puisne judges shall not exceed six.

(2) Every judge of the Federal Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty five years

Provided that—

- (a) A judge may by resignation under his hand addressed to the Governor-General resign his office
- (b) A judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty report that the judge ought on any such ground to be removed

(3) A person shall not be qualified for appointment as a judge of the Federal Court unless he—

- (a) has been for at least five years a judge of a High Court in British India or in a Federated State or
- (b) is a barrister of England or Northern Ireland of at least ten years standing or a member of the Faculty of Advocates in Scotland of at least ten years standing or
- (c) has been for at least ten years a pleader of a High Court in British India or in a Federated State or of two or more such Courts in succession

Provided that—

- (i) a person shall not be qualified for appointment as Chief Justice of India unless he is or when first appointed to judicial office was a barrister, a member of the Faculty of Advocates or a pleader and
- (ii) in relation to the Chief Justice of India for the references in paragraphs (b) and (c) of this sub section to ten years, there shall be substituted references to fifteen years

In computing for the purposes of this sub section the standing of a barrister or a member of the Faculty of Advocates, or the period during which a person has been a pleader any period during which a person has held judicial office after he became a barrister a member of the Faculty of Advocates or a pleader as the case may be, shall be included

(4) Every person appointed to be a judge of the Federal Court shall, before he enters upon his office make and subscribe before the Governor-General or some person appointed by him an oath according to the form set out in that behalf in the Fourth Schedule to this Act

201. The judges of the Federal Court shall be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling upon appointment and to such rights in respect of leave and pensions, as may from time to time be fixed by His Majesty in Council

Section 201,
Salaries, &c., of
judges

Section 201.

Provided that neither the salary of a judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment

Section 202

Temporary appointment of acting Chief Justice

202. If the office of Chief Justice of India becomes vacant, or if the Chief Justice is, by reason of absence or for any other reason, unable to perform the duties of his office, those duties shall, until some person appointed by His Majesty to the vacant office has entered on the duties thereof or until the Chief Justice has resumed his duties, as the case may be, be performed by such one of the other judges of the court as the Governor General may in his discretion appoint for the purpose

Section 203

Seat of Federal Court

203. The Federal Court shall be a court of record and shall sit in Delhi and at such other place or places if any, as the Chief Justice of India may, with the approval of the Governor-General, from time to time appoint

Section 204

Original jurisdiction of Federal Court

204.—(1) Subject to the provisions of this Act, the Federal Court shall, to the exclusion of any other Court, have an original jurisdiction in any dispute between any two or more of the following parties that is to say, the Federation, any of the Provinces or any of the Federated States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends

Provided that the said jurisdiction shall not extend to—

(a) a dispute to which a State is a party, unless the dispute—

(i) concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State, or

(ii) arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature, or otherwise concerns some matter with respect to which the Federal Legislature has power to make laws for that State, or

(iii) arises under an agreement made after the establishment of the Federation, with the approval of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, between that State and the Federation or a Province, being an agreement which expressly provides that the said jurisdiction shall extend to such a dispute,

(b) a dispute arising under any agreement which expressly provides that the said jurisdiction shall not extend to such a dispute

(2) The Federal Court in the exercise of its original jurisdiction shall not pronounce any judgment other than a declaratory judgment

Section 205
Appellate jurisdiction of Federal Court in appeals from High Courts in British India

205.—(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion, to give or to withhold a certificate accordingly.

(2) Where such a certificate is given any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council either with or without special leave

Section 21

206.—(1) The Federal Legislature may by Act provide that in such civil cases as may be specified in the Act an appeal shall lie to the Federal Court from a judgment, decree or final order of a High Court in British India without any such certificate as aforesaid, but no appeal shall lie under any such Act unless—

Section 21
Power of Fed.
Legislature to
large appe
jurisdiction

- (a) the amount or value of the subject matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than fifty thousand rupees or such other sum not less than fifteen thousand rupees as may be specified by the Act, or the judgment decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value, or

(b) the Federal Court gives special leave to appeal

(2) If the Federal Legislature makes such provision as is mentioned in the last preceding sub section, consequential provision may also be made by Act of the Federal Legislature for the abolition in whole or in part of direct appeals in civil cases from High Courts in British India to His Majesty in Council either with or without special leave

(3) A Bill or amendment for any of the purposes specified in this section shall not be introduced into, or moved in, either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion

207.—(1) An appeal shall lie to the Federal Court from a High Court in a Federated State on the ground that a question of law has been wrongly decided, being a question which concerns the interpretation of this Act or of an Order in Council made thereunder or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State, or arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature

Section 207
Appellate jur
diction of Fed.
Court in app
from High Cot
in Federat
States

(2) An appeal under this section shall be by way of special case to be stated for the opinion of the Federal Court by the High Court, and the Federal Court may require a case to be so stated, and may return any case so stated in order that further facts may be stated therein

208 An appeal may be brought to His Majesty in Council from a decision of the Federal Court—

Section 208
Appeals to
Majesty in Cou
cil

- (a) from any judgment of the Federal Court given in the exercise of its original jurisdiction in any dispute which concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority

Section 208

vested in the Federation by virtue of the Instrument of Accession of any State or arises under an agreement made under Part VI of this Act in relation to the administration in any State of a law of the Federal Legislature without leave and
(b) in any other case by leave of the Federal Court or of His Majesty in Council

Section 209
Form of judgment
on appeal

209—(1) The Federal Court shall where it allows an appeal remit the case to the court from which the appeal was brought with a declaration as to the judgment decree or order which is to be substituted for the judgment decree or order appealed against and the court from which the appeal was brought shall give effect to the decision of the Federal Court

(2) Where the Federal Court upon any appeal makes any order as to the costs of the proceedings in the Federal Court it shall as soon as the amount of the costs to be paid is ascertained transmit its order for the payment of that sum to the court from which the appeal was brought and that court shall give effect to the order

(3) The Federal Court may subject to such terms or conditions as it may think fit to impose order a stay of execution in any case under appeal to the Court pending the hearing of the appeal and execution shall be stayed accordingly

Section 210
Enforcement of
decrees and orders
of Federal Court
and orders as to
discovery &c

210—(1) All authorities civil and judicial throughout the Federation shall act in aid of the Federal Court

(2) The Federal Court shall as respects British India and the Federated States have power to make any order for the purpose of securing the attendance of any person the discovery or production of any documents or the investigation or punishment of any contempt of Court which any High Court in British India has power to make as respects the territory within its jurisdiction and any such orders and any orders of the Federal Court as to the costs of and incidental to any proceedings therein shall be enforceable by all courts and authorities in every part of British India or of any Federated State as if they were orders duly made by the highest court exercising civil or criminal jurisdiction as the case may be in that part

(3) Nothing in this section—

(a) shall apply to any such order with respect to costs as is mentioned in sub section (2) of the last preceding section or

(b) shall as regards a Federated State apply in relation to any jurisdiction exercisable by the Federal Court by reason only of the making by the Federal Legislature of such provision as is mentioned in this chapter for enlarging the appellate jurisdiction of the Federal Court

Section 211
Letters of request
to Federated
States

211 Where in any case the Federal Court require a special case to be stated or re stated by or remit a case to or order a stay of execution in a case from a High Court in a Federated State or require the aid of the civil or judicial authorities in a Federated State the Federal Court shall cause letters of request in that behalf to be sent to the Ruler of the State and the Ruler shall cause such communication to be made to the High Court or to any judicial or civil authority as the circumstances may require.

212 The law declared by the Federal Court and by any judgment of the Privy Council shall so far as applicable be recognised as binding on and shall be followed by all courts in British India and so far as respects the application and interpretation of this Act or any Order in Council thereunder or any matter with respect to which the Federal Legislature has power to make laws in relation to the State in any Federated State

Section 212
Law declared by Federal Court and Privy Council to be binding on all Courts

213—(1) If at any time it appears to the Governor General that a question of law has arisen or is likely to arise which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Federal Court upon it he may in his discretion refer the question to that court for consideration and the court may after such hearing as they think fit report to the Governor General thereon

Section 213
Power of Governor General to consult Federal Court

(2) No report shall be made under this section save in accordance with an opinion delivered in open court with the concurrence of a majority of the judges present at the hearing of the case but nothing in this sub section shall be deemed to prevent a judge who does not concur from delivering a dissenting opinion

214—(1) The Federal Court may from time to time with the approval of the Governor General in his discretion make rules of court for regulating generally the practice and procedure of the court including rules as to the persons practising before the court as to the time within which appeals to the court are to be entered as to the costs of and incidental to any proceedings in the court and as to the fees to be charged in respect of proceedings therein and in particular may make rules providing for the summary determination of any appeal which appears to the court to be frivolous or vexatious or brought for the purpose of delay

Section 214
Rules of Court &c

(2) Rules made under this section may fix the minimum number of judges who are to sit for any purpose so however that no case shall be decided by less than three judges

Provided that if the Federal Legislature makes such provision as is mentioned in this chapter for enlarging the appellate jurisdiction of the court, the rules shall provide for the constitution of a special division of the court for the purpose of deciding all cases which would have been within the jurisdiction of the court even if its jurisdiction had not been so enlarged

(3) Subject to the provisions of any rules of court the Chief Justice of India shall determine what judges are to constitute any division of the court and what judges are to sit for any purpose

(4) No judgment shall be delivered by the Federal Court save in open court and with the concurrence of a majority of the judges present at the hearing of the case but nothing in this sub section shall be deemed to prevent a judge who does not concur from delivering a dissenting judgment

(5) All proceedings in the Federal Court shall be in the English language

215 The Federal Legislature may make provision by Act for conferring upon the Federal Court such supplemental powers not inconsistent with any of the provisions of this Act as may appear to be necessary or desirable for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by or under this Act

Section 215
Ancillary powers of Federal Court

Section 216
Expenses of Federal Court

216.—(1) The administrative expenses of the Federal Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the court, shall be charged upon the revenues of the Federation, and any fees or other moneys taken by the court shall form part of those revenues

(2) The Governor-General shall exercise his individual judgment as to the amount to be included in respect of the administrative expenses of the Federal Court in any estimates of expenditure laid by him before the Chambers of the Federal Legislature

Section 217
Construction of references to High Courts in States

217. References in any provision of this Part of this Act to a High Court in a Federated State shall be construed as references to any court which His Majesty may, after communication with the Ruler of the State declare to be a High Court for the purposes of that provision

Section 218
Savings

218. Nothing in this chapter shall be construed as conferring or empowering the Federal Legislature to confer any right of appeal to the Federal Court in any case in which a High Court in British India is exercising jurisdiction on appeal from a court outside British India, or as affecting any right of appeal in any such case to His Majesty in Council with or without leave

CHAPTER II

THE HIGH COURTS IN BRITISH INDIA

Section 219
Meaning of High Court

219.—(1) The following courts shall in relation to British India be deemed to be High Courts for the purposes of this Act, that is to say, the High Courts in Calcutta, Madras, Bombay, Allahabad, Lahore and Patna, the Chief Court in Oudh, the Judicial Commissioners Courts in the Central Provinces and Berar, in the North West Frontier Province and in Sind, any other court in British India constituted or reconstituted under this chapter as a High Court, and any other comparable court in British India which His Majesty in Council may declare to be a High Court for the purposes of this Act

Provided that, if provision has been made before the commencement of Part III of this Act for the establishment of a High Court to replace any court or courts mentioned in this sub-section then as from the establishment of the new court this section shall have effect as if the new court were mentioned therein in lieu of the court or courts so replaced

(2) The provisions of this chapter shall apply to every High Court in British India

Section 220
Constitution of High Courts

220.—(1) Every High Court shall be a court of record and shall consist of a chief justice and such other judges as His Majesty may from time to time deem it necessary to appoint

Provided that the judges so appointed, together with any additional judges appointed by the Governor-General in accordance with the following provisions of this chapter, shall at no time exceed in number such maximum number as His Majesty in Council may fix in relation to that court

(2) Every judge of a High Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty years

Provided that—

- (a) a judge may by resignation under his hand addressed to the Governor resign his office
- (b) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body if the Judicial Committee of the Privy Council on reference being made to them by His Majesty report that the judge ought on any such ground to be removed

(3) A person shall not be qualified for appointment as a judge of a High Court unless he—

- (a) is a barrister of England or Northern Ireland of at least ten years standing or a member of the Faculty of Advocates in Scotland of at least ten years standing or
- (b) is a member of the Indian Civil Service of at least ten years standing who has for at least three years served as or exercised the powers of a district judge or
- (c) has for at least five years held a judicial office in British India not inferior to that of a subordinate judge or judge of a small cause court or
- (d) has for at least ten years been a pleader of any High Court or of two or more such Courts in succession

Provided that a person shall not unless he is or when first appointed to judicial office was a barrister a member of the Faculty of Advocates or a pleader be qualified for appointment as Chief Justice of any High Court constituted by letters patent until he has served for not less than three years as a judge of a High Court

In computing for the purposes of this sub section the standing of a barrister or a member of the Faculty of Advocates or the period during which a person has been a pleader any period during which the person has held judicial office after he became a barrister a member of the Faculty of Advocates or a pleader as the case may be shall be included

(4) Every person appointed to be a judge of a High Court shall before he enters upon his office make and subscribe before the Governor or some person appointed by him an oath according to the form set out in that behalf in the Fourth Schedule to this Act

221 The judges of the several High Courts shall be entitled to such salaries and allowances including allowances for expenses in respect of equipment and travelling upon appointment and to such rights in respect of leave and pensions as may from time to time be fixed by His Majesty in Council

Section 221
Salaries &c of
judges

Provided that neither the salary of a judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment

Section 222
Temporary and
additional judges

222.—(1) If the office of chief justice of a High Court becomes vacant, or if any such chief justice is by reason of absence or for any other reason, unable to perform the duties of his office those duties shall, until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the chief justice has resumed his duties, as the case may be, be performed by such one of the other judges of the court as the Governor-General may in his discretion think fit to appoint for the purpose

(2) If the office of any other judge of a High Court becomes vacant or if any such judge is appointed to act temporarily as a chief justice or is by reason of absence, or for any other reason unable to perform the duties of his office the Governor-General may in his discretion appoint a person duly qualified for appointment as a judge to act as a judge of that court, and the person so appointed shall, unless the Governor General in his discretion thinks fit to revoke his appointment, be deemed to be a judge of that court until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the permanent judge has resumed his duties

(3) If by reason of any temporary increase in the business of any High Court or by reason of arrears of work in any such court it appears to the Governor-General that the number of the judges of the court should be for the time being increased, the Governor General in his discretion may, subject to the foregoing provisions of this chapter with respect to the maximum number of judges appoint persons duly qualified for appointment as judges to be additional judges of the court for such period not exceeding two years as he may specify

Section 223
Jurisdiction of
existing High
Courts

223 Subject to the provisions of this Part of this Act to the provisions of any Order in Council made under this or any other Act and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court and the respective powers of the judges thereof in relation to the administration of justice in the court including any power to make rules of court and to regulate the sittings of the court and of members thereof sitting alone or in division courts shall be the same as immediately before the commencement of Part III of this Act

Section 224
Administrative
functions of High
Courts

224—(1) Every High Court shall have superintendence over all courts in India for the time being subject to its appellate jurisdiction and may do any of the following things that is to say—

- (a) call for returns
- (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts,
- (c) prescribe forms in which books entries and accounts shall be kept by the officers of any such courts, and
- (d) settle tables of fees to be allowed to the sheriff attorneys, and all clerks and officers of courts

Provided that such rules forms and tables shall not be inconsistent with the provision of any law for the time being in force and shall require the previous approval of the Governor

(2) Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision

Section 224.

225—(1) If on an application made in accordance with the provisions of this section a High Court is satisfied that a case pending in an inferior court being a case which the High Court has power to transfer to itself for trial involves or is likely to involve the question of the validity of any Federal or Provincial Act it shall exercise that power

Section 225
Transfer of certain cases to High Court for trial

(2) An application for the purposes of this section shall not be made except in relation to a Federal Act by the Advocate General for the Federation and in relation to a Provincial Act by the Advocate-General for the Federation or the Advocate General for the Province

226—1) Until otherwise provided by Act of the appropriate Legislature no High Court shall have any original jurisdiction in any matter concerning the revenue or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force

Section 226
Jurisdiction in revenue matters

(2) A Bill or amendment for making such provision as aforesaid shall not be introduced into or moved in a Chamber of the Federal or a Provincial Legislature without the previous sanction of the Governor General in his discretion or as the case may be of the Governor in his discretion

227 All proceedings in every High Court shall be in the English language

Section 227
Proceedings of High Courts to be in English

228—1) The administrative expenses of a High Court including all salaries allowances and pensions payable to or in respect of the officers and servants of the court and the salaries and allowances of the judges of the Court shall be charged upon the revenues of the Province and any fees or other moneys taken by the court shall form part of those revenues

Section 228
Expenses of High Courts

(2) The Governor shall exercise his individual judgment as to the amount to be included in respect of such expenses as aforesaid in any estimates of expenditure laid by him before the Legislature

229—(1) His Majesty if the Chamber or Chambers of the Legislature of any Province present an address in that behalf to the Governor of the Province for submission to His Majesty may by letters patent constitute a High Court for that Province or any part thereof or reconstitute in like manner any existing High Court for that Province or for any part thereof or where there are two High Courts in that Province amalgamate those courts

Section 229
Power of His Majesty to constitute or reconstitute High Court by letters patent

(2) Where any Court is reconstituted or two Courts are amalgamated, as aforesaid the letters patent shall provide for the continuance in their respective offices of the existing judges officers and servants of the Court or Courts and for the carrying on before the reconstituted Court or the new Court of all pending matters and may contain such other provisions as may appear to His Majesty to be necessary by reason of the reconstitution or amalgamation

Section 230
Extra provincial jurisdiction of High Courts

230—(1) His Majesty in Council may if satisfied that an agreement in that behalf has been made between the Governments concerned, extend

Section 230

the jurisdiction of a High Court in any Province to any area in British India not forming part of that Province and the High Court shall thereupon have the same jurisdiction in relation to that area as it has in relation to any other area in relation to which it exercises jurisdiction

(2) Nothing in this section affects the provisions of any law or letters patent in force immediately before the commencement of Part III of this Act empowering any High Court to exercise jurisdiction in relation to more than one Province or in relation to a Province and an area not forming part of any Province

(3) Where a High Court exercises jurisdiction in relation to any area or areas outside the Province in which it has its principal seat nothing in this Act shall be construed—

- (a) as empowering the Legislature of the Province in which the Court has its principal seat to increase restrict or abolish that jurisdiction or
- (b) as preventing the Legislature having power to make laws in that behalf for any such area from passing such laws with respect to the jurisdiction of the court in relation to that area as it would be competent to pass if the principal seat of the court were in that area

Section 231
Saving and definitions

231.—(1) Any judge appointed before the commencement of Part III of this Act to any High Court shall continue in office and shall be deemed to have been appointed under this Part of this Act but shall not by virtue of this Act be required to relinquish his office at any earlier age than he would have been required so to do if this Act had not been passed

(2) Where a High Court exercises jurisdiction in relation to more than one Province or in relation to a Province and an area not forming part of a Province references in this chapter to the Governor in relation to the judges and expenses of a High Court and references to the revenues of the Province shall be construed as references to the Governor and the revenues of the Province in which the Court has its principal seat and the reference to the approval by the Governor of rules forms and tables for subordinate courts shall be construed as a reference to the approval thereof by the Governor of the Province in which the subordinate court is situate or if it is situate in an area not forming part of a Province by the Governor General

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PART XIV

BURMA

* * * * *

CHAPTER VIII

THE HIGH COURT

399.—(1) The High Court at Rangoon (in this Part of this Act called the High Court) shall continue and shall be a Court of record and shall consist of a Chief Justice and such number of other Judges as His Majesty may deem it necessary to appoint

Section 399
The High Court
shall consist of a Chief Justice and such number of other Judges as His Majesty may deem it necessary to appoint

Provided that the judges so appointed together with any additional judges appointed by the Governor in accordance with the following provisions of this chapter shall at no time exceed in number such maximum number as His Majesty in Council may fix

(2) Every judge of the High Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty years

Provided that—

(a) a judge may by resignation under his hand addressed to the Governor resign his office

(b) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body if the Judicial Committee of the Privy Council on reference being made to them by His Majesty report that the judge ought on any such ground to be removed

(3) A person shall not be qualified for appointment as a judge of the High Court unless he—

(a) is a barrister of England or Northern Ireland of at least ten years standing or a member of the Faculty of Advocates in Scotland of at least ten years standing or

(b) is a member of the Indian Civil Service or the Burma Civil Service (Class I) of at least ten years standing who has for at least three years served as or exercised the powers of a district judge or

(c) has for at least five years held judicial office in Burma not inferior to that of a district judge or judge of the small cause court of Rangoon or

(d) has for at least ten years been an advocate of the High Court

Provided that a person shall not unless he is or when first appointed to judicial office was a barrister a member of the Faculty of Advocates or an advocate of the High Court be qualified for appointment as chief justice of the High Court until he has served for not less than three years as a judge of the High Court

In computing for the purpose of this sub section the standing of a barrister or a member of the Faculty of Advocates or the period during which a person has been an advocate any period during which he has held judicial office after he became a barrister or a member of the Faculty of Advocates or an advocate as the case may be shall be included

(4) Every person appointed to be a judge of the High Court shall before he enters upon his office make and subscribe before the Governor or some person appointed by him an oath according to the form set out in that behalf in the Fourteenth Schedule to this Act

400 The judges of the High Court shall be entitled to such salaries and allowances including allowances for expenses in respect of equipment and travelling upon appointment and to such rights in respect of leave of absence and pensions as may from time to time be fixed by His Majesty in Council

Section 400

Provided that neither the salary of a judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment

Section 401
Temporary and
additional judges

401.—(1) If the office of chief justice of the High Court becomes vacant or if the chief justice is by reason of absence or for any other reason unable to perform the duties of his office those duties shall until some person appointed by His Majesty to the vacant office has entered on the duties thereof or until the chief justice has resumed his duties as the case may be be performed by such one of the other judges of the Court as the Governor may in his discretion think fit to appoint for the purpose

(2) If the office of any other judge of the High Court becomes vacant or if any such judge is appointed to act temporarily as chief justice or is by reason of absence or for any other reason unable to perform the duties of his office the Governor may in his discretion appoint a person duly qualified for appointment as a judge to act as a judge of the court and the person so appointed shall unless the Governor in his discretion thinks fit to revoke his appointment be deemed to be a judge of the court until some person appointed by His Majesty to the vacant office has entered on the duties thereof or until the permanent judge has resumed his duties

(3) If by reason of any temporary increase in the business of the High Court or by reason of arrears of work in that Court it appears to the Governor that the number of the judges of the Court should be for the time being increased the Governor in his discretion may subject to the foregoing provisions of this chapter with respect to the maximum number of judges appoint persons duly qualified for appointment as judges to be additional judges of the Court for such period not exceeding two years as he may specify

Section 402
Jurisdiction of
High Court

402 Subject to the provisions of this Part of this Act to the provisions of any Order in Council made under this or any other Act and to the provisions of any Act of the Legislature the jurisdiction of and the law administered in the High Court and the respective powers of the judges thereof in relation to the administration of justice in the court including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in division courts shall be the same as immediately before the commencement of this Part of this Act

Section 403
Administrative
functions of High
Court

403.—(1) The High Court has superintendence over all Courts for the time being subject to its appellate jurisdiction and may do any of the following things that is to say—

- (a) call for returns
- (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts
- (c) prescribe forms in which books entries and accounts shall be kept by the officers of any such courts and
- (d) settle tables of fees to be allowed to the sheriff attorneys and all clerks and officers of courts

Provided that such rules forms and tables shall not be inconsistent with the provisions of any law for the time being in force and shall require the previous approval of the Governor

(2) Nothing in this section shall be construed as giving to the High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision

Section 403

404.—(1) Until otherwise provided by Act of the Legislature the High Court shall not have any original jurisdiction in any matter concerning the revenue or concerning any act ordered or done in the collection thereof according to the usage or practice of the country or the law for the time being in force

Section 404
Jurisdiction in revenue matters

(2) A Bill or amendment for making such provision as aforesaid shall not be introduced or moved in either Chamber of the Legislature without the previous sanction of the Governor in his discretion

405.—(1) In addition to any other right of appeal there shall subject to the provisions of section twenty of the Judicial Committee Act 1833 (which relates to the time for appealing) be a right of appeal to His Majesty in Council from any decision of the High Court on the ground that a question of law with respect to the interpretation of this Part of this Act or any Order in Council made thereunder has been wrongly decided

Section 405
Additional appeal to His Majesty as respects interpretation of this Act
3 & 4 Will IV
c 41

(2) Nothing in this Part of this Act shall be construed as authorising the Legislature to derogate from any prerogative right of His Majesty to grant special leave to appeal in any case

406 All proceedings in the High Court shall be in the English language

Section 406
Proceedings in High Court to be in English

407.—(1) The administrative expenses of the High Court including all salaries allowances and pensions payable to or in respect of judges officers and servants of the Court shall be charged upon the revenues of Burma and any fees or other moneys taken by the Court shall form part of those revenues

Section 407
Expenses of High Court

(2) The Governor shall exercise his individual judgment as to the amount to be included in respect of such expenses as aforesaid in any estimates of expenditure laid by him before the Legislature

(3) Nothing in this Part of this Act shall render a pension payable to or in respect of a judge of the High Court who retired before the commencement of this Part of this Act chargeable upon the revenues of Burma

408 Any judge appointed before the commencement of this Part of this Act to the High Court shall continue in office and shall be deemed to have been appointed under this chapter but shall not by virtue of this Act be required to relinquish his office at an earlier age than he would have been required so to do if this Act had not been passed

Section 408,
Saving

* * * * *

MADRAS.

Page 1557 O 16 R 4 A (2).

Substitute the following for O YVI R 4 A (2)

4 A (2) When any other party to such a suit applies for a summons to such an officer he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer *according to the scale*

Page 1847 O 21 R 52

Add the following as proviso (ii) and re number the existing proviso as (i) —

(11) Provided further that where the Court whose attachment is determined to be prior receives or realizes such property, the receipt of realization shall be deemed to be on behalf of all the Courts in which there have been attachments of such property in execution of money decrees prior to the receipt of such assets

Explanation—Priority of attachment in the case of attachment of property in the custody of Court shall be determined on the same principles as in the case of attachment of property not in the custody of Court

Page 2771, O 43 R 1, Sub-Rule (3)

11. *Substitute the following for sub rule (s) of Rule 1 of Order XLIII of the Code of Civil Procedure —*

(5) An order under Rule 1 or 4 of Order XL, except an order under the proviso to Sub Rule (2) of Rule 4.

Page 2887, Appendix B Form 18 A

Substitute the following for Form No. 13 A of Appendix B —

No 13 A

CERTIFICATE OF ATTENDANCE TO AN OFFICER OF GOVERNMENT SUMMONED
AS A WITNESS IN A SUIT TO WHICH THE GOVERNMENT IS A PARTY

Order VI I, Rule 4 A

(Cause Title)

his is to certify that (name) (designation) being a Government servant in the Province of (name) was summoned to give evidence on behalf of the plaintiff/defendant in the Court of (name) on this day of (name) 193 , (inclusive) and that a sum of Rs. (name) was paid by the plaintiff/defendant towards the costs of the proceedings for (name) days according to the scale of (name) and that the Government treasury at (name) has paid the sum of Rs. (name) to the plaintiff/defendant as aforesaid.

19 Judge or Chief
Ministerial Officer

MADRAS.

Page 1557, O 10, R. 4 A (2).

Substitute the following for O XVI, R 4 A (2)

- 4-A (2) When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the *tres* *prescribed* *pay any in.* scale, and

Page 1847, O 21 R 52

Add the following as proviso (u) and re number the existing proviso as (i) —

- (u) Provided further that, where the Court whose attachment is determined to be prior, receives or realizes such property, the receipt of realization shall be deemed to be on behalf of all the Courts in which there have been attachments of such property in execution of money decrees prior to the receipt of such assets

*Explanation —*Priority of attachment in the case of attachment of property in the custody of Court shall be determined on the same principles as in the case of attachment of property not in the custody of Court "

Page 2771, O 43, R 1, Sub-Rule (s).

II. *Substitute the following for sub-rule (s) of Rule 1 of Order XLIII of the Code of Civil Procedure —*

- (s) An order under Rule 1 or 4 of Order XL, except an order under the proviso to Sub Rule (2) of Rule 4.

Page 2887, Appendix B. Form 13 A.

Substitute the following for Form No. 13 A of Appendix B —

No 13 A

CERTIFICATE OF ATTENDANCE TO AN OFFICER OF GOVERNMENT SUMMONED AS A WITNESS IN A SUIT TO WHICH THE GOVERNMENT IS A PARTY.

Order XVI, Rule 4 A

(Cause Title)

This is to certify that (name) (designation) being a Government servant from the Province of (name) was summoned to give evidence in his official capacity on behalf of the plaintiff/defendant in the above suit/matter and was in attendance in this Court from the day of to the day of 193 , (inclusive) and that a sum of Rs has been paid into Court by the plaintiff/defendant towards his travelling and subsistence allowance for days according to the scale prescribed by the Government of the Province of (name) and that the said amount has been/will be remitted to the Government treasury at to be credited to Government under the head "XVI. A—Miscellaneous Fees and Fines."

Dated the day of 193 .

*Presiding Judge or Chief
Magisterial Officer.*

MADRAS,

Page 1557 O 16, R 4 A (2),

Substitute the following for O XVI R 4 A (2)

- 4 A (2) When any other party to such a suit applies for a summons to such an officer he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer *according to the scale prescribed by the Government under whom the officer is serving* and shall also pay any further sum that may be required under Rule 4 according to the same scale, and the money so deposited or paid shall be credited to Government

Page 1847, O 21 R 52

Add the following as proviso (ii) and re number the existing proviso as (i) --

- (ii) Provided further that where the Court whose attachment is determined to be prior receives or realizes such property the receipt of realization shall be deemed to be on behalf of all the Courts in which there have been attachments of such property in execution of money decrees prior to the receipt of such assets

Explanation — Priority of attachment in the case of attachment of property in the custody of Court shall be determined on the same principles as in the case of attachment of property not in the custody of Court "

Page 2771, O 43, R 1, Sub Rule (s)

- II. *Substitute the following for sub rule (s) of Rule 1 of Order XLIII of the Code of Civil Procedure —*
- (s) An order under Rule 1 or 4 of Order XL, except an order under the proviso to Sub Rule (2) of Rule 4.

Page 2897, Appendix B Form 13 A

Substitute the following for Form No. 13 A of Appendix B —

No 13 A

CERTIFICATE OF ATTENDANCE TO AN OFFICER OF GOVERNMENT SUMMONED
AS A WITNESS IN A SUIT TO WHICH THE GOVERNMENT IS A PARTY

Order XVI Rule 4 A

(Cause Title)

This is to certify that (name) (designation) being a Government servant from the Province of (name) was summoned to give evidence in his official capacity on behalf of the plaintiff/defendant in the above suit/matter and was in attendance in this Court from the day of to the day of 193 , (inclusive) and that a sum of Rs has been paid into Court by the plaintiff/defendant towards " " days according to the scale (name) and that Government treasury at XVI A—Miscellaneous Fees

and Fines "

Dated the

day of

193 .

*Presiding Judge or Chief
Magisterial Officer*

PATNA

Page 2589, O 41, R 1

Add the following proviso to Order XLII, sub rule (1) of Rule 1 —

- * Provided that when the decree appealed from is a final decree in a partition suit and embodies the allotment papers, the appellate Court may accept a copy of the decree containing only a portion of the allotment papers, provided further that the appellate Court may, subsequently, on the application of the respondent require a copy of the remaining or any further portion of the allotment papers to be filed by the appellant

RANGOON

Page 1552 O 16 R 2

1 For sub rule (3) of Rule 2 as amended by item 2 of Correction List No 4 substitute the following

(3) Subject to provisions of sub rule (2) travelling and other expenses of witnesses, in Courts subordinate to the High Court other than the Court of Small Causes of Rangoon, shall be payable on the following scale —

(1) *Ordinary Labouring Classes*—The actual fare to and from the Court by the lowest class for journeys which were or could have been performed by public conveyance as defined in Burma Travelling Allowance Rule 6 (12), or where the journey could not have been performed by public conveyance actual travelling expenses reasonably incurred not exceeding Rs 1 4 0 a day by boat and annas *two* a mile by road and an allowance for each day's absence from home of annas *six* to those who are residents of places other than the place where the Court is held and of annas *four* to those who are residents of the place where the Court is held

(2) *Petty Village Officers*—The same rates as above for journeys which were or could have been performed by public conveyance as defined in Burma Travelling Allowance Rule 6 (12), or actual travelling expenses reasonably incurred not exceeding Rs 1 4 0 a day by boat and annas *two* a mile by road, and an allowance of annas *eight* for each day's absence from home

(3) *Persons of higher ranks of life such as Clerks, Tradespeople Village Headmen, Headmen of Circles and Members of Circle Boards*—Third class fare to and from the Court for journeys which were or could have been performed by public conveyance as defined in Burma Travelling Allowance Rule 6 (12) or where the journey could not have been performed by public conveyance actual travelling expenses reasonably incurred not exceeding Rs 2 0 0 a day by boat and annas *two* a mile by road and an allowance not to exceed, except in special cases Rs 1 for each day's absence from home

Provided that the second class fare by public conveyance may be paid in any case in which the Court is satisfied that the witness is a person who ordinarily travels by second class and did actually travel by that class. The Court should certify that it is so in all cases in which second class fare is paid

(4) *Members of District Councils, persons paying income tax on Rs 3 000 per annum or more and other persons of equal or superior status*—The actual travelling expenses reasonably incurred to and from the Court with an allowance according to circumstances not to exceed, except in very special cases Rs 2 for each day's absence from home

(5) *Witnesses following any profession such as Medicine or Law*—A special allowance according to circumstances, which is not to exceed Rs. 3, unless the witness is called to

PATNA

Page 2589, O 41, R 1

Add the following proviso to Order LLI, sub rule (1) of Rule 1 —

"Provided that when the decree appealed from is a final decree in a partition suit and embodies the allotment papers, the appellate Court may accept a copy of the decrees containing only a portion of the allotment papers, provided fur-

RANGOON

Page 1552, O 16, R 2

1 For sub rule (3) of Rule 2 as amended by item 2 of Correction List No 4 substitute the following

"(3) Subject to provisions of sub rule (2) travelling and other expenses of witnesses, in Courts subordinate to the High Court other than the Court of Small Causes of Rangoon, shall be payable on the following scale —

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RANGOON

Page 1852, O 16, R 2

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(3) *Headmen, Village Officers, and other persons of equal or superior status*—The actual travelling expenses reasonably incurred to and from the Court with an allowance according to circumstances not to exceed, except in very special cases, Rs 2 for each day's absence from home

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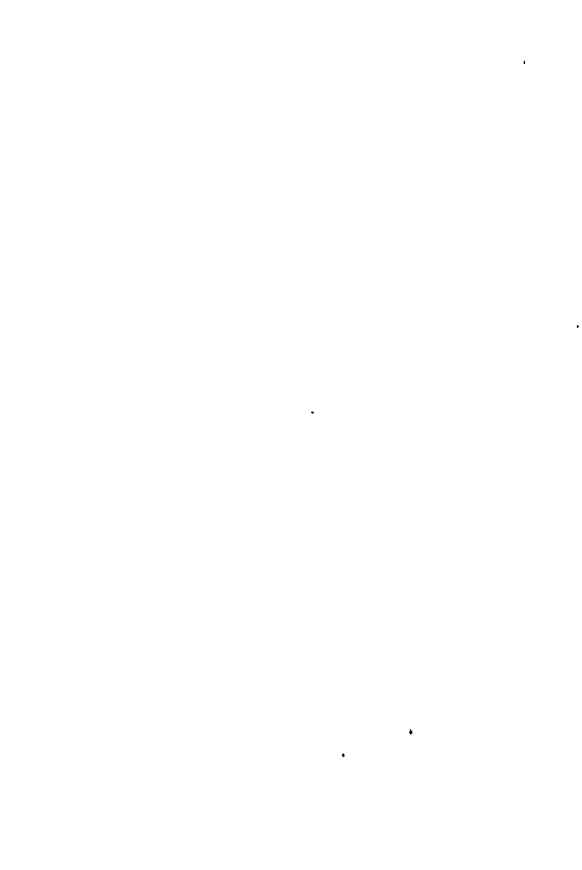
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Page 2589 O 41, R 1

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Page 1552 O 16 R 2

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(5) *Witnesses following any profession such as Medicine or Law*—A special allowance according to circumstances which is not to exceed Rs 3 unless the witness is called to give

expert evidence In determining the amount payable under this rule the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

(6) *Lodging Allowance*—In addition to the above, a lodging allowance not exceeding, except in special cases, annas *thirteen* for persons in class (3) and Rs 1-10-0 for persons in classes (4) and (5) may be allowed for each night necessarily spent away from home if the Court is satisfied that the witness had to pay for his night's lodging. When an amount exceeding this scale is sanctioned as a special case, it shall not exceed the actual amount spent and the Court must be satisfied that such expenditure was necessary.

Provided that—

(i) a servant of Government or of a *Local Authority* whose salary exceeds Rs 10 per mensem giving evidence in his official capacity in a suit to which Government or the *Local Authority* respectively is a party—

(a) when giving evidence at a place more than five miles from his headquarters, shall not receive anything under these rules, but shall be given a certificate of attendance,

(b) when giving evidence at a place not more than five miles from his headquarters, shall, in cases where the Court considers it necessary receive under these rules actual travelling expenses, but shall not receive subsistence, special or expert allowances

(ii) a servant of Government or of a *Local Authority* whose salary does not exceed Rs 10 per mensem, giving evidence in his official capacity, shall receive his expenses from the Court.

[NOTE—When the journey has to be performed partly by rail or steam boat and partly by road or boat, the fare shall be paid in respect of the former and the mileage or boat allowance in respect of the latter part of the journey]

Railway servants summoned by a Civil Court as witnesses, and travelling by rail to attend the Court, shall be paid the railway fare to which they are entitled under the rules for the payment of witnesses without regard to the fact that they may have travelled under a pass and not on actual payment of the fares "

Page 2367, O 34, Rr 1 to 7.

For Order XXIV substitute the following —

' Order XXIV.

Suits relating to mortgages of immoveable property

I Subject to the provisions of this Code, in every suit on a mortgage for foreclosure, sale or redemption—
Parties to suits

(a) all persons having an interest in the mortgage security or in the right of redemption shall be joined as parties provided that a prior mortgagee need not be joined as a party to a suit relating to a subsequent mortgage except on application made by him in that behalf.

(f) the plaint shall include a statement of all persons who to the knowledge of the plaintiff are interested in the mortgage security or in the right of redemption, and

(c) the Court may direct that any party claiming any present remedy in respect of the mortgaged property shall prove his claim and have such remedy as may be included in the decree in the suit

2 In a suit by a mortgagee for foreclosure of a mortgage by conditional sale or an anomalous mortgage whose terms provide for this remedy if the plaintiff succeeds the Court shall make an order as to which (if any) of the parties shall personally pay the costs of the suit and shall ascertain the amount due by the mortgagor to the plaintiff (a) for the redemption of the mortgaged property (i) for the costs of the suit (if any) payable by the mortgagor to the plaintiff and (c) for such costs charges and expenses if any and interest thereon as may be legally recoverable by the plaintiff from the mortgagor in respect of the mortgage deducting therefrom the costs charges and expenses if any legally recoverable by the mortgagor from the plaintiff in respect of the mortgage and the costs of the suit (if any) payable by the plaintiff to the mortgagor.

and the Court shall pass a preliminary decree declaring the amount so found due and further declaring that the plaintiff shall subject to the provisos hereunder stated be

Provided that—

(a) the mortgagor or any other party to the suit who has a right to redeem the plaintiff's mortgage may apply for and obtain a final decree for redemption on payment into Court of the amount so declared to be due on or before a date to be fixed by the preliminary decree (not being more than six months after the date of such decree) or such later date as the Court may substitute therefor on good cause shown and upon terms to be fixed by the Court and on compliance with all orders of the Court and on payment of such further sums as the Court may determine to be payable under Rule 7, and

(b) in the case of an anomalous mortgage the Court may at the instance of any party to the suit pass a decree for sale as under Rule 3 in lieu of a decree for foreclosure

3 (1) In a suit by a mortgagee for sale of the mortgaged property if the plaintiff succeeds the Court shall make an order as to which (if any) of the parties shall personally pay the costs of the suit and shall ascertain the amount due by the mortgagor to the plaintiff (a) for principal and interest on the mortgage (b) for the costs of the suit (if any) payable by the mortgagor to the plaintiff and (c) for such costs charges and expenses if any and interest thereon as may be legally recoverable by the plaintiff from the mortgagor in respect of the mortgage deducting from such sums the costs charges and expenses if any legally recoverable by the mortgagor from the plaintiff in respect of the mortgage and the costs of the suit (if any) payable by the plaintiff to the mortgagor

and the Court shall pass a preliminary decree declaring the amount so found due and further declaring that the plaintiff shall subject to the proviso hereunder stated be entitled to apply for and obtain a final decree for sale of the mortgaged property or a sufficient part thereof

Provided that the mortgagor or any other party to the suit who has a right to redeem the plaintiff's mortgage may apply for and obtain a final decree for redemption on payment into Court of the amount so found due on or before a date to be fixed by the preliminary decree (not being more than six months after the date of such decree) or such later date as the Court may substitute therefor on good cause shown and upon terms to be fixed by the



Court and on compliance with all orders of the Court and on payment of such further sums as the Court may determine to be payable under Rule 7

(2) In pursuance of a final decree for sale the property shall be sold as the Court may direct, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) shall subject to any orders made by the Court as to setting off the amount due against the purchase money, be paid into Court and applied in payment of the amount found due as aforesaid together with such further sums as the Court may determine to be payable under Rule 7.

Provided that at any time before the confirmation of the sale the mortgagor or any other party to the suit who has a right to redeem the plaintiff's mortgage may apply for and obtain a final order for redemption on payment into Court of the amount found due as aforesaid together with such further sums as the Court may determine to be payable under Rule 7, and a compensatory amount equal to five per cent of the purchase money (if any) paid into Court by the purchaser, which said compensatory amount shall be paid to the purchaser

together with the said purchase money on his application

(3) Where there is included in the preliminary decree a declaration of the priorities of the parties to payment out of the proceeds of sale the Court shall (subject to the provisions of Sect on 61 of the Transfer of Property Act 1882) pass a final order for payment in accordance with such priorities provided that a mortgagee having priority over the plaintiff may (subject to the provisions of section 57 of the Transfer of Property Act, 1882) elect that the property shall be sold subject to his mortgage

(4) Where the proceeds of the sale are not sufficient for the payment of the money due to the plaintiff or any other party to the suit, and the balance due to the plaintiff or such other party is legally recoverable by him from the mortgagor the Court shall, on application made in this behalf by the plaintiff or such other party, pass a decree against the mortgagor personally for the payment of such balance

(5) The provisions of this Rule shall, so far as may be, apply to every suit to enforce a charge in respect of which the Court may pass a decree for sale of the property charged

(6) In territories to which the Transfer of Property Act, 1882 has been extended, a mortgagee who has obtained a decree for payment of money in satisfaction of a claim arising under his mortgage shall not be entitled to bring the mortgaged property to sale otherwise than by a suit for sale under this Rule and he may institute such suit notwithstanding anything contained in O 2 R 2

4 (1) In a suit for redemption of a mortgage, if the plaintiff succeeds the Court shall make an order as to which (if any) of the parties shall personally pay the costs of the suit, and shall ascertain the amount due by the plaintiff to the defendant (a) for principal and interest (if any) due on the mortgage, (b) for the costs of the suit (if any) payable by the plaintiff to the defendant and (c) for such costs, charges and expenses, if any, and interest thereon, as may be legally recoverable by the defendant from the plaintiff in respect of the mortgage, deducting therefrom the costs, charges and expenses, if any, legally recoverable by the plaintiff from the defendant in respect of the mortgage and the costs of the suit (if any) payable by the defendant to the plaintiff

(2) If it appears that nothing is due to the defendant on the mortgage or that he has been overpaid, the Court shall pass a final decree for redemption directing further that the defendant shall pay to the plaintiff the amount (if any) overpaid with such interest thereon as the Court may deem reasonable

(3) If the account is in favour of the defendant the Court shall pass a preliminary decree declaring the amount found due by the plaintiff to the defendant,

and further declaring that, on payment into Court of the said amount on or before a date to be fixed by the said decree (not being more than six months after the date of such decree) or such later date as the Court may substitute therefor on good cause

shown and upon terms to be fixed by the Court and on compliance with all orders of the Court and on payment of such further sums as the Court may determine to be payable under Rule 7 the plaintiff shall be entitled to apply for and obtain a final decree directing the defendant to deliver to the plaintiff or to such person as the plaintiff appoints in this behalf the mortgaged property in the possession of the defendant and all documents in the possession or power of the defendant relating to the said property, and to execute and have registered (as required by the plaintiff and at the cost of the plaintiff) either (a) an acknowledgment in writing that all rights created by the mortgage have been extinguished or (b) a re transfer to the plaintiff or to such third person as he may direct of the property freed from the mortgage and from all encumbrances created by the defendant or by any person deriving title from him or where the defendant claims by derived title by those under whom he claims or (c) a transfer of the mortgage to such third person as the plaintiff may direct.

and further declaring that if the plaintiff fails to make full payment as aforesaid the defendant shall be entitled to apply for and obtain a final decree for sale of the property subject to the provisions of Rule 3 or a final decree for foreclosure subject to the provisions of Rule 2 where such remedy is legally available

5 Where in any suit on a mortgage a party other than the mortgagor claims to be Subrogation subrogated to the rights of the mortgagee the Court may, on the application of such party make an order declaring that the mortgage subsists for his benefit

6 In any decree passed in a suit for foreclosure sale or redemption, where interest Interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely—

(a) Interest up to the date on or before which payment of the amount declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage—

(i) on the principal amount declared due on the mortgage—at the rate payable on the principal or, where no such rate is fixed, at such rate as the Court deems reasonable,

(ii) on the amount of the costs of the suit awarded to the mortgagee,—at such rate as the Court deems reasonable from the date of the preliminary decree, and

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred in respect of the mortgage security up to the date of the preliminary decree—at the rate agreed between the parties or, failing such rate, at the same rate as is payable on the principal, or failing both such rates, at nine per cent per annum, and

(b) Subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable—

(i) on the aggregate of the principal sums specified in Clause (a) and of the interest thereon as calculated in accordance with that Clause, and

(ii) on the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under Rule 7

7 In finally adjusting the amount to be paid to a mortgagee the Court shall determine Adjustment of account the sum (if any) payable in respect of costs, charges, and expenses properly incurred by the mortgagee in respect of the mortgaged property and interest from the date of the last adjustment "

shown and upon terms to be fixed by the Court and on compliance with all orders of the Court and on payment of such further sums as the Court may determine to be payable under Rule 7 the plaintiff shall be entitled to apply for and obtain a final decree directing the defendant to deliver to the plaintiff or to such person as the plaintiff appoints in this behalf the mortgaged property in the possession of the defendant and all documents in the possession or power of the defendant relating to the said property, and to execute and have registered (as required by the plaintiff and at the cost of the plaintiff) either (a) a acknowledgement in writing that all rights created by the mortgage have been extinguished or (b) a transfer to the plaintiff or to such third person as he may direct of the property freed from the mortgage and from all encumbrances created by the defendant or by any person deriving title from him or where the defendant claims by derived title by those under whom he claims or (c) a transfer of the mortgage to such third person as the plaintiff may direct.

and further declaring that if the plaintiff fails to make full payment as aforesaid, the defendant shall be entitled to apply for and obtain a final decree for sale of the property subject to the provisions of Rule 3 or a final decree for foreclosure subject to the provisions of Rule 2 where such remedy is legally available

5 Where in any suit on a mortgage a party other than the mortgagor claims to be Subrogation subrogated to the rights of the mortgagee the Court may, on the application of such party make an order declaring that the mortgage subsists for his benefit

6 In any decree passed in a suit for foreclosure, sale or redemption, where interest Interest is legally recoverable the Court may order payment of interest to the mortgagee as follows namely —

(a) Interest up to the date on or before which payment of the amount declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage—

(i) on the principal amount declared due on the mortgage—at the rate payable on the principal or, where no such rate is fixed, at such rate as the Court deems reasonable.

(ii) on the amount of the costs of the suit awarded to the mortgagee—at such rate as the Court deems reasonable from the date of the preliminary decree, and

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred in respect of the preliminary decree—at the rate such rate, at the same rate as is payable rates, at nine per cent per annum, and

(b) Subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable—

(i) on the aggregate of the principal sums specified in Clause (a) and of the interest thereon as calculated in accordance with that Clause, and

(ii) on the amount adjudged due to the mortgagee in respect of such further charges and expenses as may be payable under Rule 7

7 In finally adjusting the amount to be paid to a mortgagee the Court shall determine the sum (if any) payable in respect of costs, charges, and expenses properly incurred by the mortgagee in respect of the mortgage property and interest from the date of the last adjustment

RANGOON —(Contd)

Page 2771, O 43, R. 1.

2 (1) *In* Clause (o) of Rule 1, *for* the words and figures " under rule 2, rule 4 or rule 7" *substitute* the words and figures " under rule 2, rule 3 or rule 4 "

(2) *Delete* the asterisk on figure " 7 " *occurring between* the word " rule " and the word " of " in Clause (o) of Rule 1 and *delete* the foot note on page 157.

Page 2869, Appendix A, Forms 45 and 46

In Forms Nos 45 and 46 of Appendix A, *re number* Clause G as Clause 7 and *insert* the following as Clause G.

' G The persons who, to the knowledge of the plaintiff, are interested in the mortgage-security or in the right of redemption are as follows, namely — '

R. 2. [S. 438.] *Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them:*

Provided that the executors who have not proved their testator's will, and *trustees, executors and administrators outside British India*, need not be made parties.

[1877—S. 438. See S. 52, O. 2, R. 5 and O. 7, R. 4.]

Synopsis.

	Note No		Note No
Legislative changes	1	"Outside British India"	3
Several Trustees, Executors or Administrators	2	Administration decree	4

Other Topics.

Proviso. See Note 2, Pts (1) to (6). See also Note 3, Pts (2) and (3).
S. 52, Note 7, Pt (1). See also O. 7, R. 4.

1 Legislative changes

1. The word "trustees" has been added before the word "executors".
2. The words "outside British India" have been substituted for the words "beyond the local limits of the jurisdiction of the Court".

2 Several trustees, executors or administrators

This rule deals only with suits *against* and not with suits *by* trustees, executors or administrators. *All* trustees or *all* executors who have proved

9 (1901) 12 B.L. 1107 (1902, 1903)

4. (1927) 1927 Bom 49 (51) : 51 Bom 16.

5. (1932) 1932 Cal 337 (339) : 58 Cal 77 (82).

6. (1902) 26 Bom 301 (301)

7. (1902) 4 Bom L Rep 358 (360)

8. (1903) 7 Cal W N 817 (820, 821)

9. (1861) 1861 Suth W Rep 190 (191).

1 Scope and object of the Rule

This rule entitles a trustee to represent the beneficiaries in *all* suits concerning properties vested in the trustee where the contention is between the beneficiaries and third persons¹ But the Rule is an enabling one and does not disentitle a person who happens to be a trustee from suing in his individual capacity at his option² Nor can it be construed to mean that for the purpose of suits under the Code of Civil Procedure no person who is not a party can be represented by any person who is not a trustee, executor or administrator³

In order that this rule may apply it is essential that

- (1) the suit should be concerning *pr perty* vested in the trustee, executor or administrator. A suit for a declaration of plaintiff's right to worship in a temple and for an injunction restraining the defendant from interfering with such right is not a suit concerning property vested in a trustee, executor or administrator and the rule will not apply to such a suit⁴
- (2) the contention in the suit must be between the beneficiaries and a *third* person, although the beneficiaries are unascertained or unascertainable persons⁵ or body of persons⁶ The rule does not apply where the contention is between the beneficiaries themselves or between the beneficiary and the trustee, executor or administrator⁷

Under section 43 of the Specific Relief Act 1877 a declaration granted in a suit in which any of the parties are trustees is binding on the beneficiaries

2 When beneficiaries may be added as parties

In suits by or against trustees, executors or administrators concerning property vested in them, it is not necessary that the beneficiaries should be impleaded as parties¹ But the Court may, if it thinks fit order them or any of them to be made parties. The beneficiaries may apply to be added as parties where there are reasonable grounds to suppose that their interest will not be sufficiently represented by the trustees or will be endangered unless

they are made parties. Thus the beneficiaries can be added as parties where the trustee has no interest in the case or has an interest adverse to that of beneficiaries² or where the question in the suit is one of accounts and the trustee is the accounting party³ or where the beneficiaries are absolutely entitled to a major portion of the property and complain of breach of trust on the part of the trustee⁴ or where the interests of the beneficiaries are likely to be affected by their not being impleaded in the suit⁵. The trustee, executor or administrator may also apply in a proper case for adding the beneficiaries as parties for the purpose of appointing himself⁶ but the beneficiaries may come in only where there is a trust *admitted or proved* to exist where the *factum* that it is is in dispute the beneficiaries are not necessary parties⁷.

Where a beneficiary is added in a suit by or against trustees under this Rule it is not an addition to the addition or substitution of *new* plaintiff or defendant under the provisions of section 22 of Limitation Act⁸.

Where a decree has been obtained by a trustee under this Rule the beneficiary is entitled to sue for recovery of the benefit thereunder⁹.

R. 2. [S. 438] *Where there are several trustees, executors or administrators they shall all be made parties to a suit against one or more of them:*

Provided that the executors who have not proved their testator's will and trustees, executors and administrators *outside British India*, need not be made parties.

[1877—S. 438. See S. 52 O. 2, R. 5 and O. 7, R. 4.]

Synopsis

Legislative changes	Act No.	Note No.
Several Trustees, Executors or Administrators	1	Outside British India
	2	Administration decree

Other Topic

1. See S. 52 O. 2, R. 4. See also Note 3 Pts. (2) in I (3).

1 Legislative changes

1 The word trustees has been added before the word executors.

2 The word outside British India have been substituted for the words beyond the limits of the jurisdiction of the Court.

2 Several trustees, executors or administrators

This rule deals only with suits *against* and not with suits *by* trustees, executors or administrators. *All* trustees or *all* executors who have proved

1. See S. 52 O. 2, R. 4.

4 (1927) 1927 I om 49 (51) 51 Bom 16

5 (1932) 1932 Cal 377 (338) 58 Cal 77 (82)

6 (1902) 26 Bom 301 (304)

7 (1907) 4 Bom L Rep 358 (360)

8 (1903) 7 Cal W N 817 (820, 821)

9 (1861) 1861 Suth W Rep 190 (191)

the will or *all* administrators should be made parties¹ If this has not been done, no decree can be passed against any of them² Where one of them is an infant a guardian *ad litem* must be appointed for him and properly served, otherwise the suit will be dismissed for defect of parties³ It has been held in the undermentioned cases that the rule applies only to *suits*, and not to *applications*, and that therefore it is competent for the Court to entertain an application for the appointment of a Receiver in a suit even though all proving executors are not made parties thereto The proviso to the rule clearly indicates that executors who have not proved their testators will need not be made parties⁴ But when an executor intermeddles with the estate⁵ or has acted as executor⁶ he may be made a party even if he has not proved the will

3 'Outside British India

If a defendant insists that an executor is a necessary party the *onus* is upon him to show that the latter is living within British India¹ A Court will be justified in refusing to add as defendant an executor who has absconded² and whose whereabouts are not known

4 Administration decree

Where general administration is sought a general personal representative is necessary¹ Representation by an administrator *ad litem* or by an executor or administrator *de son tort* is insufficient²

Husband of married executrix not to join

R. 3. [s. 439] Unless the Court directs otherwise the husband of a married *trustee* administrator or executrix shall not *as such* be a party to a suit by or against her

ORDER XXXII

SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND

GENERAL

Synopsis

Suits by or against minors and persons	Not No 1	Applicability of the Order to execution proceedings	Note No 2

1 Suits by or against minors and persons of unsound mind

An infant is, in law regarded as of immature intelligence and capacity and owing to his want of capacity and judgment is disabled from binding himself except where it is for his benefit² Thus the law will as a general principle treat all acts of an infant which are for his *benefit*

on the same footing as those of an adult but will not permit him to do anything *prejudicial* to his own interests³ This principle regulates not only the infant's capacity to aquire and dispose of property but also his capacity in reference to legal proceedings instituted by or against him⁴ Thus a decree of a court in *favour* of a minor without his being represented by a next friend in the suit is not a nullity whereas no effectual or valid decree can be passed *against* a minor without his being represented by a proper next friend *ad litem*⁵ A minor who is a party to a suit is considered to be under the protection of the Court and it is consequently the duty of the Court to watch his interests vigilantly and to see that he is represented by a proper person⁶

Persons who are of unsound mind or are suffering from mental infirmity are thereby in a state of incapacity of protecting their interests and are placed on the same footing as minors for the purposes of legal proceedings by or against them

This order has been made applicable to proceedings under the Ganjam and Vizagapatnam Act (XXIV of 1839) (see R 20) and to proceedings under the Chota Nagpur Tenancy Act [see Act VI of 1908 S 265 (3)]

2 Applicability of the Order to execution proceedings

There is a conflict of opinion as to whether this order directly applies to execution proceedings According to one view this order applies only to suits and not directly to execution proceedings and therefore the fact that no guardian *ad litem* is appointed for a minor party in such proceedings will not vitiate the proceedings if, in *substance*, his interests were represented by the other parties on the record¹ and if no injury has resulted to him by such non-representation² Another view is that proceedings in execution are a *continuation of the suit* that this Order applies to such proceedings³ and that a compromise entered into by the guardian in execution proceedings is not

Order 32 General—Note 1

In titles cited in Halsbury's
England Vol XVII para 43

1 (1) Chancery Practice 6th Edition

para 10 tit 1 n 22 Cl 270

(1) 13 Ves 411 (1807) Reports 277

(1) 13 Ves 411 (1807) Reports 277

(1) 13 Ves 411 (1807) Reports 277

(1) 13 Ves 411 (1807) Reports 277

(1) 13 Ves 411 (1807) Reports 277

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(1) 13 Ves 411 (1807) Reports 277

(1) 13 Ves 411 (1807) Reports 277

(1) 13 Ves 411 (1807) Reports 277

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(1) 13 Ves 411 (1807) Reports 277

R 11 does not apply to a suit after final decree is passed in which case it only remains to proceed in execution [1907] 1907 Cal 490 (493)

(1921) 1199 M.L. 27 (243 249)

(1908) 2 Sind L.R. 55 (E 1)

(1910) 1910 Cal 603 (601)

(1907) 5 Cal L.Jour 434 (439 440)

(1902) 20 Bom 109 (114)

1907 1907 (1907) J. Mad L. Jour 144 (117)]

[See also the cases cited in foot note 4 below]

[See also (1912) 10 Ind Cas 519 (544 517) (Cal) Gross negligence in the conduct of the petition to set aside

4 See cases cited in Note 3 to R 2

5 See cases cited in Note 5 to R 2

6 (1902) 1902 All 293 (300) (I 1)

Note 2

1 (1921) 1921 Cal 476 (478)

(1927) 1927 Cal 930 (931)

(1920) 1920 Cal 109 (112)

[See also (1925) 23 C 170 (2 5) O 2

binding on the minor if no sanction is required by Rule 7 is obtained therefor. It is submitted that this last view is correct. As pointed out by Wallis C. J., in *Muthiah Chettiar v. Krishna Doss Varu*⁵ the Code expressly provides by O 22 R 12 that nothing in Rr 3, 4 and 8 of that order shall apply to execution proceedings and in O 23 R 4 that nothing in that order shall apply to execution proceedings while it contains no such provision in O 32. It would appear to follow from this that the Code has been drafted on the basis that an application for execution is a proceeding in a suit.

R. 1. [S 440] Every suit by a minor² shall be instituted in his name¹ by a person who in such suit shall be called the next friend of the minor.

[1877—S 440]

Local Amendments

LAHORE

The following words were added—

Such persons may be ordered to pay any costs in the suit as if he were the plaintiff

N W F P

The following paragraph shall be added—

Such person may be ordered to pay any costs in the suit as if he were the plaintiff

Synopsis

	Note No		Note No
I Scope and object of the Rule	1	III Objection in appeal to authority of next friend	7
II Minor who is	2	IV Title of suit	8
(i) When a minor may sue without a next friend	3	V Liability of next friend for costs	9
(i) Minor sues as adult see note 2 to the next Rule	4	VI Effect of decree in suits by minors	10
(c) Suit on behalf of an alleged minor who is not a minor in fact	5	VII Estoppel	11
(d) Where question of minority is in dispute	6	VIII Limitation	12
		IX Attorney's costs	13
		X Suits for specific performance by or against minors	14
		XI Suit for possession against person in possession as guardian of minor plaintiff	15

Other Topics

Applicability of order to execution proceedings See O 32 (General Note)	P N (3 a)
Next friend negligent—Suit whether can be proceeded with See R 9 Note 2 It (?)	Next friend—Why necessary See Note 1 It (i)
Next friend of minor—Sanction of Court when necessary to represent and sue See R 4 Note 1 Its (1) and (2)	Tool of minority—Quantum of evidence See Note 1 It (3)
Next friend—Title of a Mohammedan infant whether competent See R 4 Note 5	Still to be instituted in his name See Note 1 Its (1 a) and (i)
	Volunteer guardian—Whether has right to sue See 14 of 12 F N (1)

1 Scope and object of the Rule

This rule provides that every suit by a minor plaintiff shall be brought in his name by a next friend.¹ The reason why no proceedings can be taken by a infant without the assistance of a next friend is on account of the infant's supposed want of discretion and his inability to bind himself and make himself liable for costs. But the minor is the real plaintiff, the next friend is no party to the suit in the proper sense of the term. He only represents the minor's interest and acts for him. In the course of such representation he can choose his own solicitor or even change him although he is under an obligation not to make an appointment which would be detrimental to the interests of the minor.²

Though the word "shall" is used in the rule a suit by a minor without a next friend should not normally be treated as abortive but an opportunity should be given to constitute the suit in the regular manner.³ In *Doorga M'har D. v. Tahur M'har* 11 I. L. R. 22 (A. 190) Sale J. observed: "It would seem that the rule was intended for the protection and benefit of defendants for it has been held that when a defendant waives this benefit and permits the suit to proceed without a next friend." See Note 3 to Rule 2 following.

The rule does not provide for suits by or on behalf of idols. On the analogy of this rule however it has been held that the Manager or the *Shikari* of an idol can sue on behalf of the idol which is considered to be a perpetual minor in the eye of the law.⁴

2 Minor who is

Under section 3 of the Indian Majority Act (IX of 1875) every person domiciled in British India shall be deemed to have attained majority when he shall have completed his age of 18 years and not before. But if before the expiry of the age of 18 a guardian for the person or for the property or for both of the minor has been appointed or declared by a Court of Justice (apart from the provisions of Order 32 of the Code) or the minor's property is taken charge of by a Court of Wards then the period of minority is extended till the completion of the age of 21.¹

Order 32 Rule 1 Note 1

- 1 (1874) 4 N. W. 111
- (1900) 24 I. M. 21 (190) Minor can sue through next friend in Mamlatdar's court.
- 18 J. 21 J. 64 (190) (Do)
- (1924) 1 L. J. 114 (110) Suit against husband through next friend to recover property—Husband as natural guardian cannot resist the suit.
- (1924) 19 J. 22 (128) Minor can sue as bearer of *Shah Jai H. v. Idols*.
- 1a (1890) 19 M. L. 127 (170) quoting *Daniel v. Chancery Practice* 6th Edition page 105.
- 2 (1881) 7 Cal. 137 (139)
- (1883) 9 Cal. 629 (630)
- (1884) 3 South W. R. Act. 138 (139)
- (1890) 14 Ind. W. R. 162 (162) Next friend cannot execute decree after death of minor.
- (1923) 1923 Cal. G. 656 Thus minor can sue in form a pauper's though next

friend is not a pauper

- (1881) 3 M. L. 3 (4) (Do)
- 3 (1901) 28 Cal. 261 (270)
- 4 (1928) 1928 Cal. 537 (539) 55 Cal. 712
- 5 (1927) 1927 Neg. 301 (351)
- (1929) 1929 All. 857 (888)

Note 2

- (1880) 9 N. W. 1 H. C. R. 189 Guardian appointed under Act X. L. of 1859—Minority extends till 21
- (1889) 12 Cal. 612 (614)
- (1891) 5 Cal. L. R. 411 (190)
- (1907) 29 All. 672 (675)
- (1881) 3 All. 598 (600) Guardian appointed under Act X. L. of 1859—Minority extends till 21
- (1924) 1924 Lah. 157 (158)
- (1887) 14 Cal. 25 (59) Order of appeal

3 When a minor may sue without a next friend

Under Section 32 of the Presidency Small Cause Courts Act (XV of 1882), a minor may institute a suit for any sum of money not exceeding 300 rupees which may be due to him under S. 70 of the Contract Act, 1872, for wages of piecework or for work as a servant, in the same manner as if he were of full age.

4 Minor suing as adult—See Note 2 to the next Rule

5 Suit on behalf of an alleged minor who is not a minor in fact

Supposing a suit is filed through a next friend on the allegation that the plaintiff is a minor and it is subsequently found that the plaintiff was in fact a major even on the date of the suit, what is the proper procedure to be followed in such a case? The High Court of Allahabad in the undermentioned cases held that the suit should be dismissed the reason given being that there is no valid plaint before the Court. This view has, however, been overruled by a Special Bench decision of the same High Court which holds that where the mistake in filing suit is due to a *bona fide* doubt as regards the age of the minor, the defect is a *formal* one not affecting the merits of the case and can be cured by amendment.² The High Courts of Calcutta,³ Lahore,⁴ Madras,⁵ the Chief Court of Oudh and the Court of the Judicial Commissioner of Nagpur have all held that the defect in such a case can be remedied by amending the plaint and by removing the next friend.

6 Where question of minority is in dispute

Disputes as to the question of minority may arise—

- (a) where the defendant who is sued as a major pleads that he is a minor. In such cases a preliminary issue should be framed for the purpose of deciding the plea of minority, and for the trial on this issue a guardian *ad litem* should be appointed for the alleged minor. See also Note 4 to R. 3 *infra*.
- (b) Where the plaintiff sues as a major without a next friend and the defendant pleads that he is a minor, in such a case the procedure prescribed by rule 2 should be followed.

The burden of proving minority is on the party who alleges it: As

in which the birth certificate is taken out	pointed by will—Set on appeal by a Court of Justice
(1907) 11 Bom 20 (S) (D)	Note 5
(1907) 21 Bom 281 (S) (D). Though such guardian filed at first before 18 minority never till 18 continues till 21	1 (1904) 20 All 30 (D)
(1907) 21 Bom 290 (D). Order of appointment is set aside minority does not exist till 21	(1921) 1921 All 74 (S) 45 All 701,
(1907) 11 All W N 118 (D) (D)	2 (1931) 1931 All 707 (S)
(1904) 18 Bom 6 (S). Suit under Mar 1 Marriage Act XV of 1865—Minority till 21	[See also (1904) 192 All 670 (S) 48 All 671]
(1904) 11 Bom 110 (D). In case of a guardian birth suit at age of majority	3 (1904) 21 Cal 604 (S)
(1904) 11 Bom 110 (D). In case of a guardian birth suit at age of majority	(1927) 1927 Cal 477 (S) 478
(1904) 11 Bom 110 (D). In case of a guardian birth suit at age of majority	[But see (1904) 192 Cal 224 (S)]
(1904) 11 Bom 110 (D). In case of a guardian birth suit at age of majority	4 (1906) 1921 Cal 82 (S)
(1904) 11 Bom 110 (D). In case of a guardian birth suit at age of majority	(1912) 1912 Cal 222 (S). The question depends on <i>bona fides</i>
(1904) 11 Bom 110 (D). In case of a guardian birth suit at age of majority	5 (1918) 1918 Cal 116 (S) 40 All 116
(1904) 11 Bom 110 (D). In case of a guardian birth suit at age of majority	6 (1901) 7 Cal 231 (S)
(1904) 11 Bom 110 (D). In case of a guardian birth suit at age of majority	6a (1908) 1908 Cal 44 (S). Appeal by a next friend on behalf of a major
(1904) 11 Bom 110 (D). In case of a guardian birth suit at age of majority	Note 6
(1904) 11 Bom 110 (D). In case of a guardian birth suit at age of majority	1 (1929) 1929 Cal 111 (S) 41 Cal 111
(1904) 11 Bom 110 (D). In case of a guardian birth suit at age of majority	2 (1902) 26 Bom 109 (S) 117 Cal 117
(1904) 11 Bom 110 (D). In case of a guardian birth suit at age of majority	(1915) 27 South W R 1 (S)

to the quantum of evidence sufficient to prove minority, *see* the following cases:

7 Objection in appeal to authority of next friend

If the minor plaintiff has the right to sue objection as to the want of a defect in the authority of the next friend is *not fatal* to the suit and cannot be raised for the first time in appeal. Such a defect does not affect the merits of the case and comes within the purview of Section 99 of the Code.

8 Title of suit

In a suit by the minor plaintiff, the title and description of the minor should be *A* a minor by his next friend *Y*, *versus* *A B*, defendant. Similarly when the minor is the defendant he should be described as *X*, a minor by guardian *ad litem* *Y*. But a defect or misdescription in title as for instance where the mother of the minor plaintiff describes herself as *J* for herself and as guardian of her minor daughter *S*, is not fatal to the suit. The defect is a *formal* one and cannot afford a ground *per se* for interference on appeal.

9 Liability of next friend for costs

The words "and may be ordered to pay any costs in the suit as if he were the plaintiff" occurring in the corresponding section 440 of the old Code have been omitted. But the omission does not affect the discretion of the Court in proper cases to order the next friend to be personally liable for costs as for example when it finds that the suit was instituted by him without *bona fides* or where the suit is dismissed and the Court is not satisfied that the suit was instituted for the benefit of the minor. Where, however, the Court finds that there were reasonable grounds for filing the suit and the next friend has been *bona fide* in his conduct, it will direct the costs to come out of the minor's estate.

(1903) 29 All 29 (92) 31 Ind App 1 (10)
Evidence (1) such as to carry
sufficiently to judge

(1883) 17 Cal 183 (11) Mother's evidence
supported by her own best evi-
dence

(1874) 17 All 151 (133) (10)

(1910) 7 Ind Cas 40 (514) Entry in birth
register—relvant evidence

(1903) 25 Ind 183 (209) Statement by
relative—relvant

(1883) 17 Cal 183 (11) Appearance of
minor can be taken into account

(1883) 17 Cal 183 (11) Appearance
is not conclusive

(1910) 17 Cal 183 (11) Certificate of guar-
dianship under Act No. of 1884—
Not evidence

(1903) 2 Cal 183 (11) (10)

(1883) 17 Cal 183 (11) (10)

Note 7

1 (1889) 188 Ind Re No 100 page 577
(1883) 10 Cal 206 (134) 11 Ind App 20
(1903)

(1883) 17 Cal 183 (11) (10)

(1883) 17 Cal 183 (11) (10)

(1883) 17 Cal 183 (11) (10)

(1883) 17 Cal 183 (11) (10)

(1883) 17 Cal 183 (11) (10)

(1883) 17 Cal 183 (11) (10)

(1883) 17 Cal 183 (11) (10)

[See also (1883) 4 All 1 (3)]

(1883) 188 Ind Re No 100 (11)

2 (1883) 188 Ind Re No 100 page 577

Note 8

1 (1883) 12 Cal 18 (10)

- (1883) 12 Cal 18 (10)

(1883) 20 Cal 434 (504) 20 Ind App 20
(1903)

3 (1883) 14 Cal 183 (103)

(1872) 17 Cal 183 (11) (10)

(1883) 5 Cal 183 (103)

Note 9

1 (1883) 1927 Mar 10 (1024)

(1883) 1927 Mar 10 (1024)

(1883) 1927 Mar 10 (1024)

(1883) 21 Cal 183 (11) (10) Case under

(1883) 21 Cal 183 (11) (10)

(1883) 21 Cal 183 (11) (10)

(1883) 21 Cal 183 (11) (10)

(1883) 21 Cal 183 (11) (10)

(1883) 21 Cal 183 (11) (10)

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(1883) 21 Cal 183 (11) (10)

(1883) 21 Cal 183 (11) (10)

(1883) 21 Cal 183 (11) (10)

(1883) 21 Cal 183 (11) (10)

Save in exceptional cases neither the infant plaintiff nor the next friend ought to be required to give security for costs.⁴ Where on the death of a deceased creditor, his minor legal representative demands the debt, the debtor is entitled to refuse to pay until his interests are safeguarded by the production of a succession certificate or of a probate or Letters of Administration, where the minor in such a case sues the debtor for the amount, the defendant is not liable for the costs of the suit.⁵

10 Effect of decree in suits by minors

If a minor is *properly represented* by the next friend and there is no fraud or collusion or gross negligence on his part, the decree passed in the suit is binding on the minor as on an adult and will operate as *res judicata*.¹ See also Note 13 to R 3, *infra* and Note 69 to S 11, *ante*

11 Estoppel

A Court of Equity will deprive a fraudulent minor of the benefit of the plea of infancy when by his conduct or representation he induces others to believe that he is a major. Thus where a minor, representing himself to be of full age collects rents and grants receipts¹ or where he executes a registered sale-deed representing himself to be a major² he will be estopped from filing a suit through a next friend questioning the validity of those transactions. But the person relying upon the plea of estoppel must himself come with clean hands and prove not only that fraud was practised upon him by the minor but that he was deceived into action by such fraud.³ In other words there can be no estoppel when the truth (of minority) is known to both the parties.⁴

12 Limitation

As already pointed out in Note 1, the suit though filed by the next friend is really that of the minor plaintiff and is governed by the law of limitation applicable to the minor.¹ He is entitled to the exemption prescribed by sections 6 and 7 of the Limitation Act (IX of 1908).²

4 (1899) 23 Bom 100 (102)
(1931) 1331 All 458 (1) (458) There is no provision in the Code for that

5 (1921) 64 Ind Cas 385 (386) (Lrb)

Note 10

1 (1910) 7 Ind Cas 538 (539) (Oudh)

not re

presented
(1926) 1926 Lah 289 (290) 7 Lah 129 Gross negligence in not putting up proper pleas
(1926) 1926 Mad 379 (381) A guardian filing suit *bona fide* without considering legal aspects—Not guilty of gross negligence

Note 11.

1 (1909) 29 Cal 126 (127)
[See also (1119) 1919 U B 39 (40)
(1918) 3 U B R 75 Minority no defence to a suit for breach of promise of marriage under Burmese Buddhist Law]

2 (1897) 21 Bom 198 (201)

3 (1898) 25 Cal 616 (622)

(1899) 96 Cal 381 (385 391)

4 (1903) 30 Cal 533 (540) 30 Ind App 111 (P C)

(1897) 24 Cal 263 (270 271)

(1920) 1920 Lah 372 (373) 1919 P R No 162

Note 12

1 (1891) 7 Cal 137 (139)

(1872) 17 South W R 419 (419)

(1920) 54 Ind Cas 575 (576) (U P B R)

2 (1905) 23 Mad 57 (60)

(1892) 16 Bom 536 (537)

(1882) 4 Mad 119 (120)

(1898) 21 Mad 494 (496) Applicability of S C T and on Act (IX of 1908)

13 Attorney's costs

The costs incurred by the attorney or solicitor of the guardian or next friend of a minor party in properly prosecuting or defending the suit are recoverable from the estate of the minor as "necessaries" under section 68 of the Indian Contract Act (IX of 1872).¹ The High Court of Madras has, however, held that, where a suit instituted on behalf of a minor, is repudiated by him on his attaining majority pending the suit, and the suit is dismissed, the solicitor cannot recover his costs from the estate of the *quandam* minor but can proceed against the next friend personally.² But in any case the attorney is entitled only to a charge on the minor's *estate* and cannot get a personal decree against the infant.³

14 Suits for specific performance by or against minors

As to the maintainability of suits by or against minors for specific performance of contracts entered into by the guardian, *see* the cases noted below.

15 Suit for possession against person in possession as guardian of minor plaintiff

Where *A* was in possession claiming to be the *de jure* guardian of *B*, a minor and *C* acting as next friend of *B* filed a suit against *A* for possession it was held that the question was one exclusively falling within the purview of the Guardians and Wards Act (VIII of 1890) and that no suit lay. *See also* Note 54 to S. 9.

R. 2. [S. 442] (1) *Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.*

Where suit is instituted without next friend plaint to be taken off the file

(2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit.

[1877-S. 442]

Synopsis

Scope of the Rule	Note No.	Waiver or objection by defendant	Note No.
Suit by minor without a next friend	1	Costs	3
	2		4

- (130) 7 Cal W N 531 (535) (Do)
 (1875-1876) 1 Cal 226 (213) 3 Ind App 7
 (P C) Claim suit—Limitation
 (1898) 9 Cal W N 278 (273) Applicability of
 Art. 44
 (1895) 18 Mid 99 (103, 109, 112) S. 7 Limita-
 tion Act does not apply to suits
 under S. 77 of the Registration Act
 (1894) 7 Pom 179 (180) Application for
 execution
 (1852) 9 Cal 181 (182) (Do)
 (1891) 17 Mid 180 (192) (Do)
 (1893) 20 Cal 714 (716) Case under Art. 179
 of the Limitation Act, 1877

- Note 13**
 1 (1874) 21 Cal 872 (880)
 (1891) 7 Cal 140 (144)
 (1899) 22 Mid 311 (316, 317)
 2 (1891) 17 Mid 257 (259)
 3 (1917) 1917 Cal 652 (655) 43 Cal 676
Note 14
 1 (1895) 22 Cal 515 (531)
 (1893) 20 Cal 509 (513)
 (1900) 27 Cal 276 (278)
 (1895) 18 Mid 115 (116)
 (1895) 19 Dom 797 (700) Suit on bond exe-
 cuted by minor
Note 15
 1 (1970) 1925 Nag 328 (329) 21 Nag L P 75

2,

Other Topics

Appeal See Note 2 Pt (2)
 Effect of suit by minor without next friend
 —Only irregularity See Note 3 1t (1)
 Minor becoming major before decision See
 Note 2 1t (7)
 Minority apparent or found on enquiry—
 Procedure See Note 2 1ts (1) to (6)
 Minor having certificated guardian—Suit by
 other person as next friend—Effect See

Note 1 1t (1)
 No application by defendant Rule still ap-
 ples See Note 1 1t (1)
 Objection by no for e after appointment of
 next friend See Note 1t (2)
 Striking off of plaintiff—Wick v. Wick See
 Note 2 1t (3)
 Suit as minor—Really major Effect See
 Rule 1 Note 5

1 Scope of the Rule

Where a minor sues without a next friend the defendant can under this Rule apply to have the plaint taken off the file. But even without any such application the Court is bound to take notice of the minority of the plaintiff if the same is disclosed in the course of the trial and suspend all proceedings in the suit until the defect is remedied by the minor getting himself properly represented by a next friend.¹

Where there is a certificated guardian appointed for a minor under the Guardians and Wards Act (VIII of 1890) but a suit is filed by a third person on behalf of the minor it has been held by the High Court of Allahabad that the suit should be considered to be filed by the minor without a next friend and should be taken off the file.²

2 Suit by minor without a next friend

It has been held by the High Court of Calcutta that this Rule applies only to cases where the fact of minority is apparent *on the face of the plaint* and that the rule does not contemplate an *inquiry* into the question of minority where the plaint *prima facie* shows that the plaintiff is a major.³ In the latter case where on enquiry the plaintiff is actually found to be a minor the proper procedure according to that Court is to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend. If the Court purports to act under this rule and takes the plaint off the file the order must be treated as a decree dismissing the suit or an order rejecting the plaint in both of which cases an appeal will lie.⁴ On the other hand the High Court of Bombay has held that this rule applies even to cases where the fact of minority is disclosed on enquiry but that the Court should as a matter of practice stay proceedings and allow sufficient time to enable the minor plaintiff to be represented by a next friend unless the plaintiff instituted the suit with the knowledge of the fact of minority and with the intention of deceiving the Court and of evading the payment of costs in the event of failure in which case the suit should be taken off the file.⁵ The High Courts of Lahore⁶ and Madras and the Judicial Commissioners Court of Oudh⁷ have taken the same view.

In any view where the plaintiff attains majority by the time of the

Order 32 Rule 2—Note 1

- 1 (1911) 1974 L. L. 185 (185) 4 Lah 300
 (19) 11 C. R. 325 (1 G) 3 Ring 739
 2 (19 9) 1923 Notes 8 (c) 11 Ind Cas 456 (All)
 Note 2

- 1 (1880) 13 Cal 163 (191)
 2 (1880) 13 Cal 189 (191)
 (1911) 1971 Cal 6 (7) 4 Cal 71

- (1918) 1118 Cal 55 (75 50)
 (1894) 10 Cal 107 (100)
 (18 6) 2, Suti W R 184 (189)
 (1868) 1118 L. R O C 10
 3 (1889) 19 Bom 7 (11)
 4 (1971) 1771 Cal 157 (158)
 5 (1913) 1973 Mid 3 (531)
 6 (1904) 19 Oudh C 2 1 (2 G)
 (190 1) 11 Oudh C 159 (103)

enquiry as to his minority there is no necessity for an amendment inasmuch as he can elect to proceed with the suit.⁷

3 Waiver of objection by defendant

Where a defendant against whom a suit is instituted by a minor is a next friend of the plaintiff and elects to proceed to trial and take the chance of obtaining a decree in his favour on the merits without raising any objection under this rule he cannot be allowed for the first time in appeal when the trial has gone against him to contend that the suit is not maintainable owing to the minority of the plaintiff. The decree passed in such a case is *not a nullity*. The non representation of the minor by a next friend is only an irregularity capable of being waived by the defendant.⁸

On the same principle it has been held that where on objection taken by the defendant a next friend is appointed for the plaintiff, the defendant cannot object in appeal that the suit was originally filed without a next friend and was therefore not maintainable.⁹

4 Costs

Where the plaintiff is found to be a minor and the plaint is consequently directed to be taken off the file of the Court costs should not be ordered to be recovered from the estate of the minor; the pleader or other person procuring the plaint should be made liable therefor.¹⁰

R. 3. [Ss. 443-456] (1) Where the defendant is a minor,¹¹

Guardian for the
plaintiff to be appointed
by Court for the
minor

the Court, on being satisfied of the fact of his minority,¹² shall appoint a proper person to be guardian for the suit¹³ for such minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Such application *shall* be supported by an affidavit¹⁴ verifying the fact that the proposed guardian has no interest in the matters in *controversy* in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) No order shall be made on any application under this rule except upon notice to the minor¹⁵ and to any guardian of minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and

⁷ (1886) 13 Cal 189 (191-192)

(1898) 1915 All 71 (71) The plaintiff must be deemed to have been properly represented on the day of the application to proceed with the plaintiff.

(1913) 1923 Mid 7 (1)

Note 3

1 (1913) 1923 Cal 57 (57) 5 Cal 71

(1898) 1915 Cal 50 (54)

(1881) 1881 All W N 150 (171)

(1891) 1891 I J 969 (263)

(1890) 10 Mid 127 (129)

Note 4

1 (1890) 1915 Cal 24 (236)

[See also (1890) 11 Cal L R 19 (14)]

after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

[1877—Ss 443, 446]

Local Amendments

ALLAHBAD

111 the following proviso to Sub R (1) —

Provided that if the minor is under ten years of age no such notice shall be served to him

BOMBAY

The words 'to the minor and' in line 2 of sub R (4) shall be *deleted*

LAHORE

The following sub rules were *substitute* for sub Rr (3) and (4) —

of the minor and her
most likely to be capable of
The list shall consist of

- (4) The Court may at any time after institution of the suit call upon the plaintiff to furnish such a list and in default of compliance may reject the plaintiff
- (5) An application for the appointment of a guardian for the suit and an affidavit furnished under this rule shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that each person proposed is a fit person to be so appointed
- (6) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf or where there is no such guardian upon notice to the father or other natural guardian of the minor or where there is no father or other natural guardian to the person whose care the minor is and after hearing any objection which may be urged on behalf of any person served with notice under this sub rule

Provided that the Court may if it sees fit, issue notice to the minor also

MADRAS

Delete Rr 3 and 4 and *substitute* in lieu thereof the new R 3 set forth below —

Qualifications to be a next friend or guardian

3 (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit

Provided that the interest of that person is not adverse to that of the minor and that he is not in the case of a next friend, a defendant or, in the case of a guardian for the suit a plaintiff

- (2) Where a minor has a guardian appointed or declared by competent authority, no person other than the guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded that it is for the minor's welfare that another person be permitted to act or be appointed as the case may be

Guardians to be appointed by Court

- (4) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff. The application where it is by the plaintiff shall set forth in the order of their suitability, a list of persons (with their full addresses for service of notice in Form No 11 A set forth in Appendix II hereto) who are competent and qualified to act as guardian

for the suit for the minor defendant. The Court may, for reasons to be recorded in any particular case, exempt the applicant from furnishing the list referred to above

- (5) The application referred to in the above sub rule, whether made by the plaintiff or on behalf of the minor defendant shall be supported by an affidavit verifying the fact that the proposed guardian has not or that no one of the proposed guardians has any interest in the matters in controversy in the suit adverse to that of the minor and that the proposed guardian or guardians are fit persons to act as guardian for the minor for the suit

Contents of affidavit in support of the application for appointment of guardian

The affidavit must be sworn to by a person appointed by the Court. The affidavit shall further state the following particulars of each (a) particulars of any existing guardian appointed or declared by competent authority (b) the name and address of the person if any who is the *de facto* guardian of the minor (c) the names and addresses of persons if any who in the event of either the natural or *de facto* guardian or the guardian appointed or declared by competent authority being appointed to act or by reason of relationship or interest will be liable to act as guardian for the minor for the suit

Application for appointment of guardian to be separate from application for bringing on record the legal representatives of a deceased party

petitions

- (6) No application under sub R (1) above except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf or where there is no guardian upon notice to the father or other natural guardian of the minor or where there is no father or other natural guardian to the person in whose care the minor is and after hearing any objection which may be urged on behalf of any person served with notice

Notice of application to be given to persons interested in the minor defendant other than the proposed guardian

under this sub rule The notice required by this sub rule shall be served six clear days before the day named in the notice for the hearing of the application and may be in Form No 11 set forth in Appendix II hereto

- (7) Where the application is by the plaintiff he shall along with his application and affidavit referred to in sub Rr (1) and (5)

Special provision to shorten delay in getting a guardian appointed

sub-R (1) above together the fees prescribed for serving proposed guardians signify his or their consent to act, the Court shall appoint one of them and intimate the fact of such appointment to the person appointed by registered post If no one of the persons served signifies his consent to act, the Court shall proceed to serve simultaneously another elected two if so many there be of the persons named in the list under sub R (1) shall be days of intimation by the prescribed fee

- (8) No person shall without his consent, be appointed guardian for the suit Whenever an application is made proposing the

No person shall be appointed guardian without his consent

- (10) Where the Court finds no person fit and willing to act as guardian for the suit, the Court may appoint any of its officers or

Court guardian when to be appointed—How he is to be placed in funds

lian and may that officer guardian shall any one or of any fund

in Court in which the minor is interested and may give directions for the payment or allowance of the costs as justice and the circumstances of the case may require

- (11) When a guardian for the suit of a minor defendant is appointed and it is made to appear to the Court that the guardian is not in possession of any or sufficient funds for the conduct of the suit on behalf of the defendant and that the defendant will be prejudiced in his defence to time his defence until in the I shall file
- Funds for a guardian other than Court guardian to defend**

NAGPUR

For R 3 substitute the following —

Guardian for the suit to be appointed by Court for minor defendant 3 Where the defendant is a minor the Court on being satisfied of the fact of his minority shall appoint a proper person to be guardian for the suit of such minor

POUDH

add the following proviso to sub R (4) —

Provided that if the minor is under ten years of age no such notice shall be issued to him

RANGOON

The following shall be substituted namely —

3 (1) Where any of the defendants is a minor the Court on being satisfied of the fact of his minority shall appoint a proper guardian for the suit for such minor

(9) — with the plaintiff list of acting as guardian of of an application duly appointed guardian of such persons whether he authority or a natural or and shall give the

may also be obtained ported by an affidavit rest in the matters in that he is a fit person

to be so appointed (5) the except upon notice authority competent on notice to the father is no father or other is and after hearing on served with notice

Synopsis

	Note No		Note No
Scope and object of the Rule	1	dian	7
Shall appoint a proper person to be guardian for the suit	2	Decree against major treating him as minor and vice versa	8
Title of suit against minor	2 A	Such application shall be supported by affidavit—Sub Cl (3)	9
On being satisfied of the fact of his minority	3	Service of summons	10
When defendant pleads minority	4	Notice to the minor and his guardian	11
Non representation	5	Duties of a guardian—Gross negligence	12
Absence of formal order of appointment of guardian—Substantial representation	6	Effect of fraud or gross negligence of guardian	13
Illegal procedure in appointing guar		Probate proceedings	14

Other Topics

Applicability of order by execution proceed-
ings—See O 39 General Note 2
Appellate—See Note 8 Pt (3)
Guardian not appointed—Whether decree is
valid—See Note 14 (1)

Minor—When can impetrari decree—See
Notes 5, 12 and 13
No guardian *ad litem*—Effect on limitation
—See Note 2 Pt (1)

1 Scope and object of the rule

The object of the rule is to see that the minor's interest does not suffer and that he is properly represented in a suit filed against him.¹ The Court cannot, therefore, be too jealous in observing the requirements of the law in regard to infants and in seeing that their interests are properly safeguarded. It should be satisfied not merely that the proposed guardian is a fit and proper person to act as guardian but also that he has no interest, directly or indirectly, adverse to the minor.² As to the applicability of the rule to proceedings other than suits—see the undermentioned cases:

2 Shall appoint a proper person to be guardian for the suit

The provisions of the rule are mandatory and the Court is bound to appoint a proper guardian for a minor defendant.³ The appointment is not a mere matter of form. The Court is bound to satisfy itself that the proposed guardian is a fit and proper person to represent the interests of the minor.⁴ A decree obtained against a minor without appointing a guardian for him as required by this rule is nullity (see Note 5, *infra*). The principle that the manager of a joint Hindu family represents in litigation the other members including minor co-parceners does not apply when minors are *made parties* to a suit, the Court is, therefore, bound to appoint a guardian for the minor defendant even though the managing member of the family of which such minor is a member is a co-defendant.⁵

But the fact that the validity of the proceedings depends upon the appointment of a proper guardian for a minor defendant does not mean that for purposes of limitation a suit is not validly filed until a guardian *ad litem* is appointed for the minor: the institution of a suit is complete and saves limitation even though the further progress of the suit depends upon the appointment of a suitable guardian.⁶

2 A Title of suit against minor

In a suit against a minor the minor should himself be made, and

Order 32 Rule 3—Note 1

- 1 (1977) 11 J M 113 (11)
- 2 (1902) 21 All 53 (38) (11) 11
- (1909) 1909 Cal 11 (11) 11
- (1909) 150 J 11 R 11
- (1913) 1913 Oudh 11 (11) 11
- apply to parties in suits under
U P J and Rev. Code Act
- (1911) 1911 All 11 (11) 11
- (1927) 1927 Cal 374 (374) Do not apply
to commutation proceedings under
Bengal Tenancy Act
- (1977) 11 J M 113 (200) Proceedings
to file and enforce in award of
the nature of a suit under S 2 of

Act XX of 1861 and minor has to be
represented by holder of certificate
of administration

Note 2

- 1 (1901) 11 20 Bom 54 (35) 44 Jom 767
- (1914) 1914 Oudh 107 (105) 16 Oudh Cts
- (1917) 1917 All 477 (49) 39 All 8
- (1927) 1927 All 787 (787) 49 All 809
- (1930) 51 Ind Cas 575 (576) (U P D R)
- (1931) 1931 All 136 (136) 53 All 497
- (1905) 70 All 55 (56)
- (1917) 1917 All 177 (177) 39 All 8
- (1927) 1927 All 787 (787) 49 All 809
- (1930) 51 Ind Cas 575 (576) (U P D R)

described as a defendant, some other person being named as guardian. Thus a suit against *CD* a minor, should describe him as "*CD*, a minor, of whom *EF* is guardian *ad litem*."

3 On being satisfied of the fact of his minority See the under-mentioned case.

4 When defendant pleads minority

When a defendant who is sued as a minor pleads that he is a minor, the proper procedure is to raise a *preliminary issue* on the question of his minority and give a finding thereon. In the proceedings for the determination of such issue however the alleged minor should be represented by a guardian *ad litem* appointed by the Court. If it is found that the defendant is in fact a minor then a guardian should be appointed for the suit. If not, the guardian appointed for the enquiry should cease to act. On the analogy of this principle it has been held that where a minor applies to be brought on record as the legal representative of a deceased party the Court ought to appoint a guardian for the purpose of the enquiry as to his being the legal representative.

5 Non representation

A minor cannot be considered to be a party to a suit unless he is represented therein by a duly qualified guardian. A decree passed against a minor not so represented must be regarded as a decree passed against a person not a party to the suit and is, therefore without jurisdiction null and void. In order to set aside such a decree it is not necessary to show that the

- | | |
|---|--|
| <p>(1882) 4 All 97 (31)
(1901) 1901 Ptn R. No 15, page 61</p> <p>Note 2 A</p> <p>1 (1873) 99 Suth W R 48 (48)
[See also (1933) 133 Pat 104 (110)
12 Pat 117 Minors sued as major —
Written statement filed by their
mother as their guardian — Court
accepted the same—Failure to amend
the cause title is a mere irregularity
(1926) 1926 Lah 82 (22) Suit by father as
next friend of his minor son—Find
ing him a major on that date—
Cause title amended—Though on
date of amendment barred by limi-
tation suit not to be dismissed</p> <p>Note 3</p> <p>1 (1920) 1920 Oudh 164 (166) 21 Oudh Cas
39.</p> <p>Note 4</p> <p>1 (1897) 18 Cal 311 (316)
(1926) 11 Pat 48 (190)
2 (1924) 1924 Mad 815 (811)</p> <p>Note 5</p> <p>1 (1900) 22 Cal 294 (312 315) 92 Ind App
2 (1 C)
(1913) 21 Ind Cas 288 (291) 10 Oudh C
17 3, All 48 40 Ind App 12 (1 C)
(1919) 1922 All 17 (11) 11 All 47
(1911) 1921 All 82 (83) 10 All 74
(1911) 11 O All 875 (876)
(1919) 19 All 137 (18 141)
(1911) 1911 M 111 (111) 11 Cal 29
(187) 11 B 111 (111)
(1901) 1901 Cal 811 (811)</p> | <p>(1928) 1928 Cal 844 (845) 20 Cal 1241
(1929) 1929 Cal 8 (8)
(1933) 1923 Cal 692 (691)
(1923) 1923 Cal 98 (98)
(1915) 1915 Cal 727 (730)
(1907) 91 Cal 25 (7)
(1887) 14 Cal 754 (757)
(1874) 12 F. n I R App 2 (7) (1)
(1863) 11 Suth W R 300 (301)
(1927) 1927 Lah 577 (578) 3 Lah 88
(1932) 1932 Lah 511 (512) Reader of the
Court appointed to conduct the
case for the minor but with-
out sending notice either to the minor
or to the reader as required by
R 9 O 32 C P C</p> <p>(1918) 1918 Lah 770 (772) 1918 PR No 112
(1917) 1917 M 190 (191)
(1900) 19 O Mad 713 (714)
(1922) 1922 Nag 241 (250) 1 Nag I R 19
(1903) 1903 Cal 67 (69) 60 Cal 750 The
sale in execution of the decree is
valid and nullity even though the
representative of a guardian in the
execution proceedings</p> <p>(1934) 1934 F 290 (291)
(1924) 1924 M 198 (198) 5 Mad 973
(1919) 1919 Oudh 171 (173)
(1921) 1921 I 273 (273)
(1910) Cal Ind Cas 6 (6) 4 1910 PR No 50
(1911) 1911 F R No 17 1911 10 Cal 29
See in judgment on behalf of
minor not by guardian <i>ad litem</i> —
see defendant's uncle—See head ng</p> |
|---|--|

minor has suffered any prejudice by non representation? It is not, however, necessary to set aside such a decree. The minor may ignore or disregard the decree. Not being a party to the suit the minor will not be barred by the principle of *res judicata* from raising the same questions in a subsequent suit as were decided in the prior suit.³ On the same principle their Lordships of the Privy Council have held in *Rashid un nissa v Muhammad Ismail*, I L R 31 All 572 that a minor not represented in the suit cannot in execution object to the execution of the decree.⁴ Their Lordships observed as follows:—Section 244 (now S 47) of the Civil Procedure Code applies to questions arising between parties to the suit in which the decree was passed that is to say between parties who were properly made parties in accordance with the provisions of the Code. It will also follow from this that a minor not properly represented in the suit and against whom an *ex parte* decree has been passed cannot apply under O 9 R 13 to set aside the *ex parte* decree inasmuch as under that rule only a defendant, that is a person properly made a defendant can apply. This is the view of the High Court of Madras⁵ and the Judicial Commissioners Court of Nagpur.⁶ The High Court of Allahabad⁷ and the Chief Court of Oudh⁸ have however held that such an application is maintainable. In view of the Privy Council decision mentioned above it is submitted that the latter view is not correct.

Where an incompetent or disqualified guardian is appointed for a minor party the position is the same as if no guardian is appointed at all.⁹ As to when a guardian *ad litem* can be regarded as a disqualified person and when not see Notes 4 to 8 to R 4 *infra*.

Where a minor is represented in the suit by a duly qualified guardian he becomes legally a party to the suit and the Court acquires jurisdiction to decide his case.¹⁰ The decree passed against him in such a case is binding on him as much as on an adult and the judgment will operate as *res judicata* against him in subsequent proceedings.¹¹ The law however recognises a

[See also (1919) 1919 Cal 436 (435) Decree can be set aside in an appeal by another party.]

³ (1911) 1911 All 822 (893) 10 All 741
⁴ (1911) 1911 Mad 236 (3) 5 Mad 973

⁵ (1911) 1911 Oudh 13 (14)
⁶ (1931) 1911 Mad 64 (6)
See also Notes 4 and 5 to Rule 4 *infra*.

⁷ (1911) 1911 Pat 249 (250) 9 Pat 33
[See also (1903) 30 Cal 101 103]
O I d A I P 18 (P C)]

⁸ (1911) 1911 M 12 (13)
J C I 1911 I t 8 (6) J I t 65
1911 Bo 1 (1)
(1911) 1911 All 216 (216)
(1911) 1911 All 36 (40 41) 48 All 44
(1911) 1911 All 601 (60)
1911 All 94 (10)
1911 All 4 (461)
(1911) 1911 All 191 (191) 44 All 59 Court
go into the merits of the prior
stand as whether minor was properly
represented

(1916) 1916 All 34 (3) 38 All 45

(1908) 30 All 10 (108)

(1894) 1894 All W N 141 (14)

(1900) 24 Bom 54 (509)

(1880) 10 Bom 91 (24)

(1911) 1911 Cal 86a (86 86)

(1911) 34 Cal 83 (9)

to minor to appeal from the decree or apply for a review. For the reasons given in the commentary the view is also not correct.

(1911) 1911 All 116 (116) 5 All 196

(1903) 1903 All 101a (214)

minor has suffered any prejudice by non-representation? It is not, however, necessary to set aside such a decree. The minor may ignore or disregard the decree.¹ Not being a party to the suit the minor will not be barred by the principle of *res judicata* from raising the same questions in a subsequent suit.² As was decided in the prior suit.³ On the same principle their Lordships of the Privy Council have held in *Rashid-un-nissa v. Muhammad Ismail*, 11 Lk 31 All 572 that a minor not represented in the suit cannot, in execution object to the execution of the decree.⁴ Their Lordships observed as follows: Section 244 (now S. 47) of the Civil Procedure Code applies to questions arising between parties to the suit in which the decree was passed that is to say between parties who were properly made parties in accordance with the provisions of the Code. It will also follow from this that a minor not properly represented in the suit and against whom an *ex parte* decree has been passed cannot apply under O. 9, R. 13 to set aside the *ex parte* decree inasmuch as under that rule only a defendant, that is, a person properly made a defendant can apply. This is the view of the High Court of Madras and the Judicial Commissioners Court of Nagpur. The High Court of Allahabad and the Chief Court of Oudh have, however, held that the application is maintainable. In view of the Privy Council decision the latter view is submitted that the latter view is not correct.

Where an incompetent or disqualified guardian is appointed for a party, the position is the same as if no guardian is appointed at all.⁵ As to when a guardian *ad litem* can be regarded as a disqualified person and when not, see Notes 4 to 8 to R. 4, *infra*.

Where a minor is represented in the suit by a duly qualified guardian, he becomes legally a party to the suit and the Court acquires jurisdiction to deal with his case.⁶ The decree passed against him in such a case is binding on him as much as on an adult and the judgment will operate as *res judicata* against him in subsequent proceedings.⁷ The law, however, recognises a

- (See also (1919) 1919 Cal 436 (435) 7 (1927) 1927 Oudh 173 (174) -
Decree can be set aside in an appeal 8 (1931) 1931 Mad 674 (677) -
by another party.] [See also Notes 4 and 5 to Rule 4
infra]
- 1 (1914) 1914 All 832 (833) 46 All 744
2 (1914) 1914 Mad 246 (247) 57 Mad 979
3 (1914) 1914 Bom 112 (117) 39 Bom 29
4 (1914) 1914 All 72 (81) 36 Ind App 168 (PC)
5 See also (1917) 1917 Cal 811 (817)
6 (1927) 1927 Cal 627
7 (1914) 1914 Cal 26 (27) (Cal)
8 (1914) 1914 W. L. R. 93 (99)
9 (1914) 1914 Cal 148 (146) 3 Cal 51
10 (1914) 1914 Cal 148 (146) 3 Cal 51
11 (1914) 1914 Cal 148 (146) 3 Cal 51
12 (1914) 1914 Cal 148 (146) 3 Cal 51
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95 (1914) 1914 Cal 148 (146) 3 Cal 51
96 (1914) 1914 Cal 148 (146) 3 Cal 51
97 (1914) 1914 Cal 148 (146) 3 Cal 51
98 (1914) 1914 Cal 148 (146) 3 Cal 51
99 (1914) 1914 Cal 148 (146) 3 Cal 51
100 (1914) 1914 Cal 148 (146) 3 Cal 51
- view is also not correct
(1914) 1914 All 116 (116) 55 All 126
(1914) 1914 All 212 (214)
- can go into the merits of the prior suit and see whether minor was properly represented
(1916) 1916 All 324 (325) 38 All 452
(1908) 80 All 103 (108)
(1894) 1894 All W. N. 141 (142)
(1900) 24 Bom 547 (552)
(1886) 10 Bom 21 (21)
(1927) 1927 Cal 865 (866, 867)
(1907) 34 Cal 83 (89)

3. substantive right in him to avoid the decree so passed if he can establish that the guardian has been grossly negligent in the conduct of the suit and if he suffered prejudice by reason of such negligence. The minor can exercise this right in various ways —

- (1) If the decree is an *ex parte* one, he may apply under O 9, R 13 to set aside the *ex parte* decree. The negligence of the guardian may constitute a sufficient cause for setting aside the decree within the meaning of that rule 12.
- (2) He may prefer an appeal from the decree 12a.
- (3) He may apply for a review of the judgment 12a.
- (4) He may file a *suit* to set aside the decree 13.
- (5) He may even, *in defence*, show that the decree is not binding on him on the ground of gross negligence of the guardian and consequent prejudice 14.

Where a decree is set aside on the ground of non-representation or on the ground of gross negligence of the guardian in the conduct of the suit, the minor is remitted to his original rights as it stood before the decree, and the Court, can, under its inherent powers, revive the first suit and proceed with it from the stage at which it was declared that the proceedings were illegal as against the minor 15.

6 Absence of formal order of appointment of guardian—Substantial representation

Where a minor defendant is effectively represented by a guardian with the sanction of the Court the mere fact that a *formal order* of appointment was not passed will not render the decree a nullity as in the case of *non-representation*. The absence of the order of appointment is only an irregularity which in the absence of any prejudice to the minor resulting therefrom, will not be a ground for setting aside the decree ¹. On the same principle it has

- | | |
|---|--|
| (1856) 12 Cal 69 (75 76) | (1919) 1919 Lah 133 (185) 1919 P R No 24 |
| (1871) 16 South W R 231 (202) | If the minor became a major on <i>date</i> |
| (1872) 17 South W R 371 (374) | <i>of judgment</i> and treated as such he |
| (1887) 1897 Pun Ro No 72 page 151 | cannot attack the decree |
| (1910) 16 Ind Cas 182 (188) 37 Mad 535 | (1921) 1921 Mad 609 (608 609) 47 Mad 476 |
| (1918) 1918 Oudh 95 (97) | (1976) 1976 Mad 90, (105) |
| (1910) 7 Ind Cas 538 (539) 13 Oudh Cas | (1922) 1922 Mad 213 (273) 45 Mad 473 |
| 168 | (1895) 22 Cal 8 (15) |
| | (1917) 1917 Lah 83 (84) |
| | (1912) 13 Ind Cas 20 (21) (Lah) |
| | (1918) 1918 Lah 22 (924) 1917 I R No 101 |
| | (1907) 10 Oudh Cas 371 (380) |
| | 14 (1923) 1923 Mad 719 (718) |
| | (1915) 1915 Mad 364 (385) |
| 3 Lah 88] | 15 (1925) 1925 All W N 279 (279) Discus- |
| 17 (1905) 1905 Pat 512 (514) | ting from 1974 Mad 489 |
| (1933) 1933 All 116 (117) 55 All 196 In | (1924) 1924 All 273 (225) 45 All 606 |
| such a case the minor can apply | (1917) 1917 All 477 (477) 33 All 8 |
| through another guardian | (1930) 1930 All 641 (646) 52 All 924 |
| (1885) 12 Cal 69 (75 76) | (1925) 1925 Cal 512 (513) |
| (1880) 18 Cal L R 6 (70) | (1976) 1976 Lah 441 (441) |
| 12a (1933) 1933 All 116 (116) 55 All 196 | (1976) 1976 Oudh 32 (33) |
| 12a (1876) 25 South W R 443 (450) 2 Cal 25] | Note 6 |
| (1938) 1938 All 116 (116) 55 All 186 | 1 (1903) 30 Cal 1071 (1031) 30 Ind App 182 |
| (1916) 1916 All 324 (373) 33 All 452 | (PC) |
| (1912) 16 Ind Cas 538 (545) (Cal) | |
| 19 (1918) 1918 Nag 187 (189) | |
| (1933) 1933 All 116 (116) 55 All 136 | |
| (1915) 1915 Mad 584 (385) | |
| (1907) 6 Cal L Jour 148 (151 452) | |

8 Decree against major treating him as minor and vice versa

A major defendant who is described and impleaded as a minor or a minor who is treated as a major and impleaded as such cannot be treated as a party to the suit and is not bound by the decree passed in the suit. But if the major defendant is aware of the defect or takes part in the proceedings without objection he will be *estopped* from questioning the validity of the decree later on.

9 Such application shall be supported by affidavit—Sub clause (3)

An application for the appointment of a guardian should be supported by an affidavit stating the fact of minority of the defendant and that the proposed guardian is a fit person to be appointed as guardian. The Court must be satisfied that the person it appoints will safeguard the interests of the minor and that he has no interest of his own which will come into conflict with that of the minor. But as already pointed out in Note 7 the absence of such an affidavit is only an irregularity and cannot render the decree invalid.²

See sub-R (3) of R 3 substituted by the Madras High Court as to the contents of the affidavit in support of a petition under this rule.

10 Service of Summons

There is no specific mode provided for the service of summons on a minor defendant. It should therefore be served in the manner prescribed for service of summons under O 5 *ante*.¹ Where however a guardian has been appointed in the suit for the minor notice of an appeal from a decree in that suit need only be served on the guardian.²

11 Notice to the minor and his guardian

No order should be made under this rule appointing a guardian for a minor defendant unless and until the necessary notices are given to the persons referred to in the rule.¹ The object of giving a notice to the minor is twofold: he may not be a minor at all in which case he may come to Court and defend

Note 8

- 1 (1919) 1919 Pat 10 (19)
- (1916) 1916 O 148 (201)
- 2 (1916) 1916 All 387 (387) 48 All 362
- (1918) 18 Ind Cas 307 (360) (Cal)
- (1916) 1916 Mad 33 (36) 38 Mad 107
- (1917) 1917 Mad 318 (390) 39 Mad 1031
- (1925) 1925 Pat 367 (365)
- (1911) 1911 All 148 (151) Minor sued along with other partners of a firm as major—Decree not bid
- 3 (1906) 28 All 417 (417)
- (1921) 1921 All 91 (93) 15 All 603
- (1911) 1911 Cal 584 (589)
- (189) 91 Mad 16 (169)
- [See also (1891) 9 Cal L Rep 213 (215)]

Note 9

- 1 (1907) 24 All 93 (93)
- (190) 10 Oudh Cas 391 (331)
- 2 (1910) 1 Ind Cas 38 (38) 32 All 337 37
- Ind App 7 30 Oudh Cas 129 (P C)
- (1920) 1920 Loh 417 (417) 1 Loh 2
- [See also (1911) 1922 Loh 447 (114)]

Note 10

- 1 (1898) 26 Cal 267 (273)
- (1900) 27 Cal 350 (351)
- (1908) 30 Cal 182 (184)
- (1897) 2 Cal W N 100 (103 105)
- 2 (1916) 1916 Cal 1105 (1107)

Note 11

- 1 (1917) 1917 Bom 613 (615)
- (1934) 1934 All 219 (214)
- (1917) 1917 Mad 655 (655)
- (1930) 1930 All 609 (610) Substituted service improper
- (1911) 1911 Nag 120 (196 127)
- (1915) 26 Ind Cas 712 (712)
- (1918) 1918 Pat 211 (218)
- [See (1934) 1934 Loh 132 (133) No near relation of minor on father's side — Mother refusing service — Plaintiff is not bound to make a searching inquiry as to whether

in S 141 of the Code and consequently O 32 will not apply to proceedings in probate which have not reached a *contentious stage*.

R. 4. [Ss 440 443 445 456 457] (1) Any person^a who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit.

Provided that the interest of such person is not adverse^b to that of the minor and that he is not in the case of a next friend, a defendant or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority,^c no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers for reasons to be recorded that it is for the minor's welfare that another person be permitted^d to act or be appointed as the case may be.

(3) No person shall without his consent^e be appointed guardian for the suit.

(4) Where there is no other person fit and willing to act as guardian for the suit the Court may appoint any of its officers to be such guardian^f and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

[1877—Ss 440 443, 445, 456; cf RSC O 65 R 13]

Local Amendments

ALLAHABAD

Ss 440 443 445 456 457

1. Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as next friend except by leave of the Court.
2. Subject to the provision of sub R (1) any person who is of sound mind and has attained majority may act as next friend of a minor unless the interest of the person is adverse to that of the minor or he is a defendant in the Court.
3. The Court is to be recorded considers him unfit to act.
4. A next friend shall except as otherwise provided by Cl (5) of this rule be entitled to reimbursement from the estate of the minor of any expenses incurred by him in acting for the minor.
5. The Court may in its discretion for reasons to be recorded award costs of the suit or compensation under S 20 A or S 20 B against the next friend personally as if he were a plaintiff.
6. Costs or compensation awarded under Cl (5) shall not be recoverable by the guardian from the estate of the minor unless the decree expressly directs that they shall be so recoverable.

4 CALCUTTA

Substitute the words "Except as otherwise provided in this order," for the words "Where there is no other person fit and willing to act as guardian for the suit"

LAHORE

New sub R (2 a) was inserted --

(2 a) Where a minor defendant has no guardian appointed or declared by competent authority the Court may, subject to the proviso to sub R 1 appoint as his guardian for the suit a relative of the minor

If no proper person be available, who is a relative of the minor the Court shall appoint one of the other defendants if any, and failing such other defendant shall ordinarily proceed under sub R (4) of this rule to appoint one of its officers

and the following words were added to sub R (3) --

but the Court may presume such consent to have been given, unless it is expressly refused

MADRAS

See Local Amendments to R 3 supra

NAGPUR

For R 4 substitute the following --

Who may act as next friend or guardian for the suit

4 (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit

Provided that the interest of such person is not adverse to that of the minor and that he is not in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff,

- (2) Who
no
or
recd
act in either capacity "

POUDH

Substitute the following for R 4 --

4 (1) Where a minor has a guardian appointed or declared by competent authority no person other than such guardian shall act as next friend except by leave of the Court

(2) Subject to the provisions of sub R (1) any person who is of sound mind and has attained majority may act as next friend of a minor, unless the interest of such person is adverse to that of the minor, or he is a defendant, or the Court for other reasons to be recorded considers him unfit to act

(3) Every next friend shall, except as otherwise provided by sub R (5) of this rule, be entitled to be reimbursed from the estate of the minor any expenses incurred by him while acting for the minor

(4) The Court may, in its discretion, for reasons to be recorded, award costs of the suit, or compensation under S 35 A or S 35 B against the next friend personally as if he were a plaintiff

(5) Costs or compensation awarded under sub R (4) shall not be recoverable by the guardian from the estate of the minor, unless the decree expressly directs that they shall be so recoverable "

PATNA

In sub R (4) for the words "where there is no other person fit and willing to act as guardian for the suit", in the first sentence of the sub rule substitute the following

"Where the person whom the Court, after hearing objections, if any, under sub R (4) of R 3, proposes to appoint as guardian for the suit, fails within the time fixed in a notice to him to express his consent to be so appointed "

RANGOON

For R 4, the following shall be substituted, namely --

4 (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit, provided that the next friend of a minor or as his guardian for the suit, provided that the minor and that he is not, the case of a guardian for the

acted by competent authority,
the next friend of the minor,

or be appointed his guardian for the suit unless the Court considers for reasons to be recorded that it is for the minor's welfare that another person be

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interested and may give directions for repayment or allowance of such costs as justice and the circumstances of the case may require. An advocate or pleader of the Court shall be an officer of the Court for this purpose.

Synopsis

	Note No		Note No
I Legislative changes	1	Act	7
II Scope of the Rule	2	VI Appointment of person as guardian without his consent	8
III Who may be next friend or guardian of a minor	3	VII Officer of Court as guardian ad litem—Sub R (4)	9
(a) Married woman	4	VIII Wishes of the minor if should be considered	10
(b) Persons with adverse interest	5	IX Probate proceedings—See Note 14 to R 3 <i>supra</i>	11
IV Guardian appointed by competent authority	6	X Leave to sue or defend on behalf of a minor	12
V Another person be permitted to			

Other Topics

Absence of affidavit—Effect of See R 3 Note 7, Pt (3) and Note J 1 t (2)

1 Legislative changes

Sub R (1) corresponds to Ss 445 and 457 of the old Code and sub R (2) to Ss 440 and 443 second paragraph. Sub R (3) is new. Sub R (4) corresponds to the second paragraph of S 456 of the old Code. The provision as to the direction with regard to the costs to be incurred by the Court guardian is new.

2 Scope of the Rule

This Rule deals with the question as to who can act as next friend or be appointed as guardian of a minor for the suit. The general rule is that any person who is of sound mind and has attained majority may so act or be so appointed, provided his interests are not adverse to that of the minor (sub-Rule 1).¹ Where there is a certified guardian for the minor, it is he that should be allowed to act as next friend or be appointed as guardian and not any other person unless it is for the welfare of the minor that another person should be appointed (sub-R 2). Where there is no other person fit and willing to act as guardian, the Court may appoint its own officer to act as guardian (sub R 3).

The powers of the Court under this Rule and R 11 of this Order are exercisable by the Registrar under S 105 of Sch I of the Rangoon Small Cause Courts Act (VII of 1920).

Order 32 Rule 4—Note 2

1 (1930) 1 I L R 302 (1902) In a suit to set aside alienation by mother

Court is justified in allowing minor to be represented by one of other plaintiffs though father does not wish to sue

3 Who may be next friend or guardian of a minor

Any person can be the next friend or the guardian of a minor, provided:—

- (1) he is not of unsound mind
- (2) he is himself not a minor,^{1a}
- (3) his interests are not adverse to that of the minor^{1b} and,
- (4) he is not the opposite party, *i e*, a defendant in the case of a next friend or a plaintiff in the case of a guardian

Provided these conditions are satisfied the mere fact that he happens to be an undischarged insolvent will not invalidate his appointment as a guardian²

4 Married woman

Under S 457 of the Code of 1882 a married woman was disqualified from being appointed as guardian *ad litem* in a suit. Consequently it was held that a decree obtained against a minor with a married woman as his guardian was a *nullity*.¹ But it was held that the prohibition did not apply to the case of a *next friend* and that a married woman could validly represent a minor plaintiff.² Under the present rule the disqualification has been removed altogether so that a married woman can now represent the minor plaintiff as well as a defendant.

5 Persons with adverse interest

The proviso to sub-R (1) prohibits the appointment of a guardian *ad litem* whose interests are adverse to that of the minor. Such a person is disqualified to be the guardian of the minor.¹ A minor represented by such a person is not legally represented at all and a decree obtained against him will be a *nullity*.² In the undermentioned cases,³ however it was held by the

Note 3

left open
(See (1920) 1920 Lah 417 (417) 1 Lah

Mother appointed guardian
(1922) 1922 Mad 273 (274) 45 Mad 42,
Minor entitled to a next friend who
will be diligent in his interests
(1926) 1926 Oudh 405 (407) (Do)
(1890) 13 Mad 197 (199) Collector can be

(1914) 1914 Oudh 310 (311) 17 Oudh Cal
318 A widow held to be not a mar-
ried woman
2 (1890) 17 Cal 458 (489)
(1885) 11 Cal 733 (734) Overruled in 17 Cal
488

Note 5

1 (1905) 31 All 572 (552) 36 Ind App 108
(P C)
2 (1903) 31 All 572 (583) 36 Ind App 105
(P C)

Note 4

1 (1900) 9 Ind Cas 864 (866) 31 All 572 36
Ind App 163 (P C)
(1907) 29 All 728 (723)
(1901) 29 All 159 (160)
(1889) 1899 All W N 90 (90)
(1889) 1 All 195 (196)
(1894) 18 Bom 366 (367)
(1910) 13 Ind Cas 114 (114)
(1907) 6 Cal 1, Tour 36 (37)
(1908) 1908 Ind Cas 90 9 page 63 Question

High Court of Madras that the mere fact that the interest of the guardian was adverse to that of the minor is not sufficient to invalidate the decree passed against the minor, but that the minor should be shown to have suffered *prejudice* by such appointment. The decisions do not advert to the decision of their Lordships of the Privy Council in *Rashid Unnissa v. Muhammad Ismail*, I L R 31 All 572, in which it is laid down that a person having an interest adverse to that of the minor is a disqualified person and that the minor cannot be deemed to have been legally represented by him. The said decisions cannot, therefore, be considered to be correct.

The question whether the interests of the guardian are adverse to that of the minor depends on the facts and circumstances of each case. There is a conflict of opinion as to whether a person who has executed a document or entered into a transaction on behalf of the minor is a person whose interests are adverse to that of the minor in a suit on that document or transaction. According to the High Courts of Allahabad⁴ and Patna⁵ his interests are adverse and he cannot therefore be appointed as guardian of the minor. According to the High Court of Madras,⁶ and the Chief Court of Oudha⁷ his interests are not necessarily adverse to that of the minor in all cases, but whether they are so in any particular case depends upon the facts of that case.

6 Guardian appointed by competent authority

Where a minor has a guardian appointed or declared by a competent authority, the Court is bound to appoint that guardian as guardian *ad litem* of the minor unless for reasons to be recorded it considers that in the interest and welfare of the minor some one else should be appointed. According to

[See also (1923) 1923 Mad 333 (394)]

[See also (1920) 1920 Mad 615 (615)
43 Mad 842]

3 (1922) 132 N. W. 239 (241). Minor benami
debt for next friend—Held interest
not adverse.

(1915) 1915 Mad 483 (484). Indebtedness of
next friend to minor—Court can dis-
miss the suit.

(1880) 6 Cal L R 418 (415). Uncle of a Ma-
homedan infant can represent.

(1907) 16 Mad L Jour 357 (357). Held to
possess an adverse interest.

(1893) 1893 All W N 101 (105).

See also (1935) 1935 Lah 44 (46).
Step brother of minor appointed
guardian—That is not by itself suffi-
cient to hold that his interests are
adverse to those of the minor.

4 (1922) 1922 All 91 (94). 41 All 525.

5 (1922) 1922 All 91 (94). 41 All 525.

6

(700). Mortgage bond by grand
father—Mortgage suit—Minor's
father appointed guardian *ad litem*—
Held minor properly represent-
ed.]

6 (1922) 1922 Mad 219 (222). 52 Mad 275.

(1933) 1933 Mad 507 (512). Assignment by
mother of mortgage in favour of

C P C 289 & 290.

both minor daughter and herself—
Suit on such mortgage—Merely the
fact of such assignment interest of
mother is not adverse to that of
minor daughter so as to disqualify
her from being appointed as guar-
dian.

[See also (1926) 1926 Mad 1116
(1147). Son born subsequent to
mortgage—Appointment of father as
guardian—Interest not adverse.]

(1924) 1924 Mad 297 (234). 47 Mad 79. Suit
on a mortgage by father—Father
appointed guardian of minor son—
Held interest adverse.

7 (1935) 1935 Oudh 183 (189).

Note 6

1 (1915) 1915 Cal 40 (41).

(1935) 1935 Cal 160 (165). Certified guar-
dian appointed guardian *ad litem*—
Merely because he ceases to be certi-
fied guardian he does not *ipso*
facto cease to be guardian in the suit.

(1895) 20 All 162 (164).

(1911) 1911 All W N 42 (42).

(1883) 9 Cal 176 (179).

(1881) 8 Cal 656 (662). 9 Ind App 27 (P C).

(1879) 5 Cal 219 (220, 221).

the High Courts of Allahabad,² Calcutta,³ and Patna,⁴ the violation of this provision is only an *irregularity* and does not, by itself, vitiate the decree. Thus where the mother of certain minor defendants was appointed their guardian *ad litem* in ignorance of the fact that there was a certificated guardian, it was held that the decree could not be set aside in the absence of any proof of prejudice to the minors.⁵ The High Court of Madras⁶ has, on the other hand held that in such a case the appointment is *illegal* and the decree obtained against the minor, *void*.

The words 'appointed by *competent authority*' do not include the case of a Hindu father purporting to appoint a testamentary guardian to his son even assuming that he has the power to appoint a guardian under the general Hindu Law.⁷

7. 'Another person be permitted to act'

A Court can in the interests of the minor permit a person other than the certificated guardian to act or appoint him as a guardian *ad litem* of the minor notwithstanding the existence of a certificated guardian. Thus where the appointment or the identity of the certificated guardian is not known¹ the Court may appoint another person as guardian *ad litem* of the minor.

8 Appointment of person as guardian without his consent

Sub-Rule (3) controls both Sub-R (1) and Sub-R (2)¹ and provides that no person, shall, without his consent, be appointed guardian for the suit. The consent may, however, be express or *implied*.² The object of the rule is to safeguard the interests of the minor by ensuring that the guardian has taken

(1880) 5 C il 450 (453)

(1875) 19 Bom 432 (433)
(1895) 19 Bom 309 (317) (F L)
(1895) 19 Bom 96 (98)
(1893) 17 Bom 560 (562)
(1903) 17 Bom 566 (569)
(1892) 16 Bom 634 (636)
(1903) 30 C il 613 (616)
(1892) 19 C il 301 (311)
(1890) 17 C il 944 (949) Case under Act IX of 1875

2 (1907) 29 All 290 (291)
(1895) 20 All 162 (163) The plaint should be returned for amendment

3 (1908) 7 C il L Jour 270 (273)

4 (1919) 1918 Pat 520 (522)

5 (1907) 29 All 290 (291)
[See however (1866) 1 Agra H C R 175 (177) A decree against a minor represented by his uncle without any legal authority -- May be set aside by lawful guardian though no fraud or collusion]

6 (1920) 1920 Mad 745 (746) 43 Mad 803

(1928) 1928 Mad 1057 (1058)

7 (1907) 31 Bom 413 (417)

[But see (1906) 8 Bom L R 522 (524)]

Note 7

1 (1916) 1916 Oudh 209 (211)

Note 8

see (1881)

upon himself the onerous duty of defending the interests of the minor.² Where a person is appointed guardian of a minor without his consent express or implied there is a conflict of opinion as to whether the decree passed must be deemed to be one passed against the minor who has not been represented in the suit and to be therefore a nullity. The High Courts of Allahabad and Calcutta have held that the decree passed under such circumstances is a nullity. The High Courts of Madras and Patna have expressed conflicting opinions on this point, holding in some cases that it is a nullity,⁴ and in others that it is only an *irregularity* which, in the absence of proof of prejudice to the minor will not vitiate the decree.⁵ It is submitted that the last view is correct. As has been seen in Note 5 to R. 3, *ante*, where, on the face of the record the minor is represented by a person and such person is not disqualified to be a guardian the Court has jurisdiction to deal with the suit against the minor and the non compliance with the various requirements in the process of appointing the guardian cannot render the judgment a nullity, but would only amount to *irregularities* which may be grounds for setting aside the decrees in proper proceedings on proof of prejudice to the minor.⁶

It has been held by the High Court of Calcutta that the consent of a guardian cannot be presumed merely from the fact that a notice under O 21, R 22 has been issued to him.⁷ The Chief Court of Oudh has also held that a person who is named as guardian but who does not appear in the suit cannot be said to have consented to be appointed as guardian.⁸ Where, however, the guardian has had an opportunity to object to his appointment and does not do so, the consent, according to the Allahabad High Court, can be presumed.⁹ See also the amendments to this rule made by the various High Courts.

9 Officer of Court as guardian ad litem—Sub R 4

Where the proposed guardian does not appear or declines the guardianship,² the proper procedure is to apply to the Court for the appointment of an officer of the Court as guardian. The Court should however appoint an officer

(1924) 1924 Lah 97 (98)

(1923) 1923 Pat 231 (235) 2 Pat 236

(1927) 1927 Oudh 173 (174)

o (1904) 14 Mad L Jour 342 (343)

(1909) 4 Ind Cas 1108 (1108) (Mad) Material irregularity

(1925) 1925 Mad 30 (32) 47 Mad 783 Order of reference to Full Bench — Per Phillips J. Irregularity — Per Venkatasubba Rao J. Nullity

(1923) 1923 Pat 242 (256) 2 Pat 335

(1917) 1917 Pat 657 (657) 2 Pat L Jour 390

2 (1915) 1918 Pat 211 (214)

(1851) 5 Bom 306 (303)

3 (1916) 1916 All 22 (23) 36 All 315

(1927) 1927 Cal 485 (491) 54 Cal 450

(1921) 1921 Cal 600 (601)

(1923) 1923 Cal 692 (693)

(1924) 1924 Cal 1042 (1049)

(1915) 1915 Cal 203 (205)

(1912) 18 Ind Cas 90 (91) (Cal)

[See also (1921) 1921 Cal 531 (536)]

Want of consent even on technical grounds sufficient to invalidate appointment as guardian]

pointment

Note 5

1 (1912) 17 Ind Cas 763 (764) (Cal)

(1912) 14 Ind Cas 345 (347) (Cal)

(1881) 5 Bom 310 (312)

(1880) 7 Cal L Rep 407 (410)

2 (1921) 1921 Cal 531 (535)

(1925) 1925 Notes 10 (1) 110 Ind Cas 346 (Lah)

- 4, of the Court as guardian only when there is no other person fit and willing to act as guardian³ But the fact that a Court guardian was appointed without any enquiry as to whether there was any other person fit and willing to act as guardian⁴ or the fact that the appointment of Court guardian was obtained by the fraud of the opposite party instead of another who could have conducted the case better on behalf of the minor⁵ is only an irregularity which will not render the decree null and void though it may be a ground for setting the decree aside if the minor is shown to have been prejudiced by such irregularity

Where a Court guardian is appointed the Court may provide for the payment of the costs to be incurred by him in conducting the proceedings on behalf of the minor⁶ Where the Court guardian is not put in possession of any funds for defending the suit with the result that defences open to the minor are not raised the decree can be avoided by the minor in appropriate proceedings⁷

10 Wishes of the minor if should be considered

The wishes of the minor should, if possible be considered and given due weight in the matter of the appointment of a person as his next friend¹ or guardian *ad litem*² This is the reason why notice is to be given to the minor See Note 11 to R 3

11 Probate proceedings—See Note 14 to R 3 *supra*

12 Leave to sue or defend on behalf of a minor

Under the present rule leave to sue or defend is necessary only in cases where there is already a guardian for the minor appointed or declared by a competent authority and some other person wishes to represent the minor as the next friend or guardian *ad litem* But the absence of a formal order granting leave to sue is not necessarily fatal to the suit¹

For cases under the Bengal Minors Act (XL of 1858) and the Bombay Minors Act (XX of 1864) (both of them now repealed by Act VIII of 1890) the provisions whereof required the granting of a permission or a certificate to sue on behalf of the minor, see the following cases²

3 (117) 1917 Mad 605 (605)

(1918) 1918 Cal 814 (815)

(1930) 1930 Oudh 110 (112) 5 Luck 453
Court officers have neither the time nor the opportunity to do justice to the cause of the minors and they should not be required to risk their own good name and the minors' interests by receiving these appointments

[See (1934) 1934 Cal 474 (475) 61

(1933) 1933 Nag 379 (399) Appellate Court

(177)

61 Cal 997 Guardian *ad litem* accepting position only on undertaking that provision will be made for his costs—Court has jurisdiction to pass any orders it thinks fit—Minor's remedy is to get guardian discharged or to have order for costs set aside or sue guardian for damages for negligence]

Court appointed—Appointment is

Note 10

1 (1921) 1929 Lah 207 (260)

2 (1901) 1901 Pat 20 (26) 6 Pat L Jour 82

Note 12

1 (1909) 1 Ind L.R. 550 (556) 31 All "

2 (1880) 12 Cal 131 (139)

Local Amendments (Rule 4-A)

ALLAHABAD

Add the following R 4 A —

- "4 A (1) Where a minor has a guardian appointed by competent authority no person other than such guardian shall be appointed his guardian for the suit unless the Court considers for reasons to be recorded that it is for the minor's welfare that another person be appointed
- (2) Where there is no such guardian or where the Court considers that such guardian should not be appointed it shall appoint as guardian for the suit the natural guardian of the minor if qualified or where there is no such guardian the person in whose care the minor is or any other suitable person who has notified the Court of his willingness to act or failing any such person an officer of the Court

Explanation—An officer of the Court shall for the purposes of this sub rule include a legal practitioner on the roll of the Court

- (3) No person shall without his consent be appointed guardian for the suit, provided that in all cases the consent of such person shall be presumed unless within fifteen days of receipt of notice from the Court he notifies to the Court his refusal to accept appointment as such guardian. Refusal to accept notice shall be presumed to be refusal to act
- (4) Where an officer of the Court is appointed guardian for the suit under Sub R (2), the Court may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require

NAGPUR

Add the following R 4 A —

Procedure for appointment of guardian for the suit

4 A (1) No person except the guardian appointed or declared by competent authority, shall without his consent be appointed guardian for the suit

- (2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff
- (3) Unless the Court is otherwise satisfied of the fact that the proposed guardian has no interest adverse to that of the minor in the matters in controversy in the suit and that he is a fit person to be so appointed it shall require such application to be supported by an affidavit verifying the fact
- (4) No order shall be made on any application for the appointment as guardian for the suit of any person other than a guardian of the minor appointed or declared by competent authority except upon notice to the proposed guardian for the suit and to any guardian of the minor appointed or declared by competent authority or where there is no such guardian the person in whose care the minor is and after hearing any objection that may be urged on a day to be specified in the notice. The Court may in any case, if it thinks fit, issue notice to the minor also
- (5) Where on or before the specified day such proposed guardian fails to appear and express his consent to act as guardian for the suit or where he is considered unfit or disqualified under Sub R (3) the Court may, in the absence of any other person fit and willing to act appoint any of its officers or a pleader to be guardian for the suit

(1857) 14 C 11 153 (164)

(1911) 10 C 11 102 (105 106) Volunteer—

(1852) 4 All 165 (167)

(1866) 3 Agr. H C R 92 (93)

(1867) 8 Suth W R 137 (193)

(1868) 2 Suth W R 218 (219)

(1865) 1 Suth W R 200 (201)

(1857) 4 All 1 (3)

(1854) 8 Bom 232 (240)

(1857) 11 Bom 53 (55)

(1854) 8 Bom 335 (397)

(1859) 20 All 351 (354) Case under Act VII of 1859

(See also (1859) 17 Cal 658 (693) 17 Ind App 5 (P C) Case under S 55 of the Bengal Court of Wards Act (Bengal Act IX of 1879))

A.

- (6) In any case in which there is a minor defendant the Court may direct that a sufficient sum shall be deposited in Court by the plaintiff from which sum the expenses of the minor defendant in the suit shall be paid. The matter shall be adjusted in accordance with the final order passed in the suit in respect of costs."

OUDH

Add the following R 4 A, —

- ' 4 A (1) Where a minor has a guardian appointed by competent authority, no person other than such guardian shall be appointed his guardian for the suit unless the Court considers, for reasons to be recorded that it is for the minor's welfare that another person be appointed.
- (2) Where there is no such guardian or where the Court considers that such guardian should not be appointed it shall appoint as guardian for the suit the natural guardian of the minor if qualified or where there is no such guardian the person in whose care the minor is or any other suitable person who has notified to the Court of his willingness to act or filing any such person an officer of the Court.

Explanation — An officer of the Court shall for the purposes of this sub-rule include a legal practitioner on the roll of the Court.

- (3) No person shall without his consent be appointed guardian for the suit provided that in all cases the consent of such person shall be presumed unless within fifteen days of receipt of notice from the Court he notifies to the Court his refusal to accept appointment as such guardian. Refusal to accept notice shall be presumed to be refusal to act.
- (4) Where an officer of the Court is appointed guardian for the suit under Sub-R (2) the Court may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit or out of any fund in Court in which the minor is interested and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

5.

R. 5. [Ss 441, 444] (1) Every application to the Court on behalf of a minor, other than an application under *Rule 10, Sub-Rule (2)*, shall be made by his next friend or by his guardian for the suit.

Representation of minor by next friend or guardian for the suit

(2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

[1877—S. 441.]

Synopsis

	Note No		Note No
Who may apply	1	long continues	3
Effect of an application without a next friend or guardian	2	Pleader's liability for costs	4
Appointment of guardian ad litem how		Suit for custody of minor	5

1. Who may apply.

Sub-R 1 of the rule enacts that every application on behalf of a minor other than an application under R 10 sub-R 2 shall be made by his next friend or guardian. An application by a guardian who has been di-charged by

the Court is thus not valid and ought to be rejected.¹ Where before a guardian is appointed for a minor defendant in a suit it was found necessary to apply for the transfer of the suit to another Court it was held by the High Court of Calcutta that the next friend of the minor could make such an application on behalf of the minor plaintiff.²

2 Effect of an application without a next friend or guardian

It has been seen in Note 5 to R. 3 above that where a minor is not represented in a suit the decree passed against him is a nullity. On the same principle an order made on an application without the minor being properly represented therein by a next friend or guardian does not bind the minor. Sub-R. 2 provides that such an order may be discharged.

3 Appointment of guardian ad litem how long continues

Where a guardian *ad litem* has once been appointed his appointment endures for the whole of the *lis* in all its ramifications unless and until it is revoked by the Court or the guardian dies or retires.¹ The appointment continues for purposes of execution² and appeal.³

It has been held that the Deputy Registrar of the High Court who has been appointed guardian *ad litem* ceases to represent the minor as soon as the appeal to the Privy Council is admitted although he can represent the minor in an application for leave to appeal.⁴

4 Pleader's liability for costs

Where the pleader representing the minor knew or might have known, of the fact of minority and yet files an application without a next friend or guardian he is liable to be saddled with the costs to the opposite party.¹

5 Suit for custody of minor

This rule does not apply to a suit for the custody of a minor. It is not necessary in such a suit that the minor should be separately represented.¹

Order 32 Rule 5—Note 1

1 (1922) 192 J. at 256 (299) C. I. at J. Jour 141

2 (1859) 18 C. 171 (76)

Note 2

1 (1829) 20 S. at W. P. 170 (127)

(1834) 14 S. at W. R. 10 (106)

(1831) 11 Com. 374 (236) All. at to

of *fr. ad litem*

Note 3

1 (1892) 14 All. 1 (107)

(1900) 1130 All. 14 (110)

(1901) 11 Cal. J. 431 (42) 440

1892 J. 187 (18)

fr. end can appeal

(1924) 19 J. at W. 133 (134) 7 J. at J. Jour 110

(1921) 1371 J. at W. 157 (153)

(1900) 1930 J. at W. 171 (171) If some other person wants to appeal he must apply to remove the guardian *ad litem* under R. 11

(1899) 1839 All. W. 203 (20)

[See also (1927) 19 J. at W. 171 (171)]

4 (1928) 1928 Cal. 286 (28) 1 Cal. 286

[See also (1901) 11 Cal. J. 431 (42)]

Any person can represent the minor in an application for leave to appeal to Privy Council]

Note 4

1 (1831) 11 C. 1 L. Rep. 15 (14)

Note 5

1 (1913) 21 Ind. C. 789 (790) (Mild)

Receipt by next friend or guardian for the suit of property under decree for minor

R. 6. [S. 461] (1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a minor either :—

(a) by way of compromise before decree or order, or

(b) under a decree or order in favour of the minor

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

[1877—S 461]

Local Amendment

MADRAS

Ad the proviso to Sub R (2) —

"Provided that the Court may in its discretion dispense with such security in cases where the next friend or guardian for the suit is the manager of a joint Hindu family or the karnavan of a Malabar Tarwad and the decree is passed in favour of the joint family or the tarwad

Synopsis

	Note No		Note No
The object and applicability of the Rule	1 A	Payment to next friend without leave	2
Joint Hindu family—Right of manager to withdraw money or give discharge	1	Security for protection of minor's property	3

Other Topics

Object of the Rule See Note 1 F N (2)
Remedy against surety — Procedure See

Note G A to S 145

1-A The object and applicability of the Rule

This rule as well as rule 7 *infra* are based upon the general principle of law that an infant litigant becomes the ward of the Court and the Court has got the right and also the duty to see that the guardians act properly, and *bona fide* in the interests of the minors and that no suits are instituted or carried on by them for their own benefit only irrespective of the benefit of the minors.

This rule does not in any way control the substantive provisions of law contained in S 194 of the Indian Succession Act of 1925.

1 Joint Hindu family—Right of manager to withdraw money or give discharge

It was held by their Lordships of the Privy Council in *Ganesh Rao v Tulsi Ram Rao* (1913) 1 L R 36 Mad 295, that where the managing mem-

ber of a joint Hindu family is himself the next friend or guardian of a minor party his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. According to the High Court of Madras these observations apply equally to cases coming under this rule and the *karta*, who represents minor parties to the suit as their next friend or guardian cannot without leave of the Court under this rule, give a valid discharge of the decree or withdraw any monies deposited by the judgment debtor for the benefit of the minor members. A contrary view was taken in the undermentioned cases, one of which was before the date of the decision of the Privy Council in *Ganesha Row's case* and the other, though decided after the decision of *Ganesha Row's case*, did not advert to it. It is submitted that they are not correct.

But the rule will not apply where the managing member is *not* the next friend or guardian of the minor party. His right to give a discharge on behalf of the family under the Hindu Law is not affected by this rule. According to the High Court of Bombay where the decree itself dispenses with the separate application and sanction which might be necessary under this rule and allows the manager to receive the amount so long as he furnishes security the latter can give a valid discharge without the leave of the Court under this rule.

2 Payment to next friend without leave

A payment made by the judgment-debtor to the next friend or guardian without the leave of the Court under this rule is not a valid payment and will not prevent the decree from being regarded as a subsisting one.

3 Security for protection of minor's property

The fact that the next friend or guardian is the manager of a joint Hindu family does not exempt him from giving security under sub-R. 2¹ The bond should be duly stamped and affixed with Court-fee stamp as required by Art. 6 Sch. II of the Court Fees Act.

As to the manner in which security given under this rule may be enforced see Note 6-A to S. 145 *supra*.

Note 1

- 1 (1901) 1901 M 120 (132)
(1925) 1925 M 8180 (47 M 920)
- 2 (1905) 32 Cal 571 (265 510). Object of the Rule stated—Decided before (1918) 36 M 295 (503) (P.C.)
(1915) 1915 L 150 (156) Assumed
- 3 (1927) 1927 P 373 (330)
- 4 (1924) 1924 Bom 382 (381)

Note 2

- 1 (1924) 1924 M 270 (250)
1920) 1930 L 490 (490) Trial Court directing next friend under R. 6 to refund money to Pank drawn

without its permission
[See also (1924) 1924 L 681 (682)]

Note 3

execute a bond under S. 370]
[But see (1905) 11 Oudh C 216 (217)]

[See however (1933) 1933 Cal 17 (18 19) This rule does not control S. 194 of the Succession Act (XXXI of 1925) Possession of moveables ordered without security.]

- 2 (1925) 1925 Cal 906 (907) 53 Cal 101 (F B)

R. 7. [S 462] (1) No next friend or guardian¹ for the suit shall, without the leave of the Court, *expressly recorded*³ in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian

(2) Any such agreement or compromise entered into without the leave of the Court *so recorded* shall be voidable against all parties other than the minor⁵

[1877—S 462 See S 147.]

Local Amendment

MADRAS

Insert the following as Sub Rule (1 a) —

Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader the counsel or pleader shall file in Court with the application a certificate to the effect that the agreement or compromise or action proposed is in his opinion for the benefit of the minor or other person under disability. A decree or order for the compromise of a suit appeal or matter to which a minor or other person under disability is a party shall recite the sanction of the Court thereto and shall set out the terms of the compromise as in Form No 24 in Appendix D to this schedule

Synopsis

	Note	No		Note	No
I Legislative changes		1	Hindu family		8 a
II Scope and object of the Rule		2	(g) Compromise by the		
III Without the leave of the Court expressly recorded		3	Court of Wards, on		
(a) Where leave is granted under mistake		4	behalf of the ward		9
(b) Effect of compromise without leave of the Court		5	IV Agreement to be bound by oath if a compromise		10
(c) Bond executed by minor and an adult in pursuance of a compromise without the leave of the Court		6	V Abandonment of issue—If a compromise		11
(d) Compromise by natural guardian, father or managing member of a joint Hindu family		7	VI Withdrawal of suit		12
(e) Compromise by adult members of a Taiwid		8	VII Compromise in execution proceedings		13
(f) Compromise by adult members of a joint			VIII Transfer, without leave, of decree in favour of minor		14
			IX Agreement to refer to arbitration		15
			X Compromise when can be set aside		16
			(a) Gross negligence of next friend or guardian		17
			(b) Fraud		18
			(c) Minor attuning majority pending suit		19
			XI Procedure to set aside a compromise decree		20

Other Topics

Compromise against wishes of next friend or guardian See Note 2 Pts (6) (7) and (8) Note 5 Pt (13)
Compromise due to misapprehension of material facts See Note 4 Pt (1)
Essentials for validity of compromise decree

against a minor See Note 16
Materials for Court's consideration in granting leave See Note 2 Pt (2), Note 8 Pts (4) to (10)
Sub R (2) See Note 5 See also Note 2, Pt (9)

1. Legislative changes

The word expressly recorded in the proceedings are new. See Note 3 *infra*

2 Scope and object of the Rule

This Rule as well as the other Rules of this Order are enacted for the protection of minors who are unable to look after their own interests and to whom the Court stands in a *quasi* tutelary position. The guardians and next friends are not invariably honest and even if honest are sometimes careless and occasionally lacking in intelligence. Therefore the duty of safeguarding the interest of the minors so far as is practicable, is thrown upon the Court.¹

The rule forbids the next friend or guardian to enter into agreement or compromise on behalf of the minor without the express leave of the Court and by implication requires the Court to consider in the exercise of its judicial discretion the propriety of the same in the interests of the minor.² But the rule applies only where the minor is a *party* to a pending suit and not to a case where his interests may be affected by reason of a compromise in a suit to which he is not a party.³ Nor can a person other than the next friend or guardian compromise the suit on behalf of the minor.⁴

No application for leave is necessary to negotiate the particular terms of a compromise,⁵ but such an application is necessary to enter into a compromise. Where such an application is made, the Court will, having regard to the interests of the minor pass a decree in terms thereof under O 23, R 3,^{6a} unless the guardian withdraws his consent or refuses to assent to the compromise before the Court passes the decree.⁷ The reason is that the Court cannot force a compromise upon the minor against the wishes of his guardian.⁸ But if it appears to the Court that the guardian is acting improperly in refusing to assent to a compromise which is *prima facie* beneficial to the minor, the Court can, in the interests of the minor, remove the guardian and appoint another.⁹

Sub R 2 contemplates the case of a minor on one side ranged against adults on the other. It has no reference to the effect of any compromise between adults alone although the minor may be a party to the suit. A compromise between adults is governed by the general law and not by this rule.⁹

Order 32, Rule 7—Note 2

- 1 (1912) 15 Ind Cas 161 (118) 1912 P R No 97
[See also (1931) 133 Ind 590 (911)
Infant litigants become Wards of
Court—Therefore Court has to see
that next friends act *bona fide* in the
interests of the minor and not in
their own interests]
- 2 (1931) 1931 Ind 455 (187)
(1891) 17 All 731 (119)
(1881) 9 Ind 103 (101)
(1901) 1901 All 425 (140)
[See (1931) 1931 Ind 260 (267)]

tion of any agreement between
minor and any party to the suit]

- 5 (1924) 1924 Nag 180 (182)
5a (1934) 1934 Ind 163 (170 171) Petition
for leave to compromise—Court
should consider whether it is in in-
terest of minor—If leave is granted
compromise should be upheld and
decree passed in accordance therewith—Court can make alteration in
compromise
- 6 (1899) 22 All 74 (30)
(1906) 1906 Jour 15 (1) 11 Ind Cas 11
(1912) Next friend through party to
compromise yet change of mind—
Defendant applying for set aside—
Minor's valid not final certificate
(under Sub P 1 a)—Next friend of
plaintiff is not bound—Court's
leave not to be questioned
- 7 (1925) 1925 All 50 (571) 47 All 7-2
(1933) 1933 Cal 65 (655)
8 (1911) 1911 Cal 65 (655)
(1914) 1914 Cal 247 (248)
9 (1925) 1925 Cal 506 (509)

3 (1927) 1927 Cal 870 (871) 55 Cal 10

(1905) 1 Cal Jour 58 (97)

4 (1920) 1920 Cal 37 (31) 41 Bom 574

The rule applies to compromises by all guardians including a certificated guardian¹⁰ and a natural guardian. As regards the applicability of the provisions of this rule to other proceedings, see the following cases 11

3 Without the leave of the Court expressly recorded

The requirement as to leave of the Court is based on the principle that a suit relating to the estate of an infant and for his benefit has the effect of making him a ward of the Court and no act can be done affecting the property of the minor unless under the express direction of the Court.¹ The leave of the Court should be *express* in all cases and *cannot be implied* from the mere fact that a decree has been passed by the Court adopting the terms of the compromise.² As pointed out by Lord Macnaghten in *Manohar Lal v Jadunath Singh* (1906) 1 L R 28 All 585 (P C)

There ought to be evidence that the attention of the Court was directly called to the fact that the minor was a party to the compromise and it ought to be shown by an order on petition or in some way not open to doubt that the leave of the Court was obtained."

The fact that the minor is described as such in the title of the suit and that the terms of the compromise are before the Court is not enough.⁴

The Court should before granting leave exercise a *judicial discretion* as to the propriety of the compromise in the interests of the minor.⁵ In other words, the Court must have materials before it to satisfy its mind that the proposed compromise is for the *benefit* of the minor.⁶ No compromise involving an apparent surrender of the infant's rights ought to be sanctioned by Courts.⁷ No hard and fast rule can be laid down as to what particular materials a Judge may call for before being satisfied that the compromise is in the interests and for the benefit of the minor. It is a matter for the exercise of judicial

- 10 (1903) 7 Cal W N 90 (23)
 11 (1914) 1911 All 500 (557) Does not apply to Land Revenue Act
 (1916) 1918 Oudh 217 (270) 21 Oudh Cas 220 (Do)
 (1932) 1932 Oudh 44 (45) (Do)
 (1930) 1930 Lih 250 (251) Compromise sanctioned under this Rule—Permission under S 29 of Guardians and Wards Act (V III of 1890) not necessary.
 (1922) 68 Ind Cas 997 (927) (Cil) (Do)

Note 3

- 1 (1921) 1921 Pat 14 (17) 6 Pat L Jour 190
 (1904) 27 Mad 377 (380)
 (1902) 29 Cal 735 (737)
 2 (1889) 13 Bom 137 (140)
 (1978) 1923 Pat 40 (41)
 (1930) 1930 Notes 9b 120 Ind Cas 587 (588) (All)
 (1991) 1831 All W N 46 (47)
 (1864) 1864 Suth W R Sup Vol 39 (40)
 [See however (1926) 1926 Sind 128 (128) 20 Sind L R 116]
 (1912) 14 Ind Cas 6 (6 7) (Oudh)
 3 (1925) 1925 All 570 (571) 47 All 782
 (1928) 1928 All 521 (522)

- Even under S 462 (1882 Code) leave of Court is necessary though not expressly recorded—Court has to see whether compromise is for minor's benefit—If leave is not given, compromise is voidable at minor's instance]
 5 (1908) 8 Cal L Jour 274 (277)
 (1933) 1933 Lih 468 (469)
 (1903) 7 Cal W N 90 (93)
 (1909) 4 Ind Cas 467 (469) (Cil)
 (1896) 1896 All W N 127 (128)
 [See also (1932) 1932 Mad 303 Court not considering benefit to minor—Order bid]
 (1932) 1932 Lih 571 (572) (Do)
 [See also (1933) 1933 All 140 (140) The directions in this Rule are not intended to be merely formal—Court should apply its mind to see that compromise is for the benefit of the minor]
 6 (1927) 1927 Cal 796 (799, 800)
 (1899) 1899 Pun Re No 17, page 107
 (1899) 1899 Pun Re No 105 page 368
 (1898) 21 Mad 91 (93)
 (1925) 1925 All 521 (522)

discretion in each case. It has been held that an affidavit by the guardian setting forth the terms of the compromise and how he considers them beneficial to the minor should be filed. In heavy cases there should also be an opinion of the counsel or a statement by the counsel at the bar that the compromise is a fit and proper one to be sanctioned in the interest of the minor.⁹ In the undermentioned case¹⁰ their Lordships of the Judicial Committee called for a certificate from the High Court as regards the propriety of a compromise on behalf of a minor before sanctioning the same observing that there should be a clear expression of opinion by the proper Court in India that such a compromise is beneficial one to the minor. There is a conflict of judicial opinion as to the form and nature of the order granting leave to compromise under this rule. In *Kalavati v. Chedi Lahu* the High Court of Allahabad held that

The Court should record the fact that such application was made to it that the terms of the proposed agreement or compromise were considered by the Court and that having regard to the interests of the minor the Court granted leave to the making of the agreement or compromise.

The High Court of Madras in the undermentioned case¹² also expressed a similar view and held that the order *should in terms* state that the question of benefit to the minor was considered by the Court. But in a later case¹³ the same High Court however, dissented from that view and held that the order need not on the face of it state in so many words that the Court had considered and come to the conclusion that the settlement was for the minor's benefit and that a mere order on the petition saying granted implied that the Court had applied its mind to the matter. In *Virupax v. Shuddappa*¹⁴ Sir Lawrence Jenkins C. J. expressed the view that the form of expression used for indicating that the Court granted the leave is of *slight importance* provided the Court really after a consideration of the circumstances intended to grant the required leave but Chandavarkar J. disagreed with this view and held that a mere order of the Court saying granted was not a sufficient compliance with the rule. The High Court of Calcutta has expressed conflicting opinions on this point some decisions¹⁵ following the earlier Madras case, while the case cited below¹⁶ proceeds upon a reasoning similar to that of the later Madras case. The High Courts of Lahore¹⁷ and Patna¹⁸ also hold the same view as that of the later Madras case.

4 Where leave is granted under a mistake

A compromise is only a contract and if entered into under a misapprehension as to material facts or brought about by the mistake of the parties and of the Court with regard to the subject-matter of the suit² is not valid and binding upon the minor even though sanctioned by the Court. See also S. 20 of the Contract Act.

11 (1900) 17 All 531 (532)
[See also (1900) 190 Cal 178 (183)]
12 (1906) 29 Mad 104 (106)
13 (1919) 1119 Mad 300 (307)
14 (1907) 26 Bom 109 (114)

15 (1927) 1927 Cal 96 (99)
(1903) 8 Cal L Jour 266 (270) Minor represented by his mother and guardian
(1912) 16 Ind Cis 397 (393) (Cal)
16 (1908) 8 Cal L Jour 31 (33)
17 (1927) 1927 Lah 330 (332)
(1917) 1917 Lah 113 (114) 1917 P R No 36
18 (1927) 1927 I at 370 (377) 2 Pat 538

Note 4

1 (1920) 1920 Lah 279 (280)
(1920) 1920 Lah 408 (409) 1 Lah 344
2 (1891) 6 Cal 687 (695)

5 Effect of compromise without leave of the

It was held by their Lordships of the

Chetty v Raja Rajeswara Dorai that the

obtain the leave of the Court in

the interests of the minors and in

behalf of the minor cannot be

a nullity so far as regard

Rule itself is

In other words it

is The

proceedings

to

and

become

and

absolute

in substance

minor in

on the contrary

While

of want of

regard to the

conflict of interest

No

1 (1915) 1915 1 C

[See also (1911)

97) 16 O 11

40 Ind App 1

2 (1910) 5 Ind C 1 C 1

good against all

(1915) 1915 1 C 37 (

[See also (1911)

(4) and (5)]

3 (1911) 1911 All 675 (13) 1

(1899) 7 Oudh Cas 67 (7)

(1911) 1911 Cal 211 (17) 1 C

(1910) 5 Ind C 1 C 691 (50) (1)

minor in a separate suit

1

could against minor

[See also (1910) 21 Ind C 1 C 77

16 Oudh Cas 247 35 All 487 401 1

App 182 (P C) Though in the

their Lordships say that the compromise

made without sanction is void

against them this must be understood

with reference to the context

as meaning only that the minor is

not bound by it but can avoid it]

(

Madras and Patna and the Judicial Commissioners Court of Oudh no prejudice need be shown. The High Courts of Allahabad and Lahore have on the other hand held that it is necessary for the minor to establish that he has been prejudiced by the decree before setting it aside. It is submitted that this latter view is not correct. Where the next friend or guardian has himself not consented to the compromise on behalf of the minor the compromise is of course void *in toto*.

6 Bond executed by minor and an adult in pursuance of a compromise without the leave of Court

Where a compromise is entered into without the leave of the Court and in pursuance thereof a minor defendant and an adult party jointly execute a bond the bond cannot be enforced as against the minor. But the adult co-obligee cannot be exonerated from liability owing to the failure to obtain leave to compromise on behalf of the minor.

7 Compromise by natural guardian father or managing member of a joint Hindu family.

A father or managing member in a joint Hindu family may in certain circumstances and subject to certain conditions enter into agreements which may be binding on the minor members of the family. But, as pointed out by their Lordships of the Judicial Committee in *Ganesha Row v Tulja Ram Row* [(1913) 1 L R 36 Mad 295 (P C)] when in a suit in which the minor is a party, the father or managing member is appointed the next friend or guardian of the minor his powers are controlled by the provisions of the law and he cannot do any act in his capacity as father or managing member which he is debarred from doing as next friend or guardian *without the leave of the Court*. To hold otherwise their Lordships observed, would be to defeat the object of the enactment. The same principle will apply to the case of a natural guardian of the minor dealing with minor's interests.

8 Compromise by adult members of a Tarwad

A compromise of a doubtful claim, entered into by the adult members of a Tarwad *bona fide* and in the interests of the Tarwad is binding on the

8 (1911) 12 Ind Cas 499 (400) 34 Mad 214

Note 7

1 [See (1914) 1914 Mad 70 (77)]

(1895) 9 Bom 365 (367)

[See also (1913) 20 Ind Cas 44 (45 46) 35 All 429 Compromise decree against Hindu father—No collusion—Finding on sons though not parties to the suit]

(1904) 27 All 203 (250)

(1905) 15 Mad L Jour 494 (495) *Bona fide* compromise of doubtful claim by grandmother binding in absence of collusion

2 (1913) 19 Ind Cas 515 (517) 36 Mad 225 40 Ind App 132 (P C) Overruling the decision in 19 Mad L Jour 4 1 Ind Cas 380

[See also (1920) 1920 Oudh 164 (167) 36 Ind Cas 313 (316) 23 Oudh Cas 896]

(1925) 1925 All 32 (33)

(1931) 1931 Mad 218 (221)

3 (1920) 1920 Bom 37 (39) 44 Bom 574

(1911) 11 Ind Cas 523 (525) 1912 P R No 2
[See also (1905) 1905 Pun Re No 3
Cr page 19 Can be set aside at the
instance of the minor if the equities

on
to

Note 6

1 (1910) 1916 1 C 2 (3) 89 Mad 409 43 Ind
App 99 (P C)

minor members thereof : But if the karnavan or adult member happens to be the guardian *ad litem* or next friend of the minor in a suit then on the principles mentioned in Note 7 above, leave of the Court is necessary before he can enter into a compromise binding on the minor

8 a Compromise by adult members of a joint Hindu family

In *Rameshwar Prasad v. Ram Bahadur Singh* (1907, 1 L R 34 Cal 70, P C) their Lordships of the Judicial Committee held that where a compromise was entered into by the adult co-parceners in a joint Hindu family in a pending litigation in which the minor co-parcener had no interest separate from that of the adult members of the family and the Court pronounced the compromise beneficial to the minor, the compromise was binding on the minor

9 Compromise by the Court of Wards on behalf of the ward

It has been held that in cases coming under the Bengal Court of Wards Act (IX of 1879) no leave of the Court is necessary for entering into a compromise on behalf of the minor : The reason is that S 51 of that Act makes it obligatory on the Civil Court to recognise the Court of Wards as the next friend or the guardian as the case may be in a suit by or against the minor Further S 18 of that Act itself gives power to the Court of Wards to enter into a compromise on behalf of the ward Rule 16 of this Order also contains a saving clause in respect of local laws :

10 Agreement to be bound by oath if a compromise

An offer by the next friend or the guardian as the case may be of a minor to be bound by the evidence given on oath by the opposite party or his witness under S 9 of the Indian Oaths Act (X of 1873), does not amount to an agreement or compromise within the meaning of this rule and no leave of the Court is necessary in such a case : The evidence so given is binding upon the minor under S 11 of that Act unless there is fraud or gross negligence on the part of the guardian in the conduct of the suit which results in prejudice to the minor :

But an offer by the guardian *ad litem* to suffer a decree on the oath of the plaintiff would amount to a compromise and, if not sanctioned by the Court, is not binding on the minor :

11 Abandonment of issue—If a compromise

The abandonment or giving up an issue on the part of the next friend or guardian *ad litem* in the course of the conduct of the suit does not amount to a compromise within the meaning of this rule and therefore no leave of the

Note 8		to a decree by a manager of Court of Wards without authority from the Court of Wards—Invalid]	
1 (1895) 18 Mad 88 (10)			
Note 9		Note 10	
1 (1921) 1921 P C 22 (23)	48 Cal 469 48	1 (1927) 1927 All 584 (584)	49 All 842
Ind App 27 (P C)	-	(1900) 27 Cal 299 (231)	
		(1930) 1930 Cal 463 (464)	
		(1891) 1891 Pun Ro No 18	page 110
		(1889) 12 Mad 482 (481)	
		[But see (1904) 17 C P L R 147	
		(155)]	
promise by disqualified proprietor without such sanction is not valid]			
2 (1918) 1918 Cal 879 (510)	11 Cal 899		
[See however (1890) 23 Cal 934			
(911) 23 Ind App 75 (P C) Consent			

Court is necessary. Such abandonment will bind the minor unless the guardian is proved to be guilty of fraud or gross negligence.¹

12 Withdrawal of suit

A withdrawal of a suit by the next friend of a minor plaintiff *in pursuance of an agreement or compromise* entered into with the defendant can only be made with the leave of the Court. Otherwise it will be voidable at the instance of the minor.¹ Applications to allow a suit or appeal to be withdrawn where there are parties who are not *in jure* are not granted without grave consideration. In the undermentioned case the Judicial Committee granted leave to withdraw an appeal only after being assured by the counsel at the bar that the terms on which it was proposed to be withdrawn were beneficial to the minor. But a mere withdrawal of a suit *not in pursuance of any agreement or compromise* does not come within the purview of this rule although such a withdrawal is open to attack by the minor on the ground of fraud or collusion or gross negligence on the part of the next friend.²

13 Compromise in execution proceedings—See Note 2 to Order 32, General

14 Transfer without leave of decree in favour of minor

The provisions of this rule apply also to a compromise entered into even after a decree has been passed and an adjustment of a decree to which a minor is a party is not binding on the minor unless leave of the Court has been obtained therefor.¹ On the same principle a transfer of a decree obtained in favour of a minor is not binding on the minor unless leave of the Court has been obtained for such transfer.²

15 Agreement to refer to arbitration

This rule does not apply to references made without the intervention of the Court inasmuch as there is no *suit* pending in such cases.¹ A decree passed on an award passed on such a reference and filed into Court under paragraph 20 of the Second Schedule is not bad for want of sanction, though it may not be binding on the minor for other reasons.² But an application made under paragraph 20 of the Second Schedule is a *suit* and if, during the pendency thereof the guardian *agrees* not to object to the filing of the award, the agreement must, like any other agreement be sanctioned by the Court.³

There is a conflict of opinion as to whether this Rule applies to agreements to refer to arbitration made *pending* suit. The general consensus of opinion

Note 11

- 1 (1899) 22 M.L. 583 (516) (J)
(1914) 1914 All 251 (20) Confession of judgment when no valid defence exists as to waiver by guardian
[See (1893) 17 I.O.M. 299 (1902)]
(1891) 18 Cal. 99 (106) 17 Ind. App. 30 (11 C)

Note 12

- 1 (1904) 27 Mad. 3 (38)
(1893) 17 B.M. 167 (146)
(1937) 1937 T.R. 22 (21) Such withdrawal however binds a minor co-plaintiff
2 (1900) 1120 P.C. 60 (61) 17 Ind. App. 35 (11 C)

- 3 (1902) 29 Cal. 35 (737)
(1919) 1919 Lah. 395 (396) 1919 P.R. 50 (20)

Note 14

- 1 (1917) 191 Mad. 409 (411)
[See also (1888) 17 Dom. 6 (659) 690]
2 (1911) 1911 Mad. 55 (5) D's entering from 1791 Mad. 113

Note 15

- 1 (1902) 2 I.O.M. 293 (301)
(1907) 76 Dom. 295 (301)
(1918) 1918 Lom. 123 (12) 43 Dom. 33
(1930) 1930 Mad. 38 (40)
(1903) 27 Dom. 28 (290)
3 (1890) 18 J. Lom. P.J. 609 (610)

7, in all the Courts except the High Courts of Allahabad and Calcutta is that this rule applies to such cases and that the leave of the Court is necessary.⁴ According to the High Court of Allahabad the provisions as to arbitration proceedings are self contained and this rule does not apply to such proceedings.⁵ The High Court of Calcutta has taken conflicting views on the matter.⁶ It is submitted that the Allahabad view cannot be accepted as correct.

16 Compromise when can be set aside

A compromise in order to be valid and binding upon the minor must fulfil the following conditions —

- (1) The leave of the Court must have been *expressly* obtained (See Note 3)
- (2) It should have been granted by the Court after the exercise of a judicial discretion as regards the propriety of the compromise in the interests of the minor. See also Note 3)
- (3) It should not be vitiated by fraud or mistake (See Note 4)
- (4) There must be proper representation of the minor by the next friend or guardian *ad litem*. He should not have been guilty of fraud or gross negligence in the matter of compromise (See Notes 17 and 18 below)
- (5) The minor should have *continued to be a minor* till the passing of the compromise decree (See Note 19 below)

17 Gross negligence of next friend or guardian

As has been seen in Notes 12 and 13 to R 3 *ante* gross negligence on the part of the next friend or guardian *ad litem* if established will entitle the minor to avoid any decree passed against him. There must be the strictest good faith on the part of the guardian and his acts must be based on considerations of *actual* necessity and advantage to the minor and not on calculations of any possible benefit. It is his duty to place the Court in

" m 701

Bom 707

(1912) 11 Ind Cas 6 (6) (Oudh) But sanction need not be express [See also (1930) 1930 Oudh 439 (431) Reference after decree—Leave not necessary as the suit not pending on date of reference.]
(1923) 1923 Lah 103 (101) Suit against a firm consisting also of minor members made parties—No leave necessary

1000

Cases p 5

(1931) 1931 Cal 911 (21) 58 Cal 673 It appears—Assumed

Note 17

reference

17
Guar
without
crims—

possession of all essential and material facts and any concealment thereof would amount to constructive fraud.³ But if he acts *bona fide* and compromises a *doubtful claim* with the leave of the Court the compromise would be binding on the minor.⁴ See also Note 5 to R 9 below

18 Fraud

A compromise duly entered into by the guardian and sanctioned by the Court in the exercise of its discretion will not be disturbed except upon very strong grounds.¹ The grounds must be such as to amount to fraud in the party claiming the benefit of the compromise meaning by fraud not moral fraud but what in the eye of this Court is considered as amounting to fraud.

It there be no fraud and equal knowledge on both sides the compromise cannot be disturbed but if there is knowledge on one side which is withheld the compromise cannot stand, because the withholding of knowledge amounts in the view of a Court of equity to fraud.² The question is not whether the Court was satisfied with the information before it and could have called for further information but whether the parties having had this further information in their possession were justified in withholding it.² Fraud however must be strictly proved. A man cannot complain of fraud simply because he regrets a bargain entered into with open eyes. Nor can a minor attack a compromise sanctioned by the Court on his behalf on the ground of fraud on the Court unless he can prove not merely that the compromise was not profitable to him or that his opponent put forward a false plea but also that the Court was deceived either by that plea or about the facts of the case or was deceived into believing that the compromise had been accepted by the minor's guardian or next friend with free consent and knowledge of the facts when it had not been so accepted.³

If the next friend or guardian is proved to be guilty of fraud or collusion then the compromise entered into by him and the decree passed thereon will not bind the minor.⁴

19 Minor attaining majority pending suit

If the defendant who is a minor attains majority during the pendency

Court will ordinarily relieve minor from its effect and give him opportunity to defend the suit.—But this

3 (1909) 31 Cal 111 (131)
(1925) 1925 Mad 1285 (1286) Subsequent change of law cannot vitiate compromise by guardian

Note 18

nature of compromise is on person

1

Mortgage by father—Suit against him personally and as guardian of his minor daughter—Decree against him alone—Appeal by him to make her share also liable—Compromise with plaintiff accordingly.—Court exercising no control over compromise.—Compromise not binding on minor.]

[See also (1901) 14 Mad L Jour 442 (442)]

[See also (1890) 17 Cal 675 (689) 17 Ind App 65 (P Ct)]
1, 55 Eng Rep Rolls Court 445 *Brooks v Lord Mostyn* cited in 11 Ind Cas 105 (108) (Oudh)
2 (1891) 6 Cal 687 (703)
3 (1929) 1929 Mad 96 (101) *Per Reilly J.*
4 (1904) 1 All LJ 130 (132)
(1889) 13 Bom 197 (143 146)
(1893) 1893 Pun Re No 24

7. of suit, a compromise entered into by the guardian subsequently is not binding on the minor even though sanctioned by Court¹ But the High Court of Lahore² has taken a contrary view, which it is submitted is not correct

20 Procedure to set aside a compromise decree

A minor can file a separate suit to set aside the compromise decree or file an application for review in the same suit¹ He cannot take any objection as to the validity of the decree in appeal as no appeal lies from a consent decree under the present Code (*vide* S 96, sub-S 3)² Nor can the validity of the decree be attacked in execution proceedings³ *See also* Note 5 above

If a compromise decree is set aside at the instance of the minor the effect of it would be to remit the minor to his original position in the suit⁴

R. 8. [S. 447] (1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor

[1877—S 447 Cf R 3, Sub-R (3) and R 4, Sub-Rr (1) and (4) and Rr 9 and 10 of this Order]

Synopsis

Retirement of next friend

Note No 1

Note 19

- 1 (1928) 1928 Mad 294 (226) 51 Mad 763
[See also (1864) 1864 Gap Suth W R 53 (84) Compromise by mother as guardian of her daughter of suit after latter a majority, not competent
2 (1922) 1922 Lah 407 (407)

Note 20.

- 1 (1839) 23 Bom 620 (623)
(1831) 10 Bom 594 (597, 598)
(1903) 30 Cal 613 (615)
(1907) 34 Cal 83 (83 90) When a suit lies and when review lies discussed
(1903) 3 Cal L Jour 119 (180) (Do)
(1908) 8 Cal L Jour 266 (271)
(1894) 10 Cal 357 (367)
(1926) 1926 Mad 119 (120) Can be reviewed also under S 171
(1921) 1921 Lah 427 (428) Limitation for suit is three years from attaining majority
(1917) 1917 Mad 672 (680) 39 Mad 853 Minor can avoid compromise decree in toto and not in part

[See (1932) 1932 Bom 401 (401) Minor's guardian ad litem settling the suit out of Court without leave of Court—that may be a ground for suit But the attorney cannot go behind the instructions from the guardian and continue to represent the minor]

- 2 (1905) 30 Cal 613 (615) (Case under 1883 Code) Held no appeal lies
(1901) 5 Cal W N 847 (878) (Do)
(1895) 17 All 531 (533) Do but objection entertained in appeal
3 (1889) 12 Mad 503 (504 505)
(1924) 1924 Mad 645 (646)
(1923) 1923 Pat 375 (378) 2 Pat 598
(1893) 1 Oudh Cas 49 (50)
[See also (1918) 1918 Cal 602 (604)]
4 (1913) 21 Ind Cas 288 (291) 16 Oudh Cas 247 35 All 487 10 Ind App 192 (P C)
(1935) 1935 Bom 51 (60)
(1876 7) 2 Cal 184 (196) 3 Ind App 291 (P C)

Other Topics

Subsequent appointment of guardian under
Guardians and Wards Act—Suit to set

aside decree on that ground—If lies
See Note 1 of N (1)

1 Retirement of next friend

The provisions of Sub-Rule (1) are mandatory. The mere fact that a guardian of the person and property of the minor plaintiff is appointed under the Guardians and Wards Act (VIII of 1890) during the pendency of the suit superseding the next friend will not amount to a valid retirement in the absence of any application on the part of the next friend.

R. 9. [S 446] (1) *Where* the interest of the next friend

Removal of next
friend

of a minor is adverse to that of the minor or
where he is so connected with a defendant whose
interest is adverse to that of the minor as to

make it unlikely that the minor's interest will be properly protected by him or *where* he does not do his duty, or, *during the* pendency of the suit ceases to reside within British India, or for any other sufficient cause application may be made on behalf of the minor or by a defendant for his removal, and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, *and make such other order as to costs as it thinks fit*

(2) *Where* the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it that the guardian ought not to be appointed the next friend of the minor, *and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit*

[1877—S 446 (cf R 4, Sub-R 1 (1) and (2) above and see R 10 below)]

Synopsis

	Note N		Note No
Legislative changes	1	Appeal after the expiry of limitation period	4
Where the next friend does not do his duty	2	Non appearance of next friend	5
Adverse interest of next friend	3	Death of next friend See R 10 <i>infra</i>	6

1 Legislative Changes

- The words "and make such order as to costs as it thinks fit" in Sub Rule (1) have been newly added.
- In Sub Rule (2) the word "and shall thereupon appoint the applicant etc.", are also new.

Order 32 Rule 8—Note 1

- (1903) 20 All 105 (103 103) Suit to set aside decree owing to next friend

having been superseded under Guardians and Wards Act—Not sustainable

R 9. 2 Where the next friend does not do his duty

The next friend is liable to be removed under this rule if he fails to do his duty,¹ or if he ceases to reside in British India and leaves the country. Where the Court finds that the next friend does not do his duty in relation to the suit, it should not permit him to prejudice the interest of the minor but should adjourn the suit in order that some one interested in the minor may apply on behalf of the minor for the removal of the next friend and appointment of a new next friend or in order that the minor plaintiff himself may, on coming of age, elect to proceed with the suit or withdraw from it. Similarly, as seen in Note 2 to R 7 if the next friend refuses improperly to assent to a compromise which is clearly beneficial to the minor steps may be taken to remove him.⁴

3 Adverse interest of next friend

If the next friend has an interest adverse to that of the minor plaintiff or his personal interests will come into conflict with his duty towards the minor, he can be removed under this rule.¹

4 Appeal after the expiry of limitation period

Where a decree is passed against the minor and the interest of the minor requires that it should be appealed against but the guardian *ad litem* refrains from doing so with a view to safeguard his own interest and for his private benefit, it has been held that the minor can on attaining majority be permitted to appeal and that the delay can be excused under S 5 of the Limitation Act.¹

5 Non appearance of next friend

Where the Court finds that the next friend is guilty of neglect and commits default in appearance the proper course is to stay further proceedings and not to dismiss the suit for default.¹

6 Death of next friend—See R 10 *infra*

R 10

R. 10. [Ss 448, 449]. (1) On the *actment*, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a new next friend in his place.

Stay of proceedings on removal etc of next friend

(2) Where the pleader of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, an

Order 32 Rule 9—Note 2

- 1 (1918) 128 Nag 166 (167)
- (1872) 18 Suth W R 163 (170)
- ^a (1907) 17 Mad L Jour 173 (179)
- (1903) 1923 Loh 271 (272) 3 Loh 417
- Guardian leaving jurisdiction of the Court—Minor can appeal through another next friend—No formal order of removal necessary
- [See also (1874) 21 Suth W R 312 (314)]
- ³ (1901) 27 Mad 377 (378)
- (18 1) 16 Suth W R 143 (146)
- (1929) 1 Sim 390 Ref in 5 Cal W N 434 (437)
- (1897) 1897 Pun Re No 125 page 366

(1875) 23 Suth W R 278 (280)

- 4 [See cases cited in Note 2 foot note 8 R 7 ante]

Note 3

- 1 (1920) 1920 Cal 178 (183)
- (1929) 1929 Mad 393 (391)
- (1925) 1925 Mad 741 (735) Held father acting as next friend possesses an adverse interest and can compromise

Note 4

- 1 (1896) 20 Bom 104 (109)

Note 5

- 1 (1921) 1921 Pat 103 (103) 6 Pat L Jour 31

person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit

[1877—Ss 448 See R1 8 and 9 above]

Synopsis

Removal or death of next friend Note No 1

1 Removal or death of next friend

The suit does not abate by reason of the death of the next friend. The Court should either appoint a new next friend or keep the suit pending till the minor attains majority.¹ An order dismissing the suit is a nullity.² The same rule will apply where the minors are appellants and their guardian dies pending appeal. Where however the decision is given in favour of the minor it is not on the principle mentioned in Note 1 to O 32 void by reason merely of the omission to appoint a fresh guardian for him.³

R. 11. [Ss 458 459] (1) *Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him and may make such order as to costs as it thinks fit*

(2) *Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place*

[1877—Ss 458 and 459]

Synopsis

Retirement of guardian	Note No 1			Note No
Removal of guardian	2		removal retirement or death of guardian	3
Appointment of new guardian on re		Costs		4

Other Topics

Guardian unable to find funds—Leave to retire See Note 1 F N (1)

Notice to minor—For appointment of new Guardian See Note 3 Pt (1)

1 Retirement of guardian

When once a guardian has been duly appointed he cannot retire except with the leave of the Court.¹ The Court is not bound to grant permission to retire whenever the guardian wishes to do so. It has a *discretion* to refuse the permission in a proper case.²

Order 32 Rule 10—Note 1

- 1^a (1915) 1915 All 461 (461)
 (1913) 1913 Cal 503 (509)
 1 (1915) 1915 Mad 461 (462)
 2 (1917) 1917 Mad 909 (911)
 3 (1906) 98 All 378 (330)

Order 32 Rule 11—Note 1

- 1 (1915) 1915 All 214 (215)

(1926) 1926 All 437 (438)

(1891) 14 All 35 ()

(1911) 9 Ind Cas 435 (435) (Mad) Guardian unable to find funds—Permitted to retire

(1889) 12 Bom 553 (553) (Do)

- 2 (1926) 1926 All 437 (438) Distinguishing 1912 All 416

(1919) 1919 Mad 980 (980)

1. A mere statement on the part of the guardian that he declines to act has not the effect of removal unless sanctioned by the Court³

2 Removal of guardian

It is the duty of the Court to protect the interests of a minor. A guardian is appointed for that purpose and for that purpose alone. If the Court finds that the guardian is not acting properly it would be its duty to remove him in the interests of the minor¹

The only way of getting rid of a guardian *ad litem*, who has once been properly appointed, is under the provisions of this rule². Where in a suit against a minor the certificated guardian of the minor is appointed guardian for the suit, the mere fact that he subsequently ceases to be the certificated guardian does not of itself impose such a disqualification as to make him *junctus officio*³. He will continue to be the guardian until he retires or is removed by the Court under this rule.

3 Appointment of new guardian on removal, retirement or death of guardian

It is the duty of the Court to appoint a new guardian where the guardian *ad litem* dies or retires or is removed by the Court. Where the guardian of a minor respondent dies pending appeal a decree obtained *against* him without appointing a fresh guardian for him would on general principles be a nullity,² though a decree obtained in *favour* of the minor would not³. See Note 1 to O 32.

It has been held by the High Court of Patna that no notice to minors is necessary before an order of fresh appointment is made⁴.

The power of the Court under this sub-rule may be exercised at any time during the pendency of the suit and the same is not taken away by the fact that an order to try the suit *ex parte* has been previously passed⁵. The powers of the Court under this rule are exercisable by the Registrar under S. 105 of the Rangoon Small Cause Courts Act (VII of 1920).

4 Costs

Section 35 *ante* empowers the Court to make an order as to costs against any *party* to the suit, while this rule empowers the Court to pass an order for costs against the guardian *ad litem* who is *not a party* to the suit¹. This rule cannot be construed so as to restrict the operation of S 35 and, therefore, when the guardian *ad litem* is *himself a party* to the suit the Court has

3 (1927) 1927 Mld 503 (541) 50 Mld 35²
(1005) 1 Nag L R 128 (129)

Note 2

4 (1927) 1927 Mld 503 (541) 50 Mld 35²

(775)]

1 (790)

Before order of appointment is made it is better to record a formal order of removal of the old guardian.]

2 (1935) 1935 Cal 160 (165) 61 Cal 1077

3 (1935) 1935 Cal 160 (164) 61 Cal 1023

Note 3

1 (1917) 1917 Mld 1979 (940)

(1926) 1926 Nag 40 (41)

(1927) 1927 Nag 114 (139) 23 Nag J R 146

2 (1928) 1928 Pat 169 (168)

[But see (1930) 1930 Pat 473 (470)
Submitted wrongly decided]

3 (1912) 14 Ind Cis 506 (507) 31 All 321

4 (1923) 1923 Pat 385 (386) 2 Pat 273

(1934) 1934 Pat 111 (113)

(1933) 1933 Pat 473 (477)

5 (1920) 1920 Mld 213 (214)

Note 4

1 (1929) 1929 All 18 (20) 50 All 733

power apart from the provisions of this rule to make an order for costs against him.

Where the guardian takes upon himself to file an unnecessary and unsuccessful appeal on behalf of his ward³ or where he is guilty of gross misconduct in the conduct of the case⁴ the Court will order him to pay the costs.

R. 12. [Ss 450 to 453] (1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall on attaining majority elect whether he will proceed with the suit or application.

(2) Where he elects to proceed with the suit or application he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read henceforth thus —

A B, late a minor by C D his next friend but now having attained majority.”

(4) Where he elects to abandon the suit or application he shall if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

(5) Any application under this Rule may be made *ex parte* but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend.

[1877—Ss 450 to 453]

Synopsis

	Note No		Note No
Scope of the Rule	1	Minor defendant becoming a major	3
Title to be corrected	2	during the pendency of suit	

Other Topics

on compliance with Rule—Ratification — Notice to quo him & nor See Note 1
Effect See Note 1 It (2) It (3)

1 Scope of the Rule

The rule is based on the substantive right of a person who has become *sui juris* to himself proceed with a suit instituted on his behalf during his minority. The Court should as a matter of course give him leave to proceed

Order 32 Rule 12—Note 1

- 1 (1834) 22 Cal 2 0 (2 4)
(191) 1917 Mid 318 (370) 29 Mid 1011
(1877) 19 Suth W R 107 (107)

or act in his own name and cannot ignore his application² If on attaining majority the minor elects to abandon a suit instituted by his next friend he must pay the costs of the next friend unless he can establish that the suit was improperly instituted^{2a} See also Rule 14 *infra* Where it is discovered in the course of the suit or appeal that the minor has attained majority the Court cannot dismiss the suit or appeal for default but should issue notice to the *quondam* minor to elect whether he intends to proceed with the suit or appeal³ If he elects to continue the suit his rights should be determined as on the date on which the suit was originally instituted⁴ Where the minor continues to be represented *bona fide* by a pleader even after his attaining majority and subsequently the *quondam* minor *ratifies* such acts they cannot be treated as invalid on the ground of non compliance with this rule⁵

2 Title to be corrected

It has been held by the High Court of Calcutta that the provision of this rule requiring the title of the suit to be corrected applies only where the suit is *pending* and not to proceedings taken after a final decree has been passed in the suit¹

3 Minor defendant becoming a major during the pendency of suit

No provision has been made in the Code in respect of a minor defendant attaining majority during the pendency of the suit The reason for the omission is that while a plaintiff on becoming a major can as a *dominus litis* elect either to go on or put an end to the litigation the defendant has no such choice available to him and the suit must proceed against him notwithstanding he becomes a major The minor defendant who comes of age may if he thinks fit come on the record and conduct the defence himself If however he does not do so he must be deemed to have elected to abide by the representation of the *quondam* guardian and the judgment eventually passed will be binding upon him The decree passed in such a case cannot be said to be a nullity or made without jurisdiction¹

R. 13. [S 454] (1) *Where a minor co plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co plaintiff and the Court, if it finds that he is not a necessary party, shall dismiss him from the*

Where minor co plaintiff attains majority desires to repudiate suit

suit on such terms as to costs or otherwise as it thinks fit

(2) Notice of the application shall be served on the next friend, on any co plaintiff and on the defendant

Note 2

¹ (189) 40 Cal 100 (1-4 5)

Note 3

¹ (1928) 1928 Mad 251 (211 295) 51 Mad 763
(19 9) 1903 Lah 371 (3 8)

ing proceedings and appeal—Bound by the decree]

(3) The costs of all parties of such application and of all or any proceedings theretofore had in the suit shall be paid by such persons as the Court directs

(4) *Where the applicant is a necessary party to the suit the Court may direct him to be made a defendant*

[See R 12 above (7 O 1 R 10)]

R. 14. [S 455] (1) A minor on attaining majority may, if a sole plaintiff apply *that a suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper*

(2) Notice of the application shall be served on all the parties concerned; and the Court upon being satisfied of such unreasonableness or impropriety may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit or make such other order as it thinks fit

[See R 12 Sub-R (4) above]

Synopsis
Scope of the Rule Note No 1

1 Scope of the Rule

This rule deals with the procedure to be followed where a minor plaintiff becomes a major and considers that the suit instituted on his behalf was improper or unreasonable. The Court can in such cases order the next friend to pay the costs of all the parties if it is satisfied as to the impropriety or unreasonableness alleged. But no order as to costs can be made after the death of the next friend.

Local Amendment

MADRAS

Add the following as P 14 A —
14 A —

1 or guardian for the suit
court in its appellate jurisdiction
Council shall be deemed
128 (2) (i) of the Code of

Civil Procedure and may be performed by the Registrar provided that contested applications and applications represented out of time shall be posted before a Judge for disposal

R. 15. [S 463] The provisions contained in *Rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who, though not so adjudged, are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued*
[1877—S 463]

Synopsis
Note No 1

1 Persons of unsound mind

(a) Mental infirmity

Note No 2

Order 32 Rule 14—Note 1

1 (1918) 1918 Oudh 21 (27) 20 Oudh Cas 800

5

	Note No		Note No
(b) Persons adjudged to be of unsound mind	3	guardian for persons of unsound mind	5
(c) Persons of unsound mind not so adjudged	4	III Decree against lunatic not re-presented if can be challenged in execution proceedings	6
II Appointment of next friend or		IV Revision	7

Other Topics

Finding as to infirmity — Nature of See Lunacy Act—Case and Note	
Note 4 It (2)	F N (1)
Legislative changes See Note 9 Pt (1)	Lunatic — Definition of See Note F N (1)

1 Persons of unsound mind

The present rule places persons of unsound mind in the same position as that of minors and makes the provisions of Rr 1 to 14 applicable to them. Hence a suit on behalf of a person of unsound mind has to be filed by a next friend and where the defendant is of unsound mind the Court has to appoint a guardian *ad litem*.

2 Mental infirmity

The corresponding section in the old Code was applicable only to persons of unsound mind. Now the scope of the rule has been widened by the addition of the words or mental infirmity. The result is that even a person of weak mind can sue through a next friend provided the Court is satisfied that he is incapable of protecting his interests. The High Court of Lahore has held that the rule applies also to persons who are absolutely deaf and dumb.

The fact that a person of high position has renounced the world and become a *Sanyasi* neglecting worldly affairs would not of itself justify the Court in holding that by reason of unsoundness of mind and mental infirmity he is incapable of protecting his interests within the meaning of this Rule. But a persistent delusion of being haunted by demons of persecution by imaginary voices and religious magilomania which makes him regard himself as destined to be in some sort a saviour of the world are symptoms which would justify the conclusion that the person is suffering from delusional insanity and incapable of managing his own affairs.³

3 Persons adjudged to be of unsound mind

A person can be adjudged to be of unsound mind under the provisions of the Lunacy Act IV of 1912. For cases under the Lunacy Act and evidence relating to lunacy see the following cases:

Order 32 Rule 15—Note 1	3 (19) 19 I C 193 (161) (I C
1 (1919) 1919 All 407 (417)	Note 3
[See also (1853) 21 Sutl W R 64 (1863) 30 Co ts against next friend of a lunatic — Executable personally against the next friend who can receive from the estate]	1 (1896) 20 Pom 10 (154)
	(1908) 3 Ind Crs 389 (38) 3 Mad 207
	(1896) 20 Pom 659 (664)
	(1893) 21 Mad 40 (403)
	(1838) 20 Cal 595 (591) F I Fr d nce e

Note 2

¹ (192) 19
² (19)

4 Persons of unsound mind not so adjudged

The old section applied only to persons of unsound mind adjudged to be so under Act XXXV of 1858 or under any other law for the time being in force. And even so the decisions under the old Code held that the Court had inherent power to appoint a guardian for persons of unsound mind though not so adjudged. Now the Legislature has given effect to these decisions by providing also for cases of persons not so adjudged. If the defendant alleges that he is of unsound mind and the plaintiff denies it the Court must hold a judicial enquiry and come to a finding as to whether he is *incapable of protecting his own interests*.² It is only when the Court on inquiry finds that the defendant by reason of unsoundness of mind or mental infirmity, is incapable of protecting his interests that it is necessary to appoint a guardian *ad litem*.³ Thus where a defendant alleged to be a lunatic dies before the issue of process, it cannot be said that the suit was not validly instituted against the deceased on account of the fact that no guardian was appointed. A finding in the lunacy proceedings that a person is not of unsound mind and incapable of managing his affairs does not preclude a finding under the present rule that the same person is *by reason of mental infirmity* incapable of protecting his interests in the suit.³

- Guardian under Act XXXV of 1858
- 1 (1881) 4 Cal 115 (117 to 119) Lunatic as defined in S. 23 of Act XXXV of 1858 is of unsound mind and incapable of managing one's own affairs both needed. Latter without former — Hereby is only under S. 6, Cl (d) of Act IX of 1873 the Court of Ward
- (1881) 24 South W R 124 (124) Unsoundness of mind not sufficient
- (1882) 18 South W R 20 (320) Clear grounds for supposing unsoundness of mind needed before issuing notice under Act XXXV of 1858
- 1881 20 South W P 55 (50 56) Enquiry needed
- 1881 22 South W I 23 (3) Sufficiency of evidence as to lunacy — Requires careful consideration
- (1881) 4 All 100 (162 163) High Court of Allahabad has no original jurisdiction

- (1901) 21 Mad 501 (508)
- (1902) 190 U B R Civ 1 ro 30
[But see (1889) 13 Bom 606 (609 610)]
- (1883) 6 Mad 380 (381)
- (1887) 1887 Pun Re No 91, page 193
- (1896) 1896 Pun Re No 13 page 83
[See also (1890) 14 Mad 209 (209 213) Lunatic's property under Court of

adjudged lunatic — Suit by next friend untenable]

- 2 (1922) 1922 Cal 86 (86 87)
(1933) 1933 All 149 (151)
- (1935) 1935 Cal 224 (224) Unsoundness of mind alone is not sufficient — He should be incapable of protecting his interest by reason of such unsoundness — Where the necessity for inquiry arises in appeal the inquiry should be held by the appellate Court
- (1921) 62 Ind Cas 770 (771) (Cal)
- (1899) 23 Bom 633 (636)
- (1906) 1926 All 212 (214) 48 All 306
[See also (1865) 1 South W R 113 7 (7) Defendant not appearing and alleged insane — Court not to strike off the case but to make enquiry as to insanity under Act XXXV of 1858]
- 2a (1934) 1934 Cal 833 (833)
- 2b (1934) 1934 Cal 833 (833)
- 3 (1928) 1928 All 108 (109 110) 50 All 835

Note 4

- 1 (1857) 20 All 2 (2)
- (1832) 16 Bom 132 (134)
- (1895) 19 Bom 170 (187)
- (1900) 37 Cal 1091 (1096 1094)
- (1881) 7 Cal 212 (214)
- (1903) 1903 Pun Re No 31 page 117
- (1901 1900) 1 U B R 169 (172)
- (1909) 2 Ind Cas 818 (819) (Cal)
- (1901) 14 Cal 1 South W R 219 (219)

5. Appointment of next friend or guardian for persons of unsound mind

As already seen, the Court is bound to appoint a next friend or guardian in the case of persons of unsound mind. If he is not represented by a guardian in the suit, the decree will be *null and void*.¹ See also Note 5 to R. 3. Where a manager of the property of the lunatic has been appointed under the Lunacy Act such person ought to be appointed as the next friend or guardian *ad litem* in the suit.² See also R. 4, sub-R. (2).

6 Decree against lunatic not represented, if can be challenged in execution proceedings

As already seen in Note 5 to R. 3, having regard to the decision of their Lordships of the Judicial Committee in *Rashid-un-nissa v. Muhammad Ismail* [(1909) 1 L R. 31 All 572 (P C)] an objection as to want of proper representation is not one falling under S. 47 of the Code and cannot be raised in execution proceedings inasmuch as the person not represented cannot be deemed to be a party to the suit.

7 Revision

In the undermentioned case the High Court of Allahabad interfered under its inherent powers and ordered a stay of proceedings in the suit, pending decision in the lunacy proceedings against the defendant under the Lunacy Act.

R. 16. [S. 464] Nothing in this Order shall apply to a Sovereign Prince or Ruling Chief suing or being sued in the name of his State, or being sued by direction of the Governor-General in Council or a Local Government in the name of an agent or in any other name, or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind.

[1877—S. 464 See Ss. 85 to 87.]

Synopsis

Scope of the Rule Note No. 1

Note 5

- 1 (1917) 1917 Mad 616 (619)
(1916) 1915 Cal 19 (20)
(1931) 1931 Cal 168 (169)
[But see (1914) 1914 L. B. 141 (141)]
- 2 (1879) 23 Bom 403 (405, 406)
(1896) 23 Cal 512 (514)

(P C)

can so act — Award good if income only after award was substantially finished — Alienations by manager good.]

- (1874) 22 South W. R. 200 (201) Lunatic under Court of Wards — Court of Wards can sue as next friend only during his lifetime — After his death, Court of Wards has no right to sue, but legal representatives of the deceased lunatic alone can sue.

Note 6

- 1 (1917) 1917 Cal 814 (817) 41 Cal 627
(1917) 1917 Pat 140 (141)

Note 7

- 1 (1926) 1926 All 212 (212) 42 All 450

5 (67)
— of property of lunatic under manager of Court of Wards — Act XXXI of 1858 — Collector not to act as next friend but only the manager

Other Topics

O 3
N

Bengal Court of Wards Act See Note 1 Ruling Prince—Not domiciled in British India—Minority See Note 1 Pt (1)
Pt (2) and R 7 Note 9 Pt (1)

1 Scope of the Rule

A Ruling Prince not domiciled in British India is not governed by the Indian Majority Act and therefore, is not a minor for the purpose of O 32 even though he may be under 18 years of age He can act through his manager under S 85 of the Code For cases under the Bengal Court of Wards Act (IX of 1879) see the following decisions :

Local Amendment

MADRAS

All the following as R 17 —

17 In suits relating to the person or property of a minor or other person under the superintendence of the Court of Wards the Court in fixing the day for the defendant to appear and answer shall allow not less than two months time between the date of summons and the date for appearance

ORDER XXXIII

SUITS BY PAUPERS

R. 1. [S 401] Subject to the following provisions, any suit may be instituted² by a pauper
Suits may be instituted in forma pauperis

O 3

Explanation—A person¹⁰ is a “pauper” when he is not possessed of sufficient means¹ to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed,⁴ when he is not entitled to property⁵ worth one hundred rupees other than his necessary wearing apparel⁷ and the subject matter of the suit⁶

[1877—S 401; 1859—S 297]

Local Amendment

BOMBAY

The following sentence shall be added to the Explanation namely —
In determining, whether he is possessed of sufficient means the subject matter of the suit shall be excluded

Synopsis

	Note No		Note No
Suits by paupers	1	considered in deciding sufficient means	6
Suit may be instituted by a pauper	2	Necessary wearing apparel	7
Is not possessed of sufficient means	3	Minor plaintiff	8
Where no such fee is prescribed —See note 3 above	4	Pauper defendant	9
When he is not entitled to property	5	Person —meaning of	10
Subject matter of the suit if can be		Suit by executor administrator or legal representative of pauper	11

Order 32 Rule 16—Note 1

- 1 (1925) 197, Cal 513 (514)
- 2 (18 9) 17 Cal 93 (63) 17 Ind App 5 (P C)
- Case under Bengal Court of Wards

Act IX of 18 9

- (1919) 1918 Cal 833 (810) 41 Cal 829 (Do)
- (1891) 18 Cal 500 (501) (Do)
- (1883) 16 Cal 89 (91 95) (Do)

	Note No		Note No
Suit by a official liquidator or official receiver	12	Leave to sue in forma pauperis for removal of trustees	15
Suit by mutwalli trustee or shebait	13	Award of costs and order for security for costs against pauper	16
Married woman	14		

Other Topics

Continuing a suit as a pauper See Note 2 Pt (1)

1 Suit by Paupers

The State derives a revenue from Court fee stamps and a plaintiff suing in Courts is under the Court Fees Act 1870 bound to pay the Court fee prescribed *at the time of filing the plaint*. But in view of the fact that there may be persons who by reason of their poverty, are unable to pay the fee provisions have been enacted in this Order exempting such persons from paying *in the first instance* the Court fee prescribed and allowing them to prosecute their suits in *forma pauperis*.¹ But if such pauper *succeeds* in the suit the Government can recover the amount of Court fee as a first charge from out of the subject matter of the suit (See R 10). And even if the plaintiff fails in the suit the Court should order him under R 11 *infra* to pay the Court fees due by him.

The executor of a deceased person is entitled to obtain a probate in *forma pauperis* though the petition for grant of probate is not a *suit* in the ordinary sense unless *caveat* is entered.²

The provisions of this order are not applicable to proceedings under the Agra Tenancy Act (III of 1926) and the Madras Estates Land Act (I of 1908).

2 Suit may be instituted by a pauper

It is competent to the Court to allow a suit not originally instituted in *forma pauperis* to be *continued in forma pauperis*.¹ The substitution of the word instituted in this rule in place of the word brought in S 401 of the old Code has not made any change in the law in this respect.²

3 Is not possessed of sufficient means

The explanation to this rule furnishes two different tests to determine the pauperism of a person¹ —

- (1) Where a fee is *prescribed* by law for the plaint in a suit a person who is not *possessed of sufficient means* to enable him to pay such fee is a pauper for the purposes of that suit.²

Order 33 Rule 1—Note 1

- 1 (1893) 90 Cal 111 (115)
2 (1893) 15 Bom 23 (23)

Note 2

- 1 (1877) 9 Cal 130 (131) (1877) 90 Cal 319 (31)
1931) 1931 Cal 2 (5) 60 Cal 87 1937 Cal 630 d st gt shed
1933 Cal 498 (199) Application to nt nue as a pauper made within 10 gr tel fr pment of leftit cou t fee
(1931) 1 Cal 109 (109)

- 1 30 (63)
No provis on exists for s these juent pauperism (obiter)
2 (1900) 1930 Cal 1 498 (498)

Note 3

- 1 (1914) 1914 Cal 53 (537)
2 [See also (1934) 1931 Nag 101 (100) 1 st carelessness is irrelevant for considering present poverty]

Thus where a claim requires a Court-fee of Rs 1,775 and the applicant is possessed of means to the extent of Rs 1,600, only, he is a pauper for the purposes of that suit²

- (2) Where *no* such fee is prescribed a person who is not *entitled to property* worth one hundred rupees *other than his necessary wearing apparel and the subject matter of the suit*, is a pauper for the purposes of that suit³

A person may be *entitled to property* but may nevertheless be not *possessed of sufficient means* to pay the Court-fee. It cannot therefore, be assumed that everyone who is entitled to property is possessed of means to the value of that property.⁴ Where though a person is entitled to property, yet if it is out of his reach and is thus not a realisable asset or convertible into cash, it cannot be said that he is *possessed of sufficient means* to pay the Court-fee.⁵ Thus a mere finding that the applicant is jointly interested in a property with another but over which he has no dominion, would only show that he is entitled to property but not that he is *possessed of means*.⁶

The word *means* is according to the High Court of Lahore intended to cover and include all forms of realisable assets which can be converted into cash and as such can be used for financing the litigation.⁷ Thus according to that Court, it would include an interest in a decree or a mortgage in favour of the petitioner. The High Court of Calcutta has on the other hand held that a debt which is due from a third person cannot be said to be means of which the applicant is possessed, and that the words *is not possessed of* must mean that the applicant has no actual control over it.⁸ Where the petitioner is possessed of some property which is not cash the test according to the High Court of Madras to decide whether he is a pauper, is not whether in the abstract he has the *power* of raising money but whether in the concrete circumstances of the case he can succeed in *raising anything substantial by exercising that power*.^{10a}

According to the Judicial Commissioner's Court of Nagpur a person owning a non-transferable occupancy right which is not capable of conversion

² (1906) 6 Bom L R 642 (644)

³ For some such suits see S. 19 of the Court fees Act 1870

^{3a} (1924) 1924 Pat 27 (32). 2 Pat 879

[See also (1933) 1933 Mid 679 (679) Suit for redemption—Equity of redemption is subject matter of suit within R 1—It should be excluded in determining whether plaintiff pauper]

⁴ (1929) 1929 Nag 311 (321). 26 Nag L R 115

⁵ (1928) 1928 Lah 271 (271)

(1933) 1933 Lah 523 (524) Equity of redemption is not asset when mortgagor can obtain loan

⁶ "

jointly belonging to her and her husband—She cannot be said to be possessed of any definite share in the house

[See however (1925) 1925 All 517 (547). 47 All 872 Where a minor son of a member of joint Hindu family succeeds to set aside an alienation by the father and where there is share which had not been transferred at the time of the suit the minor can not sue as a pauper]

[See (1934) 1934 All 896 (897) Share in joint family property may amount to means]

⁷ (1908) 1908 Lih 271 (271)

⁸ (1928) 1928 Lih 271 (271)

⁹ (1929) 1929 Lih 871 (873)

¹⁰ (1927) 1927 Cal 803 (810)

^{10a} (1933) 1933 Mid 883 (884) Hindu widow in possession of her husband's property applying for leave to sue as a pauper—Court should take into consideration the fact that she will neither be able to borrow money nor sell the property

(1934) 1934 Mad 561 (561) Petitioner having

	Note No		Note No
Suit by an official liquidator or official receiver	12	Leave to sue in forma pauperis for removal of trustees	15
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Married woman	14		

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1 Suit by Paupers

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- (1) Where a fee is *prescribed* by law for the plaint in a suit a person who is not *possessed of sufficient means* to enable him to pay such fee is a pauper for the purposes of that suit.²

Order 33 Rule 1—Note 1

- 1 (1893) 90 Cal 111 (115)
 2 (1893) 16 Bom 937 (233)

Note 2

- 1 (18 7) 90 Cal 180 (181) (189) 90 Cal 519 (991)

(1911) 1934 Cal 2 (75) 60 Cal 837 1937 Cal 680 dist ngui bel

1 1933 Cal 495 (499) Application to

nt n e as a pauper made within

c g at 1 for pment of deficit

(19 (10 (11 993))

(1884) 8 Bom 615 (616)

(1909) 1929 Mad 8 9 (899) 57 Mad 43

(1920) 1920 Mad 930 (231) Assumed

[But see (1937) 1937 Cal 680 (691)

No provision exists for subsequent pauperism (*obiter*)]

2 (1903) 19 3 Cal 198 (198)

Note 3

1 (1914) 1914 Cal 537 (537)

2 [See also (1934) 1934 Nag 101 (100) Pist carelessness is irrelevant for considering present poverty]

Thus where a claim requires a Court-fee of Rs 1,775 and the applicant is possessed of means to the extent of Rs 1,600, only, he is a pauper for the purposes of that suit²

- (2) Where *no* such fee is prescribed a person who is not *entitled to property* worth one hundred rupees *other than his necessary wearing apparel and the subject-matter of the suit* is a pauper for the purposes of that suit^{3a}

A person may be *entitled to property* but may nevertheless be not *possessed of sufficient means* to pay the Court fee. It cannot therefore be assumed that everyone who is entitled to property is possessed of means to the value of that property.⁴ Where though a person is entitled to property, yet if it is out of his reach and is thus not a realisable asset or convertible into cash it cannot be said that he is *possessed of sufficient means* to pay the Court-fee.⁵ Thus a mere finding that the applicant is jointly interested in a property with another but over which he has no dominion would only show that he is entitled to property but not that he is *possessed of means*.⁶

The word *means* is according to the High Court of Lahore intended to cover and include all forms of realisable assets which can be converted into cash and as such can be used for financing the litigation.⁷ Thus according to that Court it would include an interest in a decree or a mortgage in favour of the petitioner. The High Court of Calcutta has on the other hand held that a debt which is due from a third person cannot be said to be means of which the applicant is possessed, and that the words *is not possessed of* must mean that the applicant has no actual control over it.⁸ Where the petitioner is possessed of some property which is not cash the test according to the High Court of Madras to decide whether he is a pauper is not whether in the abstract he has the *power* of raising money but whether in the concrete circumstances of the case he can succeed *in raising anything substantial by exercising that power*.^{9a}

According to the Judicial Commissioners Court of Nagpur a person owning a non transferable occupancy right which is not capable of conversion

2 (1906) 5 Bom L R 642 (644)

3 For some such suits see S 19 of the Court fees Act 1870

3a (1924) 1974 Prit 27 (32) 2 Prit 879

[See also (1933) 1333 Mad 679 (679) Suit for redemption—Equity of redemption is subject matter of suit with n R 1—It should be excluded in determining whether plaintiff is pauper]

4 (1920) 1921 Nag 310 (371) 20 Nag L R 115

5 (1929) 1929 Lah 271 (271)

(1933) 1933 Lah 573 (573) Equity of redemption is not a set when money cannot be raised on it

6 (1928) 1928 Nag 24 (27)

(1930) 1930 Rang 321 (325) Irmese Hindu wife applying to sue as a pauper—Her only property a house jointly belonging to her and her husband—She cannot be said to be possessed of any definite share in the house

[See however (1925) 1925 All 547 (547) 47 All 872 Where a minor son of a member of joint Hindu family sues to set aside an alienation by the father and where there is share which had not been transferred at the time of the suit the minor can not sue as a pauper] (See (1934) 1934 All 396 (397) Share in joint family property may amount to means]

party applying for leave to sue as a pauper—Court should take into consideration the fact that she will neither be able to borrow money nor sell the property

(1931) 1931 Mad 561 (561) Petitioner having

- 1, into money cannot be considered to be 'possessed of means' for the purposes of this rule.¹¹

Where the applicant himself is proved to be a pauper he is entitled to the benefit of the Rule and the fact that he has co heirs or relations who are men of means is immaterial.¹²

The burden of proving that a person is a pauper within the meaning of the explanation lies on the applicant.¹³

4 "Where no such fee is prescribed"—See Note 3 above

5 When he is not entitled to property—See Note 3 above

It has been held by the Judicial Commissioner's Court of Nagpur, that interest of the tenant of a non-transferable occupancy holding is not 'property' but is more in the nature of an expectant claim under an inchoate right.¹

6 Subject matter of the suit, if can be considered in deciding sufficient means

The words, 'other than his necessary wearing apparel or the subject-matter of the suit' do not qualify the first part of the explanation, but apply only to cases where no specific Court-fee is prescribed.¹ But this does not mean that in dealing with the first part of the explanation the subject-matter has always to be taken into consideration.² The subject-matter of the suit may, in some cases, be in the possession of the petitioner and in some cases not. In the former class of cases it cannot be excluded from consideration merely on the ground that it forms the subject-matter of the suit.³ Thus where *A* files a suit for certain ornaments in the possession of *B* and obtains a decree and *B* applies for leave to appeal in *forma pauperis*, the ornaments in her possession will have to be taken into account in determining whether she has sufficient means to pay the Court-fee on the memorandum of appeal.⁴ In the latter class of cases the subject-matter of the suit cannot be taken into consideration. The reason is that the word 'possession' sufficiently indicates that any amount which forms the subject-matter of the suit and is not in the actual possession of the petitioner, cannot be taken into account for the purpose of determining his means.⁵

(1931) 1931 Mad 562 (562) Petitioner's properties heavily encumbered by mortgages—Court should consider whether he can raise money on them

11 (1925) 1925 Nag 438 (439, 440) 21 Nag L R 98

(1930) 1930 Cal 147 (149) 57 Cal 950
[But see (1927) 1927 Cal 309 (310)
Ornaments in petitioner's possession
were treated as being in the nature

1 (1925) 1925 Nag 438 (439, 440) 21 Nag L R 98

Note 6

1 (1906) 80 Bom 503 (507)
(1931) 1931 All 323 (324)
(1933) 1933 Pat 203 (204)
(1924) 1924 Nag 105 (108)
(1926) 1926 Nag 273 (273)
(1926) 1926 Mad 67 (68)

2 (1930) 1930 Cal 147 (149, 150) 57 Cal 950
3 (1929) 1929 Nag 319 (321) 26 Nag L R 115.
(1931) 1931 All 323 (324)
(1933) 1933 Pat 203 (204)
(1910) 8 Ind Crs 484 (484) 33 All 237
Claim for redemption of mortgage—
Applicant able to raise money upon
security of equity of redemption is
not a pauper
[But see (1882) 1882 Pun Re No 99
page 291]
4 (1929) 1929 Nag 319 (321) 26 Nag L R 115
5 (1930) 1930 Cal 147 (149, 150) 57 Cal 950
(1931) 1931 Mad 653 (653)

Now suppose that in answer to an application by a plaintiff to sue as a pauper, the defendant admits a part of the liability and produces or offers to produce into Court the property or the amount in discharge of such liability, can it be considered in determining whether the plaintiff is a pauper or not? The High Courts of Bombay⁶ and Calcutta⁷ have held that in such a case the time when the application for leave to sue as a pauper, is made is the point of time which the Court has to consider in determining whether the plaintiff is a pauper. The High Court of Madras has on the other hand held that if at the time of the hearing of the application he has become possessed of sufficient means the Court has no jurisdiction to grant him leave to sue as a pauper.⁸ It has also been held by that High Court in the undermentioned cases that where the plaintiff gets a decree in the lower Court, but wants to appeal as a pauper for a higher amount the amount deposited in Court by the judgment debtor to the credit of the plaintiff in pursuance of the decree should be taken into consideration in determining whether he should be allowed to appeal as a pauper.

7 Necessary wearing apparel

According to the High Court of Calcutta ornaments which a woman ordinarily wears should be regarded as being in the nature of wearing apparel.¹ The High Court of Lahore appears to dissent from the above view.²

8 Minor plaintiff

Where an application is filed on behalf of a minor for leave to sue in *forma pauperis* the circumstances of the next friend should not be considered, the fact that the next friend is possessed of sufficient means will not disentitle a minor plaintiff from suing in *forma pauperis*.¹ Nor will the fact that such next friend is himself a pauper disentitle him from suing on behalf of the minor in *forma pauperis*.²

9 Pauper defendant

It has been held by the High Court of Calcutta in the undermentioned cases that a defendant may, under the inherent powers of the Court, be allowed to defend a suit in *forma pauperis* although there is no provision to that effect in the Code. But the Chief Court of Punjab has taken a contrary view.² The High Court of Rangoon also has taken a view contrary to that

(1873) 3 Mad 249 (250) Person who applies for permission to sue as a pauper is not bound to try and raise funds by mortgaging his elum

(1892) 1897 All W N 11 (12) (Do)

(1924) 1924 Nag 44 (46) 19 Nag L R 165 In a suit to redeem a mortgage of property of which the plaintiff is not in possession the right to redeem the property is the subject matter of the suit

Note 7

1 (1927) 1927 Cal 309 (310)

2 (1925) 1925 Lah 271 (271)

Note 8

1 (1881) 3 Mad 3 (4)

(1924) 1924 Bom 440 (441)

(1923) 1923 Cal 626 (656)

(1929) 1929 Lah 746 (747)

(1930) 1930 Cal 993 (995)

[But see (1933) 1933 Sind 82 (84) 26 Sind L R 491 Means of next friend considered and minor's petition for leave refused Revision disallowed]

2 (1874) 11 Beng L R 373 (374)

Note 9

1 (1880) 5 Cal 819 (870)

(1905) 33 Cal 927 (937)

(1912) 18 Ind C's 207 (208) 40 Cal 955

2 (1905) 1905 Pun Re No 54 page 189

7 (1920) 1930 Cal 147 (149 150) 57 Cal 950

8 (1921) 1921 Mad 97 (98)

9 (1926) 1926 Mad 567 (568)

of the Calcutta High Court. It has further held that, in any case, the Court has no inherent power to allow a party to prosecute in *forma pauperis* an application for review of an order passed in appeal.³

10 'Person'—Meaning of

The word person occurring in the explanation to this rule has not been defined in this Code. According to the definition given in the General Clauses Act (X of 1897) it includes not only individual human beings but also companies or associations or bodies of individuals whether incorporated or not. It has, therefore, been held by the High Court of Madras that the word person indicates a juridical person.¹ But the High Court of Rangoon has however, held that it means a natural person that is a human being and that it does not include a juridical person.² Even according to this view a firm can be considered to be a person. Thus, where a firm brings a suit for damages and afterwards becomes insolvent and the Official Assignee refuses to prosecute the suit and the suit is dismissed, the firm can be granted leave to appeal as a pauper.³

11 Suit by executor administrator or legal representative of pauper

The High Court of Madras has held that an executor or an administrator or the legal representative of a deceased person is entitled to institute or maintain or continue a suit in *forma pauperis* in his representative capacity, provided he has not come into possession of sufficient means out of the estate of the deceased. It proceeds on the view that the plaintiff in his private capacity and in the capacity of the representative are two different persons in the eye of the law. The High Courts of Bombay and Calcutta and the Judicial Commissioner's Court of Nagpur have taken a contrary view that he could not do so, unless and until it was shown that he himself is a pauper.⁴ The above view is based on the ground that the provisions of this Code seem to negative the idea of anybody but an actual pauper, a real pauper, a man without means being permitted to maintain a suit in *forma pauperis*. The decisions of the High Court of Lahore are conflicting.⁵

See also Note 10 to O 22, R 1 and the undermentioned case.⁶

12 Suit by an Official Liquidator or Official Receiver

Applying the definition of the word 'person' as mentioned in Note 10, *ante*, the High Court of Madras has held that the Official Liquidator of a company, though not a pauper himself, may file a suit in *forma pauperis* on

3 (1930) 1930 Rang 980 (281) 8 Rang 423

Note 10

1 (1925) 1925 Mad 760 (766)

2 (1930) 1930 Rang 209 (263, 264)

3 (1930) 1930 Rang 272 (272)

Note 11

1 (1925) 1925 Mad 66 (67, 68)

(1925) 1925 Mad 760 (766, 767)

(1884) 7 Mad 300 (301)

[See also (1884) 3 Suth W R 115

Rt 1 O (20)]

[See 1 (114) 1933 Mad 893 (895)]

[But see (1925) 1925 Mad 819 (819)]

2 (1911) 36 Bom 279 (281, 282)

(1933) 1933 Nag 331 (335)

[See also (1891) 18 Bom 237 (239)]

(1906) 83 Cal 1163 (1168)

3 (1930) 1930 Lah 735 (736) Can sue as a pauper

(1927) 1927 Lah 665 (665) Cannot continue suit as a pauper

4 (1903) 20 All 187 (184) Decree in favour of pauper in ignorance of his death—Appeal by defendant against legal representative—Remand and decree on retrial—Defendant cannot object that plaintiff is not entitled to sue as a pauper

behalf of a pauper company : The High Court of Allahabad has applied the same principle to the case of an Official Receiver of the estate of an insolvent : A contrary view has been taken by the High Court of Rangoon that the word person in this Rule does not include a juridical person such as a receiver : See also Note 10, *ante* It is submitted that this view of the High Court of Rangoon is not correct

13 Suit by Mutawalli trustee or Shebait

As has already been observed in Note 11, *ante*, the character of a person suing in a *representative character* must be kept distinct from his *personal capacity*. Thus when a plaintiff sues in a representative character, for example as a *mutawalli* trustee or a *shebait* unless he is in possession of property belonging to the *walf* estate or trust or the idol for whom he sues, sufficient to enable him to pay the Court fee he may be allowed to sue as a pauper, even if it is shown that he has sufficient personal property of his own :

Where a *shebait* brought a suit for recovery of endowed property against one who claimed to be the alienor of that property and against three of his *co shebait*s who purported to have alienated it and the plaintiff did not either in his personal capacity or in the capacity of a *shebait* possess sufficient means to pay the Court-fee it was held that the mere fact that the *shebait*-defendants possessed sufficient properties belonging to the idol, did not dis-entitle him from suing as a pauper :²

14 Married woman

The fact that the applicant's husband has got sufficient property to pay the Court-fees due on her claim is not a ground for refusing the application of a pauper married woman for permission to sue as a pauper :

15 Leave to sue in forma pauperis for removal of trustees

S 402 of the old Code imposed certain restrictions on the right to sue as a pauper. It was held under that section that it did not preclude a person, who had obtained leave to sue under S 18 of the Religious Endowments Act (XX of 1863) for the removal of the trustees of a temple, from being permitted to sue in *forma pauperis* : The said section has now been omitted in this Code

16 Award of costs and order for security for costs against pauper

It has been held by the High Court of Bombay that the Court cannot pass an order for costs against the pauper in interlocutory applications in the suit : The High Court of Rangoon has, on the other hand, held that the Court has power to pass an order for costs against the pauper in such cases :²

A woman who has been permitted to sue as a pauper cannot be asked to furnish security for costs under O 25, R 1 :³ The reason is that it would render nugatory the order permitting her to sue as a pauper

Note 12

1 (1918) 1918 Mad 362 (363) 41 Mad 624

2 (1918) 1918 All 177 (177)

3 (1930) 1930 Rang 259 (261) 263)

Note 13

1 (1927) 1927 Cal 309 (310)

(1934) 1934 Pat 331 (331)

2 (1911) 11 Ind Cas 892 (527) (Cal)

Note 14

1 (1915) 1918 Pat 329 (329) 3 Pat L Jour 178

Note 15

1 (1901) 24 Mad 419 (421)

Note 16

1 (1922) 1922 Bom 88a (38a) 47 Bom 101 Ap
plication for amendment of plaint

2 (1925) 1925 Rang 306 (307) 6 Rang 361
Costs of adjournment

3 (1917) 1917 L B 163 (164) 8 L B R 387

An order for security for costs passed in a suit ceases to operate as regards the antecedent costs, if leave is given to continue the suit as a pauper, before the period for furnishing the security has expired ⁴

See also Note 10 to O 25, R 1

R. 2. [S 403] *Every application for permission to sue as a pauper shall contain the particulars required in regard to plaintiffs in suits: a schedule of any moveable or immovable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings*

[1877—S 403, 1859—Ss 299, 300]

Synopsis

Contents of Application	Note No	Death of Applicant	Note No
Verification	1	See O 22 R 1	4
Cause of Action—See Notes to R 5	3	Note 10	

1 Contents of application

Application for leave to sue in *forma pauperis* should set forth with the utmost good faith a schedule of all the moveable and immovable property belonging to the applicant, with the estimated value thereof. Where the applicant fails to do so the application is not properly framed and is liable to be rejected under Cl (a) of R 5 *infra* ² It does not however follow that this rule is to be meticulously interpreted against the petitioner. The Code is not designed as a trap which a litigant must try to avoid by all means in his power ³ The object of the rule being to help the Government in ascertaining whether the applicant is in a position to pay the Court-fee payable on the plaint, the Court should not throw out the application unless the omission was an act of bad faith ⁴ Thus the application should not be rejected merely on the ground that an item of property has been omitted to be given in the schedules or that the schedule has not been signed and verified by the applicant ⁵ or that the applicant was unable to name all the persons in

4 (1911) 12 Ind Cas 538 (539) 30 Com 115
Order 33 Rule 2—Note 1

1 (1920) 1930 Pat 308 (309)

[See also (1934) 1934 All 396 (397)
Share which a minor has in joint family property must be mentioned as it may amount to means within the meaning of Rule 1]

2 (1920) 1920 Pat 368 (369)

(1923) 1923 Oudh 118 (119)

(1908) 11 Oudh Cas 19 (20) Following 1903

All W N 34—Case of appeal

(1913) 0 Ind Cas 610 (611) 7 L L R 60

S 10 (1934) 1934 Cal 637 (638)

1111 to sue in *forma pauperis*

1111 to sue in *forma pauperis*

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1111 to sue in *forma pauperis*

1111 to sue in *forma pauperis*

1111 to sue in *forma pauperis*

fective so far as claim under Fatal Accidents Act is concerned but in form as to claim under other Acts should be allowed]

3 (1932) 1932 Lah 928 (32) 9 0)

4 (1932) 193 Pat 304 (309)

5 (1915) 1915 Mad 57 (603)

(1887) 1887 Ind Re No 27, 1906 59

(1931) 1934 Cal 610 (611)

6 (1932) 1932 Lah 548 (519) There is no

of allowing amendments may be applied to application to sue in *forma pauperis*

(1933) 1933 All 275 (297) 53 All 216

possession of the property left by the deceased in an administration suit ^{6a}. The proper course in such cases will be to return the application for amendment,⁷ and on such amendment being made the presentation will be deemed to be a proper presentation as from the date of the original presentation ^{7a}.

Where a plaint is filed with a stamp duty and registered as a suit and it is subsequently found that additional Court-fee is required and the plaintiff thereupon applies to continue the suit in *forma pauperis*, the fact that the application is not in the form prescribed by this rule will not necessarily entail the dismissal of the application ⁸.

2 Verification

Where the verification of the statements made in the application is not made in accordance with the provisions of O VI, R 15, the Court is bound to reject the application under R 5 *infra*.¹ But where the applicant did not verify the contents of the petition at the foot of the petition, but did so by a separate affidavit in which the statements contained in the several paragraphs in the application were said to be true it was held that the affidavit might be treated as part of the application.² The *schedule of property* need not, however, be signed and verified by the applicant and in any case, the omission to do so will not, as has been seen in Note 1 above, entail the rejection of the application.

3 Cause of action—See Notes to R 5

4 Death of applicant—See O 22, R 1, Note 10

R. 3. [S. 404] Notwithstanding anything contained in these Rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which

Presentation of application case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

[1877—S. 404; 1859—S. 301.]

Synopsis

	Note No		Note No
Presentation to Court	1	Presentation of pauper appeals	See
Presentation by applicant in person	2	Notes to O 44 R 1	5
Purdanashin woman	3	Limitation	See Notes to R 7 <i>infra</i>
Authorized agent	4		6

but inadvertently — Amendment should be allowed]
(1928) 1928 Pat 28 (29)

(1912) 1932 Pat 308 (309)
7a (1931) 1931 Bom 47 (50) Application in time
— Verification and signature after
limitation
8 (1929) 1929 Mid 428 (829) 53 Mid 48
Note 2
1 (1912) 16 Ind Cas 83 (85) 6 L B R 117
2 (1923) 1923 Lah 684 (684) 1 L B R 117 to

1 Presentation to Court

The insistence in the Rule is on the words 'in person' and not on the words 'to the Court' as meaning 'to the judge himself'.¹ Therefore where the application is presented to the *Sheristadar* of the Court² or to an officer of the Court who places it before the judge and the petitioner appears before the judge, the presentation will be valid.³

2 Presentation by applicant in person

This Rule is mandatory as regards the requirement as to the presentation in person, and a Court is bound to reject under R. 5 an application for leave to sue as a pauper, if it is not presented by the applicant in person, except in cases where he is exempted from appearing in Court.¹ Where one only out of several applicants presents the application in person, the Court should reject the application as against those persons who have not joined in presenting it in person.² Where, however, the law by reason of the fact that personal appearance in Courts is impossible either by reason of the party being a company or an infant, or a lunatic allows an appearance by somebody else, an appearance by such person would be sufficient compliance with the law.³

The provisions of this Rule as regards presentation in person do not apply to a case where a plaint, returned by one Court is presented to another Court⁴ or where a plaintiff is allowed to *continue* his suit as a pauper⁵ or where the application for leave to sue as a pauper is returned for amendment and the amended application is presented by the applicant's pleader.⁶

3 Purdanashin woman

A woman who is exempted under S. 132 from personal appearance in Court *e.g.* a Purdanashin lady is entitled to present an application for leave to sue as a pauper through an authorised agent.¹

4 Authorised agent

The term authorised agent does not mean the same thing as the expression recognised agent in O. 3 R. 2 *ante*.¹ A pleader may be a duly authorised agent within the meaning of this Rule.² But he must be *specially* authorised to present an application under this Order and must fulfil the other conditions detailed in this Rule.³

the contrary not followed

Order 33 Rule 3—Note 1

[But see (1933) 1933 Mid W N 197 (1934)]

- 1 (1971) 1971 Mad 901 (902) 48 Val 783
- 2 (1971) 1971 Mad 901 (902) 48 Mid 785
- 3 (1971) 1971 Nag 106 (107) 17 Nag L R 22

Note 2

- 1 (1867-68) 4 Bom H C R 91 (91)
- 2 (1887) 10 Mid 133 (134)
- (1909) 4 Ind Cas 777 (780) 12 Oudh Cas 341
- 3 (1118) 1918 Mad 862 (363) 41 Mid 671
- (1119) 1899 Lun Re No 19 page 114
Presentation of appeal in *forma*
lapis by manager appointed un-
der Act XXXV of 1853 is proper
- 4 (1931) 1931 Mid 418 (419)

114

Note 3

- 1 (1902) 24 All 172 (173) A case of pauper appeal
- (1899) 1899 Pun Re No 19 page 114 katri woman is exempt from personal appearance
- (1929) 1329 Pat 27 (28) 7 Pat 875

Note 4

Ordinary

5 Presentation of pauper appeals See Notes to O 44 R 1

6 Limitation See Notes to R 7 *infra*

R. 4. [S 406] (1) *Where* the application is in proper form and duly presented the *Court* may, if it thinks fit examine the *applicant*, or his agent when the applicant is allowed to appear by agent,

Examination of applicant

regarding the merits of the claim and the propriety of the applicant

If presented by agent Court may order applicant to be examined by commission

(2) *Where* the application is presented by an agent the Court may, if it thinks fit order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken

[1877—S 406, 1859—Ss 302 304]

Synopsis

Scope of the Rule	Note No 1	Right to cross examine applicant	Note No 2
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1 Scope of the Rule

This Rule empowers the Court to examine the applicant when the application is duly presented not only with reference to the question of his *pauperism*, but also with reference to the *merits* of the claim in order to ascertain whether the allegations in the petition do or do not show a cause of action¹ An enquiry under this Rule should be made by the judge himself²

As to whether persons other than the applicant can be examined on the merits see Notes to Rr 5 and 7 *infra*

2 Right to cross examine applicant

Where the applicant who seeks permission to sue as a pauper is examined under this Rule the opposite party has a right to cross examine him on the merits of the claim in order to test the statements he makes in his application³

R. 5. [Ss 405, 407] The Court shall reject an application for permission to sue as a pauper—

Rejection of application

(a) *where* it is not framed and presented in the manner prescribed by Rules 2 and 3, or

(b) *where* the applicant is not a pauper, or

(c) *where* he has, within two months next before the presentation of the application, disposed of any property fraudu-

Order 33 Rule 4—Note 1

ing the extent of investigation
 * (1867 GS) 1 Bom II CR 107 (103) And not by Shastri of the Court

Note 2

1 (1920) 1920 Cal 692 (693)

lently or in order to be able to apply for permission to sue as a pauper, or

(d) where his allegations do not show a cause of action, or

(e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter

[1877—Ss. 405, 407; 1859—Ss. 302, 304. Cf. O 7, R 11]

Local Amendment

आदेशाद

d under clause (d) merely on
barred by any law"
or the following —

'and the applicant, on being required by the Court to make any amendment within a time to be fixed by the Court fails to do so

Synopsis

	Note No		Note No
Legislative changes	1	Clause (e)	6
Applicability of the Rule	2	Appeal	7
Clause (a)	3	Letters Patent Appeal	8
Clause (b)	4	Revision	9
Clause (d)	5	Doctrine of Lis Pendens	10

Other Topics

Rule to be strictly construed See Note 2 Shall reject See Note 2 Pt (1)
It (2)

1 Legislative changes

The clause 'when his allegations do not show a cause of action' has been substituted for the clause 'that his allegations do not show a right to sue in such Court' which occurred in the old section

2 Applicability of the Rule

The Rule provides that an application for permission to sue as a pauper shall be rejected in the events enumerated in the Rule¹ It is restrictive of the right which every litigant has to seek the aid of a Court of Justice, and should therefore be interpreted strictly²

As in the case of an order rejecting a plaint under O 7, R 11, an order of rejection of an application under this Rule must be made on preliminary grounds, before notice is issued, and before an enquiry is held into the applicant's pauperism³

3 Clause (a) See Note 1 to R 2 and Note 2 to R 3, *supra*

Where the application for leave to sue in *forma pauperis* is framed in the manner prescribed by Rule 2, but is defective in some particulars with regard to the substance of the plaint, it is not obligatory on the Court to reject the application¹ In proper cases the Court has power to allow an application to be amended so as to make it conform to the law²

Order 33 Rule 5—Note 2

- 1 (1918) 1918 L B 86 (88) 9 L P R 93
(1972) 1972 All 447 (189) Cause of action
not disclosed — Application was re-
jected
2 (1887) 7 All 661 (668) 1er Mahmood J
(1933) 1933 Ring 110 (112) 11 Ring 414

- 3 (1906) 20 Bom 86 (91) Per Ranade, J

Note 3

- 1 (1903) 1933 Ring 410 (412) 11 Ring 414
Dissenting from 1929 Ring 125
[But see (1929) 1929 Ring 124 (129)
7 Ring 359]
2 (1914) 1914 Mad 256 (258)

4 Clause (b)

The question of the applicant's pauperism has to be decided with reference to the definition given in R 1. The Court in this respect is bound to proceed on the valuation given in the *plaint* and cannot go into an investigation of the question whether the suit has been overvalued.¹ Nor can it go into the merits of the case when dealing with the question of pauperism of the applicant.²

Where the applicant is found to be a pauper it is not necessary for the Court to give a finding on the other matters enumerated in the Rule unless it finds that the application has to be rejected for any of the other reasons mentioned therein.³

5 Clause (d)

The words used in clause (c) of S 407 of the old Code were right to sue. The expression was however held not to be limited to questions of jurisdiction alone but to include a good and subsisting cause of action capable of enforcement in Court, and calling for an answer, and not barred by the law of Limitation or any other law.¹ The present clause (d) gives effect to this view by substituting the words cause of action for the words right to sue so that the Court has got the power to reject an application for permission to sue in *forma pauperis* where the claim is *prima facie* barred by limitation² or is unlawful³ or is immoral or opposed to public policy.⁴ But in considering the question whether the applicant has a cause of action or not the Court has to look only into the *allegations* made by the applicant. This does not mean that the Court should confine itself to the allegations in the *petition*. It is open to the Court to consider not only the allegations contained in the *plaint* but also the facts appearing in the *examina-*

judicata]

[See also (1909) 1079 All 674 (1914)]

3 (1906) 1926 Lah 642 (613)

Note 4

- 1 (1921) 61 Ind Cas 691 (691) (Pit)
(1891) 1891 Pun Re No 81. Where a Court finds that an applicant who applies to sue in *forma pauperis* is unable to pay the Court fees upon his claim it should allow him to sue as a pauper for the whole amount claimed and it is illegal on the part of the Court to confine the permission to part of the claim because it finds that he may succeed only as to that part.
- (1912) 16 Ind Cas 612 (614) (Mad)

- 2 (1882) 4 Mad 223 (321)
(1895) 2 Cal W N 474 (478 479)
(1901) 8 Cal W N 70 (9)
[See (1934) 1934 All 823 (323). The fact that issue as to possession of property will be decided in suit is no reason for not deciding it in proceeding for dispossessing. But such decision will not operate as res

Note 5

- 1 (1885) 7 All 661 (664) (F P)
(1893) 20 All 293 (301)
(1899) 13 Bom 196 (198)
(1913) 18 Ind Cas 491 (491) (I th)
(1901) 27 Mad 31 (39)
(1903) 11 Oudh Cas 6 (18)
- 2 (1885) 7 All 661 (664)
(1919) 1919 Lah 4 (5) 1919 I un Re No 134
(1924) 1934 Rang 111 (112)
(1894) 1894 I un Re No 130
(1900) 1900 Mad 123 (124)
(1910) 1915 Mad 395 (399)
[See however (1933) 1932 All 543 (546). Question of limitation should properly be determined after the *plaint* is admitted]
- 3 (1917) 1917 L B 18 (19). Suit for recovery of amount won at a lottery.
- 4 (1889) 13 Bom 196 (190)
(1883) 13 Bom 190 (191). Marriage brokerage contracts.

tion of the applicant's. Beyond this, however, the Court cannot go. In fact, even in an inquiry under R. 7 the Court can confine itself to the evidence of the plaintiff and refuse to go into other evidence.⁷ Consequently, complicated questions of limitation,⁸ or of *res judicata*,⁹ or of local jurisdiction¹⁰ cannot be gone into for deciding the application. Nor can the Court refuse the application on the ground that, on the merits, the litigation is very likely to end in failure.¹⁰ The Court should exercise great caution in considering the question of cause of action inasmuch as the applicant is often without the advantage of the aid of Counsel. Further the opposite party will have the opportunity of urging these very objections under R. 7.¹²

6 Clause (e)

The object of the provisions of this Order is to help *bona fide* litigants. Where, therefore, a litigation is not *bona fide*, and the plaintiff has been set up by another for the purpose of evading the Court-fee, the Court will not allow him to sue as a pauper.¹

The Clause will apply only if the agreement has reference to the *subject-matter* of the suit and is of a champertous character.² Further, the agreement

- 5 (1919) 1919 Cal 385 (386) 46 Cal 651
 (1934) 1934 Rang 214 (216)
 (1919) 1919 Cal 155 (155)
 (1911) 11 Ind Cts 55 (57) (Cil)
 (1909) 4 Ind Cts 975 (976) (Lah)
 (1882) 4 Mid 323 (324)
 (1928) 1928 Sind 118 (119) 22 Sind L R 441

- (1898) 20 All 209 (301)
 (1932) 1932 Bom 584 (585)
 6 (1929) 1929 Rang 209 (209)
 (1934) 1934 Rang 214 (216) Any other evidence oral or documentary cannot be considered
 (1934) 1934 Lah 231 (232) Court should not embark upon considerations of doubtful questions of law or fact in order to see whether allegations show a cause of action
 (1929) 1929 All 624 (624) (Do)
 [See also (1933) 1933 Pat 234 (235) Plaintiff held not to disclose a cause of action]
 (1932) 1932 Rang 107 (112 113) 10 Rang 357 (F1) Evidence relating to merits not admissible 1929 Rang 273, over ruled

7 See Notes to Rule 7, *infra*

- 8 (1918) 1918 Mid 60 (61) 41 Mid 620
 (1926) 1926 Mid 195 (195)
 (1919) 1919 Mid 218 (219)
 (1923) 1923 Lah 495 (495)
 (1910) 8 Ind Cts 475 (476) (1910) 1 U B R 29

- 9 (1925) 1925 All 275 (276)
 [See also (1870) 14 South W R 231 (232)]
 (1919) 1934 Lah 231 (232)
 10 (1910) 1930 All 755 (755) 52 All 927
 (1913) 1913 Lah 121 (121)
 (1909) 4 Ind Cts 703 (703) (All)
 (1919) 1923 All W N 215 (219)
 (1928) 10 All 467 (472)

- (1925) 1925 Cal 990 (990)
 (1904) 8 Cal W N 70 (73)
 (1898) 2 Cal W N 474 (478, 479)
 (1924) 1924 Lah 659 (660)
 (1885) 1885 Pun Re No 25, page 45

- (1919) 1919 Mid 218 (219)

- 12 (1900) 27 Mid 37 (40)
 (1901) 27 Mid 120 (121)
 [See also (1905) 4 Mid L Tim 302 (303)]
 (1916) 1916 Mid 1047 (1048)

- Note 6
 1 (1919) 1919 Pat 53 (59)
 (1927) 1927 Pat 352 (352)
 (1907) 30 Mid 547 (545) Where on the date of the institution of a suit in *forma pauperis* the plaintiff has allowed third parties to obtain an

date of the presentation of the appeal the appellate Court cannot grant leave to appeal in *forma pauperis*
 2 (1917) 1917 All 146 (186)
 (1934) 1934 Cal 740 (740) Mortgage subsequent to application under O 33 not for cash but executed under pressure for previous loans does not

must be one between the proper and a third party. Thus, where a company has gone into liquidation and the liquidator sues in *forma pauperis* to recover a debt due to the company, the fact that the liquidator is paid a percentage of the collections will not bring the application under this clause.³ The agreement contemplated by this Clause is one which is subsisting and effective of the time of the application.^{3a}

It is however not necessary that the "interest" should be a vested and completed interest. Thus, an agreement with pleader appearing in the pauper suit, that he is to recover his fee out of the *fruits of the decree* that may be obtained in that suit by the plaintiff is within the prohibition of the Clause.⁴ But a mere agreement to pay the fees when the decree is obtained without any condition by which the pleader could recover the fees *from the decretal amount*, will not fall under the Clause.⁵

7 Appeal

An order rejecting an application for permission to sue in *forma pauperis* is not appealable as it is neither a decree nor an order coming within any of the Clauses of O 43 R 1.¹

8 Letters Patent Appeal

An order of a Single Judge of the High Court, sitting on the Original Side, allowing or refusing to allow a plaintiff to sue in *forma pauperis* is a "judgment" within the meaning of the Letters Patent and is appealable as such.¹

9 Revision See Note 26 to S 115 and also the undermentioned cases¹

10 Doctrine of Lis Pendens See Notes to R 8, *infra*

come within this Rule

- (1934) 1934 Rang 214 (215) Person advancing money to another out of pity — No agreement giving him interest in subject matter — Expectation that he would be repaid on suit being successful — Unless repayment is secured on subject matter, under standing is not illegal
- 3 (1918) 1918 Mad 362 (364) 41 Mad 624
- 3a (1935) 1935 Oudh 20 (21) If not subsisting it does not stand in the way of application being allowed
- 4 (1885) 9 Bom 371 (372)
[See also (1892 1896) Upp Bur R 272]
- (1932) 1932 Rang 69 (69)
- 5 (1926) 1926 Lih 642 (643)

Note 7

- 1 (1885) 7 All 661 (668)
(1899) 21 All 133 (136) (FB)
(1930) 1930 Rang 259 (259)
(1910) 8 Ind Cas 475 (476) (1910) 1 Upp Bur R 28
(1865) 3 Suth W R Misc 20 (20)
(1931) 1931 Rang 129 (130) 9 Rang 86

Note 8

- 1 (1931) 1931 Bom 166 (166 167)
(1925) 1925 Mad 167 (168) 48 Mad 700
(1930) 1930 Rang 259 (260, 262)

Note 9

- 1 (1927) 1927 Lah 56 (56)
(1933) 1933 All 295 (296) 55 All 216 Order

and is revisable

- (1935) 1935 Oudh 20 (21)
(1933) 1933 Pat 284 (285) Court, in deciding properism not confining to plaintiff, acts with material irregularity
- (1934) 1934 Rang 214 (216)
(1885) 1885 Pun Re No 21 Revision lies

when Court embarks upon an enquiry by examining other witnesses where it has no power to do

- (1888) 1888 All W N 150 (151) When the leave is refused on the ground that the petitioner has a weak case on the merits
- (1893) 13 All W N 218 (219) (Do)
(1910) 6 Ind Cas 703 (708) (All) (Do)
(1915) 1915 Mad 652 (653) (Do)
(1917) 1917 All 355 (355) (Do)
(1898) 20 All 293 (302) But no revision lies when the Court has not acted with material irregularity or illegality
- (1919) 1919 Lah 1 (5) 1919 Pun Re No 134. (Do)

R 6. [S 408] *Where the Court sees no reason to reject the application on any of the grounds stated in Rule 5, it shall fix a day (of which at least ten days' clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof*

[1877—S 408; 1859—S 305]

Synopsis

Notice	Note No 1	Evidence of pauperism	Note No 2
		See R 7, <i>infra</i>	

1 Notice

The provision directing notice is imperative¹ and therefore an order made without notice to the Government pleader or to the opposite party is one made without jurisdiction and is open to revision²

As to the form of notice under this Rule, see App H, Form No 12

2 Evidence of pauperism—See R 7, *infra*

R 7 [S 409] (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall

Procedure at hearing

examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in *Rule 5*

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper

[1877—S 409; 1859—S 306]

(1807) 7 Suth W R 486 (487) No revision lies from an order granting leave

(1910) 6 Ind Cas 831 (832) 32 All 623 (Do)

(1931) 1931 Rang 129 (131) 9 Rang 86 Order refusing leave to sue in *forma pauperis* is subject to revision

(1932) 1932 Bom 581 (589) Revision lies where provisions of this Order are violated

(1933) 1933 Sind 82 (83 84) 26 Sind L R 491 Revision lies against order refusing leave

[See also (1934) 1934 Lah 231 (232) Order granting leave is a case with in the meaning of S 115]

Order 33 Rule 6—Note 1

1 (1927) 1927 Cal 464 (461)

(1914) 1914 Cal 537 (537)

2 (1927) 1927 Cal 464 (461)

Synopsis

	Note No		Note No
Scope of the inquiry under this Rule	1	Death of applicant—Legal representative if can continue proceedings	See Note 10 to O 22 R 1 and Note 11 to R 1 above
Sub R (2) See Note 1 <i>ante</i>	2	Order rejecting application whether appealable	9
Review of Order under this Rule See Note 1 to R 15 <i>infra</i>	3	Appeal from decree—Whether propriety of Order allowing suit in forma pauperis can be questioned	10
Limitation when the application is granted	4	Dismissal of application for default	11
Limitation when application is refused	5	See R 15 <i>infra</i>	
Limitation when application is converted into a plaint on payment of Court fee	6		
Limitation where plaintiff is disappointed	7		

Other Topics

Evidence—Whether should be confined to pauper alone	See Note 1 Pt (2)	See R 4 Note 9
Examination of pauper—Who can conduct		The Court shall hear argument See Note 1 Pt 6b

1 Scope of the inquiry under this Rule

Two kinds of examinations are contemplated by this Order —

- (1) An examination of the applicant under R 4, *ante*, and
- (2) An examination under this Rule¹

It is important to remember the following distinction between the two kinds of examinations —

- (1) An examination under R 4 takes place *before* issuing notice to the Government pleader and to the opposite party, while the examination under this Rule takes place *after* such notice. There is thus no cross-examination of the applicant under the former Rule.
- (2) The examination under R 4 is only of the *applicant* and none else, while the examination under this Rule may be not only of the applicant but also of his *witnesses*.
- (3) The examination under R 4 may be in respect of the applicant's *pauperism* as well as the *merits* of the case, while the examination under this Rule is confined to the question of the applicant's *pauperism*.² It has accordingly been held that a Court has no power to allow the examination of witnesses on questions other than the *pauperism* of the applicant such as

Order 33 Rule 7—Note 1

- 1 (1912) 15 Ind Cas 184 (184) (Mad) The Court is bound to enquire into plaintiff's pauperism unless petition is rejected under R 5.

(1927) 1927 Rang 79 (73)

written statement
[See (1933) 1933 All 779 (580) Application to sue as pauper—Court must first see whether cause of action is disclosed and then determine whether applicant is really pauper—Order allowing prayer conditional on furnishing security for court fee is not proper].

R
a

questions as to the existence of a cause of action³ or as to the title of the applicant to institute the suit⁴ or as to limitation⁵ or as to *res judicatae* and decide the application on such evidence. It is however, not clear as to whether when the applicant is examined under this Rule as to his *pauperism* he can be cross examined as to matters relating to the cause of action or limitation^{6a}.

It is only the *examination of witnesses* on questions other than the *pauperism* of the applicant that is prohibited by this Rule. The Court is not precluded from hearing *arguments* on the question whether the applicant is or is not subject to any of the prohibitions specified in R. 5^{6b}. But even arguments are confined to the matters specified in R. 5 and the Court has no jurisdiction to reject the applicant on other grounds than those specified⁷. Thus the Court cannot reject the application on the ground that other co heirs who are not paupers are seeking to establish their rights through the applicant who is admittedly a pauper⁸. Nor can it reject the application on the construction of documents filed by parties⁹ or on any complicated questions of law such as limitation *res judicata* etc.¹⁰

Even if the other party does not offer any arguments as provided under Sub Rule (2) the Court is not precluded from considering *suo motu* if the application is subject to the prohibitions under R. 5¹¹. This Rule in so far as it relates to the manner of taking evidence does not apply to proceedings under the N.W.F.P. Regulation (VII of 1901 S. 46 Cl. 2) and the Oudh Courts Act (IV of 1925) (S. 16 Cl. 2).

2 Sub R. (2) — See Note 1 *ante*

3 Review of order under this Rule — See Note 1 to R. 10 *infra*

4 Limitation when the application is granted

Where an application to sue in *forma pauperis* is granted the suit is deemed to be instituted on the date of the *presentation* of the application and not on the date when the applicant is *allowed* to sue as a pauper¹. Therefore where an application to sue in *forma pauperis* was made before the amendment of the Court Fees Act (Madras Act 1922) but was registered as a suit after

3 (18 9) 14 South W. R. 251 (282)
(1898) 2 Cal. W. N. 474 (4th 8) [See com.]

(1882) 4 Mad. 323 (324)
(1925) 1925 Pat. 30 (31) 3 Pat. 275
8 (1910) 8 Ind. Cas. 474 (475) (1910) 1 Upp.
Bur. R. 26
9 (1901) 8 Cal. W. N. 70 (73)

19 Mad. 107 which took a contrary
view overruled
15 114 South W. R. 251 (282)
b 1 321 132 Ring 107 (109) 10 Rang. 357
(311)
(1907) 13 Mad. L. J. 232 (295 296)
(1904) 2 Cal. W. N. 4 (4th 8)
(1907) 4 S. Cal. W. N. 0 (73)

1 (1867) 1862 Marsh. 174
(1861) 4 Bom. H. C. 1 C. 30 (10)
(1916) 1916 Mad. 695 (695)
(1887) 4 All. 37 (37)
[See also (1861) 9 Moo. Ind. App. 66
(31 95) (1 C)]

the amendment, the amount of Court-fees to be entered in the decree should be calculated on the basis of the old Court-Fees Act 2

As to appeals in *forma pauperis*, see O 44, *infra*

5 Limitation when application is refused

Where the application to sue in *forma pauperis* is rejected the proceedings come to an end and if the applicant thereafter brings a regular suit on payment of the Court-fees prescribed the suit will be deemed to be instituted only on the date when the Court-fees are paid and not on the date of presentation of the rejected application 1 As to whether at the time of refusing the application the Court can grant time for the payment of the Court-fees on the plaintiff and whether if the Court-fees are paid within the time so granted the suit would be deemed to be instituted on the date of the presentation of the application see Note 10 to S 149 *supra* and the cases cited below

As to appeals in *forma pauperis* see O 44 R 1 Note 7 *infra*

6 Limitation when application is converted into a plaint on payment of Court fee

Where during the pendency of an application to sue as a pauper the applicant pays the Court-fee in respect of the plaint and thereupon the plaint is registered as a suit does the institution of the suit date back to the date of presentation of the application? Their Lordships of the Privy Council in *Skinner v Orde* 1 observed

The petition is filed and proceedings are taken to inquire into the pauperism which are delayed by various orders of the Court until a very considerable period of time has elapsed. Then pending that inquiry the plaintiff by paying the amount of stamp-fees into Court admits he is no longer desirous to sue as a pauper, and gives up so much of the privity of his petition as asks to be allowed to sue but no more. Is there then anything in the Act which requires that in such a state of things the petition of plaintiff shall be rejected altogether and the plaintiff be compelled to commence *de novo*?

The plaint is not converted into a plaint from that time only but remains with its original date on the file of the Court. In their view the suit must be deemed to be instituted when the application was filed

Though *Skinner v Orde* was decided under the Code of 1859, the principle has been followed in cases arising under the later Codes, and it has been held that where the application is *bona fide*, the suit will be deemed to be instituted on the date of the application to sue in *forma pauperis* and not on the date when the Court-fees are paid 2 But if the application is *mala fide* and it is found that the applicant was even at the time of the application, possessed of means to pay the Court-fees the suit will be deemed to be

2 (1911) 139 M.L.J. 159 (153)

Note 5

1 (1892) 17 All N.R. (285)
(1893) 20 Ind. 503 (510)

(1897) 24 Cal. 889 (891)

2 (1907) 9 Ind. 1 R 204 (206, 207) Time can not be granted after the petition is dismissed

(1917) 1923 M.L.J. 883 (885) 1 *super* applied

(P.C.) *Reversing* (1870) 1 All 230

2 (1901) 25 Cal. 427 (430)

(1904) 25 Mid. 493 (495)

(1916) 1916 Mid. 684 (685)

(1925) 1925 Mid. 793 (793)

(1932) 1322 Nig. 160 (161) 18 Nig. L.R. 41

(1917) 1317 Oudh. 324 (325)

(1923) 1923 Ring. 256 (257) 1 Ring. 196

(1901) 4 Oudh. C.S. 250 (251)

1 (1880) 2 All 211 (250, 251) 1 Ind. App. 14

C.P.C. 295 & 296

instituted only on the date on which Court fees are paid and not on the date when the application was presented :

7 Limitation where plaintiff is dispaupered

A plaintiff dispaupered under R 9 is entitled to continue the suit on payment of Court fees and no question of limitation arises¹

8 Death of applicant—Legal representative if can continue proceedings—See Note 10 to O 22 R 1 and Note 11 to R 1 above

9 Order rejecting application whether appealable

No appeal lies from an order rejecting an application to sue in *forma pauperis* whether under R 5 or under R 7¹ but in proper cases it may be open to revision by the High Court. As to cases where the application is granted *see also* the undermentioned cases^{2a} (*See* Note 26 to S 115) The final order on such an application of a Judge sitting on the Original Side of the High Court is however, a judgment under Cl 15 of the Letters Patent and is therefore appealable as such :

10 Appeal from decree—Whether propriety of order allowing suit in *forma pauperis* can be questioned

In an appeal from the *decree* it is not open to the appellate Court to entertain the plea that the plaintiff should not have been allowed to sue as a pauper as the matter is one affecting the *institution* of the suit, and not one affecting the *decision* :

11 Dismissal of application for default—See R 15 *infra*

R. 8. [S 410] *Where* the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in

Procedure if application admitted

the ordinary manner, except that the plaintiff shall not be liable to pay any court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit

[1877—S 410, 1859—S 308]

Note 7

1 (1895) 17 All 506 (509)

Note 9

1 (1875) 1 All 746 ("47) (T B)

2

(1880) 7 All 1 667 672 (1 B)
(1873) 18 1 11 (12)
(1917) 191 1 1 (18)

(1880) 5 Cal 60 (310 511)

(18 5) 21 Sat W R 67 (62)

(1930) 1930 Lah 730 (735)

2 (1933) 1933 All 220 (296) 50 All 216

(1931) 1931 Lah 231 (231)

[See (1931) 1931 Lah 225 (296) Application to sue as pauper granted—Only party affected is Crown—High Court can interfere but would be slow to move at the instance of defendant]

3 (1920) 1920 Mad 167 (169) 18 Mad 700
[See however (1920) 1920 All 446 (416) 48 All 493]

Note 10

1 (1901) 23 All 261 (305)

Synopsis

	Note No		Note No
Scope of the Rule	1	Except that the plaintiff shall not be	
Limitation when application is granted See R 7 ante	2	liable to pay any Court fee	4
Security for costs See Note 10 to O 25 R 1 and Note 16 to R 1 above	3	Insolvency of plaintiff	5
		Lis pendens	6
		Appeal See R 7 ante	7

Other Topics

Proceedings prior to filing and numbering is a suit See Note 1 its (1) to (4) Stamp duty and penalty—Not governed by this Rule See Note 4 Pt (1)

1 Scope of the Rule

The application to sue as a pauper cannot be deemed to be a plaint till leave to sue is granted and therefore, the Court has no jurisdiction to order the return of the plaint under the provisions of O 7 R 10, for presentation to the proper Court¹ See also Note 6 to O 7 R 10 Until the leave is granted there is no *suit* in existence and therefore the Court cannot direct an attachment of properties before judgment² See also Note 5 to O 38 R 5

Where a plaint is filed with insufficient Court-fee and the plaintiff being unable to pay the additional Court fee applies to *continue* the suit in *forma pauperis* it has been held that the Court has to ascertain if the plaint discloses a cause of action and then to direct an inquiry into the pauperism of the applicant If he is found to be a pauper he should be allowed to *continue* the suit as a pauper as the procedure under Rr 2 and 8 is impossible under such circumstances⁴

Where an application for leave to sue as a pauper is granted and thereby becomes converted into a suit the vakalat given by the applicant becomes a vakalat for the purpose of the suit unless it is distinctly confined to the pauper application alone⁵

2 Limitation when application is granted—See R 7 ante

3 Security for costs—See Note 10 to O 25 R 1 and Note 16 to R 1 above

4 Except that the plaintiff shall not be liable to pay any Court fee

The exemption does not extend to the liability to pay stamp duty or penalty in respect of a document which owing to defect in stamp is inadmissible in evidence¹

5 Insolvency of plaintiff

Where the plaintiff permitted to sue as a pauper is subsequently adjudged an insolvent the Official Receiver is entitled to continue the suit¹

6 Lis pendens

The doctrine of *lis pendens* will apply to suits instituted in *forma pauperis*¹

7 Appeal—See R 7 ante

Order 33 Rule 8—Note 1

	Note 4
1 (1868) 10 Suth W R 357 (358)	
	Note 5
1 (1918) 1918 All 177 (177)	
[See also (1975) 1975 VLa 1 791 (791)]	
	Note 6
1 (190) 20 All 95 (107)	

9

R. 9. [S 414] The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff order the plaintiff to be disaupered—

(a) if he is guilty of vexatious or improper conduct in the course of the suit,

(b) if it appears that his means are such that he ought not to continue to sue as a pauper, or

(c) if he has entered into any agreement with reference to the subject matter of the suit under which any other person has obtained an interest in such subject-matter

[1877—S 414 of R 5, *supra*]

Synopsis

	Note No		Note No
Scope of the Rule	1	Death of plaintiff after institution of the suit	10
Vexatious or improper conduct	2	above	5
Ought not to continue to sue as a pauper	3	Appeal in forma pauperis	4
Agreement with reference to the subject matter	4	Limitation where plaintiff is disaupered	7

Other Topics

Appeal See R 5 Note 1 It (1) R 5 Suit disposed of—Rule applicable See Note 1 Pt (1)

1 Scope of the Rule

This rule applies to cases where the suit is *pending* and therefore the plaintiff cannot be disaupered after the suit or appeal has been disposed of on a settlement between the parties¹ An order granting leave to sue as a pauper does not operate as *res judicata* It can be re opened under this rule on any of the grounds mentioned therein²

2 Vexatious or improper conduct

A fraudulent concealment of property will amount to vexatious or improper conduct but a mere omission to state in the list of assets a life insurance policy worth about Rs 245 where the Court fee to be paid on the plaint was over Rs 500 was held not to be a sufficient ground to disauper the plaintiff under this Rule¹ Intentional delay in prosecuting proceedings such as failure to bring the legal representatives of a deceased defendant on the record within a reasonable time may amount to vexatious or improper conduct within the meaning of this rule²

3 Ought not to continue to sue as a pauper

The plaintiff cannot be disaupered under this rule on the ground that he was in receipt of an interim allowance during the suit barely sufficient for

Order 33 R 9 Note 1
1 (1877) 18 B n 44 (40)
(1874) 11 All 1

Note 2
1 (1877) 11 All 130 (130)
(1877) 11 All 130 (130)

his maintenance,¹ or that he had a rich relation,² or that he appeared by an eminent counsel.³ Where it is proved that the applicant has received a sum of money sufficient to pay the Court-fee after the date of the application he ceases to be a pauper and the fact that the money was paid to a creditor will not prevent the Court from holding that he is no longer a pauper.⁴

4 Agreement with reference to the subject matter—*See also* Note 6 to R 5 above

This clause is intended to prevent the prosecution of a suit where the plaintiff has entered into a champertous agreement with another for the prosecution of the litigation and also to prevent a party continuing his suit as a pauper even after a third party has acquired an interest in the subject-matter, and therefore an interest in paying Court-fees to Government.² Thus an agreement by the plaintiff with his advocate promising to pay him a large sum of money in the event of his success was held to amount to such an agreement as is contemplated by Cl (c) of this rule.³ But this clause does not apply to cases where the parties have settled their differences in order to put an end to litigation.⁴

5. Death of plaintiff after institution of the suit—*See* O 22, R 1, Note 10 above

6 Appeal in forma pauperis—*See* O 44, *infra*

7 Limitation where plaintiff is dispaupered—*See* R 7, *ante*

R. 10. [S 411] Where the plaintiff succeeds in the suit, the Court shall calculate the amount of Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit.

[1877—S 411; 1859—S 309.]

Synopsis

	Note No		Note No
Scope of the Rule	1	Amount of Court fees	4
Amount of court fees to be a first charge	2	Recovery of Court fees by Government from party ordered to pay the same	5
Effect of the first charge	3	Mode of realisation of Court fees	6
Crown entitled to precedence in res		Appeal	7

Other Topics

Pauper succeeding only in part *See* Note 1, Pt (1)

Note 3

- 1 (1924) 1924 Pat 27 (23, 29) 2 I at 879
- 2 (1924) 1924 Pat 27 (28, 29) 2 Pat 879
- 3 (1924) 1924 Pat 27 (30) 2 Pat 879
[But see (1915) 1915 Lih 77 (77)]
- 4 (1921) 1921 Mad 97 (98)

Note 4

- 1 (1904) 18 Bom 461 (467)
- 2 (1913) 21 Ind Cas 536 (537) 7 Sind L R 52
- 3 (1927) 1927 Rang 283 (284)
- 4 (1904) 18 Bom 461 (467)

9

R. 9. [S 414] The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff order the plaintiff to be dispaupered—

(a) if he is guilty of vexatious or improper conduct in the course of the suit,

(b) if it appears that his means are such that he ought not to continue to sue as a pauper, or

(c) if he has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter.

[1977—S 414 of R 5 *supra*]

Summary

	Note No		Note No
Scope of the Rule	1	Death of plaintiff after institution of the suit	10
Vexatious or improper conduct	2	See O 9 R 1	10
Ought not to continue to sue as a pauper	3	Appeal in forma pauperis	5
Agreement with reference to the subject matter	4	Limitation where plaintiff is dispaupered	6
		See R ante	7

Other Topics

Appeal See R 5 Note 1 It (1) R 7 Suit disposed of—Rule applicable See Note 1 Pt (1)

1 Scope of the Rule

This rule applies to cases where the suit is *pending* and therefore the plaintiff cannot be dispaupered after the suit or appeal has been disposed of on a settlement between the parties. An order granting leave to sue as a pauper does not operate as *res judicata*. It can be re-opened under this rule on any of the grounds mentioned therein.

2 Vexatious or improper conduct

A fraudulent concealment of property will amount to vexatious or improper conduct but a mere omission to state in the list of assets a life insurance policy worth about Rs 245 where the Court fee to be paid on the plaint was over Rs 500 was held not to be a sufficient ground to dispauper the plaintiff under this Rule.¹ Intentional delay in prosecuting proceedings such as failure to bring the legal representatives of a deceased defendant on the record within a reasonable time may amount to vexatious or improper conduct within the meaning of this rule.²

3 Ought not to continue to sue as a pauper

The plaintiff cannot be dispaupered under this rule on the ground that he was in receipt of an interim allowance during the suit barely sufficient for

Order 33 R 9—Note 1

1 (1931) 18 Bom 461 (46)
(1931) 12 LAL 33 (34)

Note 2

1 (1933) 1933 Bom 215 (216) 46 Bom 1017
2 (1939) 1939 Sind 136 (136)

his maintenance,¹ or that he had a rich relation,² or that he appeared by an eminent counsel³ Where it is proved that the applicant has received a sum of money sufficient to pay the Court-fee after the date of the application he ceases to be a pauper and the fact that the money was paid to a creditor will not prevent the Court from holding that he is no longer a pauper⁴

4 "Agreement with reference to the subject matter —*See also* Note 6 to R 5 above

This clause is intended to prevent the prosecution of a suit where the plaintiff has entered into a champertous agreement with another for the prosecution of the litigation and also to prevent a party continuing his suit as a pauper even after a third party has acquired an interest in the subject-matter, and therefore an interest in paying Court-fees to Government² Thus an agreement by the plaintiff with his advocate promising to pay him a large sum of money in the event of his success was held to amount to such an agreement as is contemplated by Cl. (c) of this rule³ But this clause does not apply to cases where the parties have settled their differences in order to put *an end* to litigation⁴

5. Death of plaintiff after institution of the suit —*See* O 22 R 1, Note 10 above

6 Appeal in forma pauperis —*See* O 44, *infra*

7. Limitation where plaintiff is dispaupered —*See* R 7, *ante*

R. 10. [S. 411] Where the plaintiff succeeds in the suit, the Court shall calculate the amount of Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit.

Costs where pauper succeeds

[1877—S. 411; 1859—S. 309.]

Synopsis

	Note No		Note No
Scope of the Rule	1	Amount of Court fees	4
Amount of court fees to be a first charge	2	Recovery of Court fees by Government from party ordered to pay the same	5
Effect of the first charge	3	Mode of realisation of Court fees	6
Crown entitled to precedence in res		Appeal	7

Other Topics

Pauper succeeding only in part *See* Note 1, Pt (1)

Note 3

- 1 (1924) 1924 Pat 27 (23, 29) 2 Pat 874
- 2 (1924) 1924 Pat 27 (28, 29) 2 Pat 879
- 3 (1921) 1924 Pat 27 (30) 2 Pat 879
[But *see* (1915) 1915 Lih 77 (77)]
- 4 (1921) 1921 Mad 97 (95)

Note 4

- 1 (1934) 15 Bom 461 (467)
- 2 (1918) 21 Ind Cas 536 (537) 7 Sind L R 52
- 3 (1927) 1927 Ring 283 (284)
- 4 (1901) 18 Bom 461 (467)

1 Scope of the Rule

This rule and the next are intended to secure to the Government its rights to Court-fees, the payment of which is temporarily suspended when the plaintiff is permitted to sue in *forma pauperis*.¹ This rule deals with the case of a pauper plaintiff who succeeds in the suit and R 11 deals with the case of a pauper plaintiff who fails in the suit. No provision has been made in the Code for the case of a plaintiff succeeding in part and failing in part. In the absence of any such provision, presumably the Court is intended to deal with the case by combining the provisions of the two rules and by appropriating the Court-fees payable between the plaintiff and the defendant in proportion to the extent of success of each party.^{1a} The High Courts of Allahabad² Madras³ and Patna⁴ have held that it is not open to the Court to direct the defendant to pay Court-fees exceeding the amount which would be payable on that portion of the plaintiff's claim on which the plaintiff succeeds. The High Court of Calcutta⁵ has on the other hand held that this rule leaves the discretion entirely with the Court to direct which of the parties should pay the Court fees due to the Government and that the Court should not be fettered by any hard and fast rule but must only be guided by the equities of the case.

As has been seen already this rule is applicable only where the plaintiff succeeds in the suit. Where, in a pauper suit, the amount decreed to the plaintiff fell short of the amount payable by him as costs to the defendant he was held not to have succeeded within the meaning of this rule because so far as the plaintiff was concerned the decree was in the result not a success in view of O 21, R 19 of the Code.⁶

This rule is applicable also to Chartered High Courts in the exercise of their Original Civil Jurisdiction.⁷

2 Amount of Court fees to be a first charge

The Court-fee payable to the Government under this rule is a *first charge* on the subject matter of the suit.¹ "The Crown has a right to receive

Order 33 Rule 10—Note 1

1 [See however the observations in (1930)

not inconsistent with O 33 Rr 10 and 11 C P Code

1a

proportion to their success cannot be altered by the same Court so as

780

[See however (1903) 1923 Mad 786 (787) Pauper appeal allowed on a point not touching merits—Court par

Note 2

1 (1875 77) 1 Bom 7 (9)

(1934) 1934 All 438 (439) Purchaser of decree from pauper plaintiff takes it subject to the charge for Court fees—The charge is only to the extent of the Court fees and Government pleader's fee is not a charge on the subject matter of suit

(1875 78) 1 All 536 (598)

(1907) 2 J All 537 (510) (F D)

(1894) 18 Bom 23, (240) Probate proceeding in *forma pauperis*—Joint charge will be on property covered by probate

(1900) 25 Mad 733 (735) But first charge may be lost by waiver or consent

certain fees at the institution of every suit, it temporarily forgoes its right in the case of pauper plaintiffs, and places means in their hands to proceed to judgment against their defendants. Without the forbearance of the Government to insist on its ordinary rule the suit in such a case, could not have been brought or the money realised. It is therefore, reasonable that the Crown, in consideration of its giving up its right to those fees, should have for their defrayal, the first claim on the proceeds of the pauper suit.²

The rule creates two distinct and separate rights exercisable at the option of the Crown, viz —

- (1) A right *in rem* against the property recovered in the suit, and
- (2) A right *in personam* against the party ordered by the decree to pay the Court-fee.

In the event of the Crown not succeeding in realising the amount by pursuing the personal remedy it has a right to recover the same from the subject-matter of the suit.³ The charge is enforceable in *execution* by attachment and sale of the properties covered by the charge and not by a separate suit.⁴ See R 13, *infra*.

The Court fee payable to the Government is to be calculated as on the date of the presentation of the application for leave to sue *in forma pauperis*. Where the Court-Fees Act was amended after the institution of the suit and before the decree, the calculation of Court-fees has to be made in accordance with the law at the time of the institution.⁵

3 Effect of the first charge

The effect of the first charge is that a sale in execution of the same prevails as against a subsequent sale. Thus where a property was sold in 1896 for the Court-fees due to the Government under a decree of 1893 and it was again sold in 1899 in execution of a money decree obtained by a third person in 1894 on a debt anterior to 1893 the former purchase was held to prevail over the latter.¹ Similarly the claim of the Government against any amounts due to the plaintiff under the decree will prevail against any cross-claim or claims under cross-decrees against the plaintiff in favour of the defendant, provided the defendant has not taken out execution for the balance under O 21, Rr 18 or 19. In the case cited below² A sued B *in forma pauperis* to recover a property of the value of Rs 60,000 and obtained a decree for a sum of Rs 1,500. He was ordered to pay a sum of Rs 1,200 to the Government as Court-fees. In an application by the Government to recover the amount of the Court-fees from the decree amount of Rs 1,500 due from B to A B contended that a sum of Rs 1,000 was due to him from A as costs of the suit and that a sum of Rs 800 was also due from him under another cross-decree against him making a total sum of Rs 1,800 and B claimed to be entitled to set-off against this total sum the above amount of Rs 1,500 due to A. It was held that under the circumstances the Government was entitled to recover the amount of Court-fee from the decretal amount of

² (1875) 1 Bom 7 (9-10)

³ (1919) 1919 Pat 99 (101) 4 Pat L Jour 166

⁴ (1896) —

(1919) 1919 Pat 99 (101) 4 Pat L Jour 166

⁵ (1926) 1926 Mad 474 (475)

(1931) 1931 Sind 354 (351) 27 S L R 210

Note 3

1 (1902) 23 Mad 783 (733)

² (1897) 9 All 61 (67)

A in the hands of *B* in preference to the cross-claims of *B*. It would be otherwise if in the above case *B* had before the application by the Government was made actually applied to execute his decree against 1 for the balance after making the set-off³

4 Crown entitled to precedence in respect of Court fees

It is a principle recognised by the laws of all countries that claims of the State are entitled to precedence over other claims¹. The amount of Court-fees due to the Crown is therefore entitled to precedence over the claims of other creditors of a pauper decree-holder. This rule is only an enabling one indicating the manner in which the Crown may realise the debt. It does not preclude the Crown or its representatives from urging its prerogative rights of precedence in any other manner². So when a successful proper plaintiff attached and sold for costs due to her certain property other than the property in suit belonging to the judgment debtor and the sale proceeds were paid into Court and both the plaintiff and the Government solicitor applied for payment out of the said sum it was held that the Government solicitor was entitled to be paid out in preference to the plaintiff and that it was not obligatory on the Government to *attach* the fund in Court before getting payment³.

But though in respect of the Court fees the Government is entitled to precedence among ordinary creditors it cannot claim precedence over *lien* holders. It is only when claims of the Crown and claims of common persons come into competition that the Crown is preferred. It is a matter of common justice and common honesty that the Crown has no more right than a common person to seize *A's property* and apply it in or towards the discharge of a debt due from *B*⁴. Accordingly it was held that the Government could not attach and sell a defendant's property for Court fees so as to destroy the rights of a previous *mortgagee* of the defendant⁵.

5 Recovery of Court fees by Government from party ordered to pay the same

The party ordered by the Court under this rule to pay the amount of Court fee due to the Government is the person who is liable to pay the same to the Government. The Government can proceed against that person personally or against his properties as the case may be¹.

6 Mode of realisation of Court fees

An order under this rule for the recovery of the Court-fees due to the Government is equivalent to a decree in its favour¹ and may be executed by the Government at its option, either by enforcing the charge on the subject-matter of the suit, or by proceeding in execution against the person or

¹ (1922) 197 All 194 (190)

Note 4

² (1863) 10 M H C (O L) 23 (20)

(1901) 99 All 537 (510) (L 1) Overturning

(1879) 2 All 130

[See also (1926) 1926 Cal 859 (860)]

Maintenance decreed in proper suit

1

1

(charge)

Note 5

1 [See (1881) 8 Bom 577 (582)]

Note 6

1 (1901) 99 All 516 (518)

(1883) 7 M H C (O L) 1434 (135)

(1912) 15 M H C (O L) 17 (180)

(P C)

31 All 223

erty of the party ordered to pay the Court-fee² No separate *suit* lies O
the recovery of the same³ See R 13 below The fact that the property,
subject-matter of the suit, has ceased to be in the possession of the party,
cted to pay the costs and has come into the possession of the successful
y does not affect the right of the Government to enforce the charge⁴
en a decree is attached in execution of another decree the proper course,
realising the fruits of the latter decree is not to *sell* the former decree
ched as aforesaid but to execute the attached decree itself at the instance
the attaching decree holder or otherwise, as provided in O 21, R 53
i principle applies to the Government as well, and the fact of the
ernment possessing a first charge on the subject-matter of the suit under
rule will not entitle the Government to *sell* the decree passed in favour
he proper plaintiff⁵ The proper method of recovering Court-fee from a
per plaintiff who has obtained a decree for future maintenance is by the
ointment of a receiver to collect the maintenance amount and pay the
ernment the Court-fee due by the plaintiff⁶

In proper cases, the decree holder may be allowed to take out execution
inst the judgment-debtor for the Court fee due to Government also, in
e he has already paid the fee to the Government or on the Court taking
icient precaution to have the Court-fee amount paid over to the Govern-
it⁷

A sale for Court-fee wrongly believed to be due⁸ or of the property
a third person in execution of an order for the Court-fee due to the
ernment⁹ is a nullity

An application by the Government for recovery of the amount of the
urt fee is subject to the Law of Limitation and must be made within three
rs from the date of the decree¹⁰

Appeal

There was a difference of opinion under the old Code as to whether
Government, in proceedings under the Chapter corresponding to this
er was a *party* to the suit within the meaning of S 47¹ R 13 now

(1919) 1919 Pat 93 (101) 4 Pat L Jour 166

(1896) 18 All 419 (421)

(1919) 1919 Pat 93 (101) 4 Pat L Jour 166

(1899) 18 All 419 (421)

(1919) 1919 Pat 93 (101) 4 Pat L Jour 166

(1896) 18 All 419 (421) 422

[See (1899) 20 Cal 111 (115)]

(1926) 1326 Mad 565 (565) 49 Mad 565

A portion of each instalment of

future maintenance may be reserved

for the decree holder to live upon

[See also (1925) 1925 P C 176 (176)]

47 All 355 57 Ind App 262 (P C)

Decree for future maintenance not

attachable under S 60 G P C Put

receiver may be appointed and por-

tion of collection may be paid to

creditors of maintenance holder See

S 60 Note 22]

[But see (1933) 1933 Bom 350 (351

352) 57 Bom 507]

(1933) 1933 Sind 21 (27) Suit in *forma*

pauperis for maintenance decreed

and right to future maintenance

made charge on immovable property

—Sale of such property in execution

proceedings cannot be attached by

Government for Court-fee

" (1920) 1920 All 205 (206) A case where the

decree holder was under the decree

bound to pay Court fee to Govern-

ment and entitled to recover himself

from the judgment debtor

8 (1893) 15 All 321 (326)

9 (1901) 26 All 316 (327)

10 (1889) 7 Bom 516 (517) 1900

(1874) 22 South W R 512 (512) (E 1)

(1882) 4 All 155 (156)

(See however (1899) 11 South W R 67

(67))

Note 7

1 [See Note 10 to S 47, *ante*]

[See also (1894) 1894 Bom Print

Judgt 406]

0. *A* in the hands of *B* in preference to the cross claims of *B*. It would be otherwise if in the above case *B* had, before the application by the Government was made actually applied to execute his decree against *A* for the balance after making the set-off.³

4 Crown entitled to precedence in respect of Court fees

It is a principle recognised by the laws of all countries that claims of the State are entitled to precedence over other claims.¹ The amount of Court-fees due to the Crown is therefore entitled to precedence over the claims of other creditors of a proper decree-holder. This rule is only an enabling one indicating the manner in which the Crown may realise the debt: it does not preclude the Crown or its representatives from urging its prerogative rights of precedence in any other manner.² So when a successful pauper plaintiff attached and sold for costs due to her, certain property other than the property in suit, belonging to the judgment-debtor and the sale proceeds were paid into Court and both the plaintiff and the Government solicitor applied for payment out of the said sum it was held that the Government solicitor was entitled to be paid out in preference to the plaintiff, and that it was not obligatory on the Government to *attach* the fund in Court before getting payment.³

But though in respect of the Court-fees the Government is entitled to precedence among ordinary creditors it cannot claim precedence over *lien* holders. It is only when claims of the Crown and claims of common persons come into competition that the Crown is preferred. It is a matter of common justice and common honesty that the Crown has no more right than a common person to seize *A's* property and apply it in or towards the discharge of a debt due from *B*.⁴ Accordingly it was held that the Government could not attach and sell a defendant's property for Court fees so as to destroy the rights of a previous mortgagee of the defendant.⁵

5 Recovery of Court fees by Government from party ordered to pay the same

The party ordered by the Court under this rule to pay the amount of Court-fee due to the Government is the person who is liable to pay the same to the Government. The Government can proceed against that person personally or against his properties as the case may be.¹

6 Mode of realisation of Court fees

An order under this rule for the recovery of the Court-fees due to the Government is equivalent to a decree in its favour¹ and may be executed by the Government at its option either by enforcing the charge on the subject-matter of the suit, or by proceeding in execution against the person or

3 (1902) 1923 *Mal* 120 (126)

Note 4

(1907) 20 *All* 537 (140) (1 *L*) Overruling (1879) 2 *All* 196

[See also (1926) 1926 *Cal* 859 (800) Maintenance decreed in proper suit with charge on defendant's properties—Government selling said properties for Court fees—Government's right is subject to maintenance charge]

Note 5

1 [See (1884) 8 *Bom* 577 (182)]

Note 6

1 (1901) 20 *All* 316 (318)

[See also 7 *Mal* 431 (433)]

3 (1893) 7 *Mal* 491 (190)

3 (1912) 15 *Ind* 117 (180) 31 *All* 223

(1 *L*)

property of the party ordered to pay the Court-fee.² No separate *suit* lies for the recovery of the same.³ See R 13 below. The fact that the property the subject matter of the suit has ceased to be in the possession of the party directed to pay the costs and has come into the possession of the successful party does not affect the right of the Government to enforce the charge.⁴ When a decree is attached in execution of another decree the proper course in realising the fruits of the latter decree is not to *sell* the former decree attached as aforesaid but to execute the attached decree itself at the instance of the attaching decree holder or otherwise as provided in O 21 R 53. This principle applies to the Government as well and the fact of the Government possessing a first charge on the subject matter of the suit under this rule will not entitle the Government to *sell* the decree passed in favour of the proper plaintiff.⁵ The proper method of recovering Court-fee from a pauper plaintiff who has obtained a decree for future maintenance is by the appointment of a receiver to collect the maintenance amount and pay the Government the Court-fee due by the plaintiff.⁶

In proper cases the decree-holder may be allowed to take out execution against the judgment-debtor for the Court-fee due to Government also in case he has already paid the fee to the Government or on the Court taking sufficient precaution to have the Court-fee amount paid over to the Government.⁷

A sale for Court-fee wrongly believed to be due⁸ or of the property of a third person in execution of an order for the Court-fee due to the Government⁹ is a nullity.

An application by the Government for recovery of the amount of the Court fee is subject to the Law of Limitation and must be made within three years from the date of the decree.¹⁰

7 Appeal

There was a difference of opinion under the old Code as to whether the Government, in proceedings under the Chapter corresponding to this order was a *party* to the suit within the meaning of S 47¹ R 13 now

¹ (1919) 1919 I at 99 (101) 1 I at L Jour 167

(1897) 18 All 413 (421)

(1913) 1913 I at 99 (101) 1 I at L Jour 167

(1893) 18 All 413 (421)

⁴ (1913) 1913 I at 91 (101) 1 I at L Jour 167

(1896) 18 All 419 (421 & 2)

⁵ [See (1893) 20 Cal 111 (115)]

⁶ (1907) 112 Mad 56 (C) 49 M.L.J. 7

A portion of each instalment of

and right to future maintenance

⁷ (1903) 1029 All 303 (304) Where the decree holder was under the decree bound to pay Court fee to Government and entitled to recoup himself from the judgment debtor

⁸ (1893) 15 All 324 (326)

⁹ (1901) 96 All 316 (352)

¹⁰ (1898) 7 I on 516 (519) 22 J

(1874) 22 South W R 512 (17) (I F)

(1897) 4 M.L.J. 155 (15)

[See 1 Meyer (1897) 11 South W I 67 (68)]

Note 7

¹ [See Note 10 to S 47 (1)]

[See also (1894) 1898 Bom Print Judgt 406]

attachable under S 60 C.I.C. But receiver may be appointed and portion of collection may be paid to creditors of maintenance holder See S 60 Note 22]

[But see (1933) 1933 Bom 350 (351

352) 51 Bom 507]

(1903) 1935 Sind 21 (27) Suit in *forma pauperis* for maintenance decreed

10. provides that the Government in such cases is a party within S 47. An order on application by the Government for payment of the Court-fee under this order, will therefore now be an order under S 47 and as such will be appealable as a *decree* ²

11. **R. 11.** [S 412] *Where the plaintiff fails in the suit or is dispaupered, or where the suit is withdrawn or dismissed,—*
 Procedure where pauper fails

(a) *because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (if any) chargeable for such service, or*

(b) *because the plaintiff does not appear when the suit is called on for hearing,*

the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper.

[1877--S 412]

Synopsis

	Note No		Note No
Legislative changes	1	Costs	4
Scope of the Rule	2	Costs of successful defendant	5
Where the suit is withdrawn or dismissed	3	The Court shall order the plaintiff to pay the Court fees <i>See</i> Note 2 above	6

Other Topics

Influence of Court to provide for Court fees--Remedy *See* Note 2

1 Legislative changes

- 1 The corresponding section in the old Code contained a penal clause to the effect that if it was found that the suit is vexatious or frivolous the pauper plaintiff was liable to a fine not exceeding Rs 100 or imprisonment for a term which may extend to a month or both. The said clause has been omitted in the present rule.
- 2 The word "withdrawn" has been newly added *See* Note 3, below

2 Scope of the Rule

The provisions of this rule are mandatory and the Court when it passes a decree in the suit must provide in that decree for payment by the plaintiff of the Court-fee due to the Government ¹ As to the remedy of the Government in case the Court omits to make an order as to Court-fee, *see* Rr 12 and 13 below and the notes thereto

3 Where the suit is withdrawn or dismissed

The old Code did not contain the words "when the suit is withdrawn" and there was a conflict of decisions as to whether the words "if the plaintiff fails in the suit" included also cases where the suit was *withdrawn* ¹ The in-

² (1911) 85 Bom 118 (150)

Order 33 Rule 11--Note 2

¹ (1901) 13 All 32 (379)

Note 3

¹ (1894) 18 Bom 461 (467) (No)
 (1890) 16 Bom 77 (78-79) (No)

retraction of the words where the suit is *withdrawn* has now set the conflict at rest.

It has been held by the High Courts of Bombay² and Madras³ that when where a suit is dismissed on grounds other than those specified in Cls (a) and (b) of this rule the plaintiff must be deemed to have failed in the suit and that the Court is bound to make an order for the payment of the Court fees by him to the Government.

Where a plaint *in forma pauperis* is returned for presentation to the proper Court the plaintiff cannot be said to have *failed* in the suit and therefore no order for payment of Court fee can be made under this rule.⁴ Similarly where an application to sue as a pauper is rejected because the applicant is a minor and unrepresented and no enquiry is made as to pauperism and order under this rule for payment of the Court fees from the estate of the minor applicant is not legal.⁵

4 Costs

It is held as in S 35 *ante*¹ that a Court can under certain circumstances order a next friend or a guardian of a minor to pay the costs of a suit personally though he is not a *party* to the suit. Can this Court in a pauper suit order the next friend or the guardian to pay the *Court fees* due to the Government? It has been held that it can do so under the combined operation of S 35 and this Rule. Though the Court fee may not be costs but only *revenue* so far as the Government is concerned it is costs incurred by the party paying it and S 35 is wide enough to cover such a case.²

5 Costs of successful defendant

This rule makes a provision for the payment of Court fees due to the Government and does not deal with the power of the Court to order costs of a defendant who has succeeded in a suit *in forma pauperis*. But it does not follow that in the case of a pauper suit the Court cannot order the plaintiff to pay the costs of the successful defendant. Orders as to costs as between the parties to the suit are governed by S 35 as much in suits by paupers as in other suits.³

6 The Court shall order the plaintiff to pay the Court fees—See

Note 2 above

Government Code apply for payment of Court fees

R. 12. [New] The Government shall have the right at any time to apply to the Court to make an order for the payment of Court-fees under Rule 10 or Rule 11

(1905) 20 Bom 107 (10) (Yes)

(1907) 31 Bom 10 (10) (F D) (Yes)

(1908) 1908 Pun Re No 101 page 485 (Yes)

(1911) 12 Ind Cas 29 (30) 35 Bom 418

Under the new Code

[Put see (1890) 10 Bom 77 (8 79) Under the old Code—Overruled in (1907) 31 Bom 10 (F D)]

3 (1897) 21 Ind 119 (114) Reference made Court Fees Act S 5

(1894) 4 Mad L Jo 98 (97)

4 (1881 1882) 6 Bom 500 (597)

5 (1889) 18 Bom 234 (936)

Note 4

1 [See Note 19 S 30 *ante*]

[See also (1876) 20 Sutl W R 816 (316)]

2 (1931) 1931 Mad 749 (250 951) 43 Mal 716

Note 5

1 (1891) 8 Bom 5 (5 9) (F D)

12

Synopsis

Scope of the Rule

Note No 1 | Appeal

Note No 2

1 Scope of the Rule

This rule is new and entitles the Government to apply to the Court *at any time* to make an order under R 10 or R 11.¹ In the undermentioned case² it was held that the present rule being a rule of procedure had a retrospective effect and applied to cases of dismissal of suits before the new Code came into force

2 Appeal

An order passed on an application by the Government under this rule for payment of Court-fee is an order under S 47 and is therefore appealable.¹ See Note 7 to R 10 *ante*

13.

R. 13. [New] *All matters arising between the Government and any party to the suit under Rule 10, Rule 11 or Rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of Section 47.*

Government to be deemed a party

Synopsis

Scope and object of the Rule

Note No 1

1 Scope and object of the Rule

This rule is new. It sets at rest the conflicting rulings of the several High Courts under the old Code as to whether the Government is to be deemed a party to the pauper application and suit (See Note 7 to R 10). Questions arising under Rr 10 to 12 between the Government and any of the parties are now questions to be determined under S 47 and therefore this rule operates as a bar to the institution of an independent suit whether by the Crown or any other party with reference to such matters.¹

14

R. 14. [New.] *Where an order is made under Rule 10, Rule 11 or Rule 12, the Court shall forthwith cause a copy of the decree to be forwarded to the Collector.*

Copy of decree to be sent to Collector

Synopsis

Scope of the Rule

Note No 1

1 Scope of the Rule

All that the Court should do under this rule is to send to the Collector a copy of the decree which it has passed and which contains an order that the

Order 33, Rule 12—Note 1

The cases under the old Code in the absence of such a provision were conflicting. See (1879) 2 Cal L Rep 461 (463) (1881) 15 Bom 77 (79) (Can) See also (1903) 29 Bom 102 (103)

106) 6 Bom L R 1122] 2 (1911) 12 Ind Cas 29 (30) 55 Bom 448

Note 2

plaintiff shall pay a certain sum to Government. What the Collector does after the receipt of the copy is no concern of the Court and the Court cannot forward the decree to him with a direction to collect the sum payable by plaintiff.¹

R. 15. [S 413] An order refusing to allow the applicant

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature

to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper.

provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper.

[1877—S 413; 1859—S 310.]

Local Amendments

RANGOON

Between the word pauper and the word shall occurring in the 2nd line insert the words "other than in the ground stated in Cl (a) of Rule 5."

Synopsis

	Note No		Note No
Scope of the Rule	1	'Right to sue'	4
Bar to subsequent application	2	Costs incurred	5
Dismissal of an application for default	3		

Other Topics

Pauper appeal See Note 1 Pt (4).

1 Scope of the Rule

The Rule provides that an order *refusing* an application to sue *in forma pauperis* shall operate as a bar to a similar subsequent *application*. It does not, however, bar a subsequent *suit* provided the costs of the Government and of the opposite party are paid.¹ Nor does the refusal of the pauper application bar an application for a *review* of that order.² As to whether the Court can after the refusal of the application, allow the pauper applicant to pay the requisite Court-fee within a time to be fixed by it and validate the plaint, see Note 10 to S 149 and the case cited below.³

The provisions of this rule apply also to applications for leave to *appeal* as a pauper.⁴

Order 33 Rule 14—Note 1

1 (1930) 1930 Rang 342 (313) 8 Rang 231

Order 33 Rule 15—Note 1

1 (1895) 17 All 526 (529)
(1893) 21 All 353 (560 381) O 2 R 2 is

no bar

(1836) 20 Bom 503 (510)

(1897) 21 Cal 899 (890)

(1917) 1917 All 955 (855)

(1932) 1932 All 312 (314)

2 (1890) 4 Bom 414 (415)

(1870) 11 South W R 22 (22 21)

(1863) 70 5 Beng L R App 29 (30)

(1898) 20 All 410 (411) No Court fee is payable on an application for review like the plaint

3 (1912) 14 Ind C 297 (298) (C 1) Following (1897) 21 Cal 889

4 (1898) 22 Bom 849 (859) Firran C J, dis

Synopsis

Scope of the Rule

Note No	1	Appeal

Note No	2

1 Scope of the Rule

This rule is new and entitles the Government to apply to the Court at any time to make an order under R 10 or R 11¹ In the undermentioned case² it was held that the present rule being a rule of procedure had a retrospective effect and applied to cases of dismissal of suits before the new Code came into force

2 Appeal

An order passed on an application by the Government under this rule for payment of Court fee is an order under S 47 and is therefore appealable¹ See Note 7 to R 10 *ante*

R. 13. [New] *All matters arising between the Government and any party to the suit under Rule 10, Rule 11 or Rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning*

Government to be deemed a party of Section 47

Synopsis

Scope and object of the Rule

Note No	1

1 Scope and object of the Rule

This rule is new. It sets at rest the conflicting rulings of the several High Courts under the old Code as to whether the Government is to be deemed a party to the proper application and suit (See Note 7 to R 10). Questions arising under Rr 10 to 12 between the Government and any of the parties are now questions to be determined under S 47 and therefore this rule operates as a bar to the institution of an independent suit whether by the Crown or any other party with reference to such matters¹

R. 14. [New] *Where an order is made under Rule 10, Rule 11 or Rule 12, the Court shall forthwith cause a copy of the decree to be forwarded to the Collector.*

Copy of decree to be sent to Collector

Synopsis

Scope of the Rule

Note No	1

1 Scope of the Rule

All that the Court should do under this rule is to send to the Collector a copy of the decree which it has passed and which contains an order that the

Order 33 Rule 12—Note 1

¹ The rule is under the old Code in the absence of which a provision were conflicting (1878) 2 Cal L Rep 161 (1872) Government could not apply (1881) 15 Bom 77 ("") (Can) (See also (1902) 23 Bom 102 (1903)

106) 6 Bom L R 1122]

2 (1911) 12 Ind Cas 29 (90) 55 Bom 143

Note 2

1 (1911) 12 Ind Cas 29 (90) 35 Bom 41

Order 33 Rule 13—Note 1

1 (1919) 1919 Pat 101 (101) 1 Pat L Jom 106

plaintiff shall pay a certain sum to Government. What the Collector does after the receipt of the copy is no concern of the Court and the Court cannot forward the decree to him *with a direction* to collect the sum payable by plaintiff.¹

R. 15. [S 413] An order *refusing* to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government *and by the opposite party* in opposing his application for leave to sue as a pauper.

[1877—S 413; 1859—S 310]

Local Amendments

RANGOON

By two ntl word pauper and the word shall occurring in the 2 lth in art the fell via —

Otherwise than on the ground stated in Cl (i) of Rule 5

Synopsis

	Note No		Note No
Scope of the Rule	1	Right to sue	4
Bar to subsequent application	2	Costs incurred	5
Dismissal of an application for default	3		

Other Topics

Pauper appeal See Note 1 Pt (4).

1 Scope of the Rule

The Rule provides that an order *refusing* an application to sue in *forma pauperis* shall operate as a bar to a similar subsequent *application*. It does not, however, bar a subsequent *suit* provided the costs of the Government and of the opposite party are paid.¹ Nor does the refusal of the proper application bar an application for a *review* of that order.² As to whether the Court can after the refusal of the application allow the pauper applicant to pay the requisite Court-fee within a time to be fixed by it and validate the plaint see Note 10 to S 149 and the case cited below.³

The provisions of this rule apply also to applications for leave to *appeal* as a pauper.⁴

Order 33 Rule 14—Note 1

1 (1930) 1930 Rang 31² (313) 8 Rang 211

Order 33 Rule 15—Note 1

1 (1905) 17 All 576 (28)

(189J) 21 All 39 (60 361) O 2 R 213

no bar

(1930) 20 Bom 504 (510)

(1897) 24 Cal 840 (900)

(1917) 1917 All 955 (300)

(1932) 1932 All 919 (914)

(1880) 4 Bom 114 (115)

(1870) 11 South W R 22 (22 3)

(1869-70) 2 Feng L R Apl 2J (30)

(1898) 20 All 410 (411) No Court fee is payable on an application for review like the plaint

3 (1917) 14 Ind Cas 297 (298) (Cal) Following (1897) 24 Cal 85J

2 Bar to subsequent application

The rule specifically provides that an order "*refusing*" the pauper application will operate as a bar to a subsequent application of the like nature in respect of the same right to sue R 7, *ante*, empowers the Court under the circumstances mentioned therein, either to allow or *refuse* to allow an application to sue as a pauper. There is a conflict of opinion as to whether an order of *rejection* of an application under R 5 of this Order is an order of 'refusal' within the meaning of this rule. In *Atul Chandra Sen v Peary Mohun*,¹ it was observed by the High Court of Calcutta that there is no distinction between an order of rejection under R 5 and an order of refusal under R 7 and both kinds of orders alike bar a subsequent application under this rule.

The order in that case was however, one passed *after evidence* and, therefore presumably one passed under R 7.² The High Courts of Allahabad³ Bombay⁴ Lahore⁵ Madras⁶ and Rangoon⁷ and the Chief Court of Oudh^{7a} have on the other hand, held that the bar under this rule does not extend to an order of rejection passed under R 5. It is submitted that the latter view is correct. The Calcutta High Court has, however, in a recent case^{7b} dissented from the decision in *Atul Chandra Sen v Peary Mohun* mentioned above and has followed the view of the other High Courts.

An order returning the application for presentation to the proper Court does not amount to an order of refusal within the meaning of this rule.⁸

The bar under this rule being one which affects the jurisdiction of the Court to entertain a fresh application, the Court is bound to take notice of it although it is raised at a late stage in subsequent proceedings.⁹

3 Dismissal of an application for default

According to the decision in the undermentioned case¹ of the High Court of Calcutta a dismissal of an application for default of appearance operates as a bar to the entertainment of a fresh application under this rule. But according to the other High Courts² such a dismissal does not amount to an order of refusal within the meaning of this rule and a second application is not barred. The High Court of Calcutta also, has, in a recent case^{2a} followed the view of these High Courts dissenting from the earlier decision of its own Court.

In *Ranchod Marar v Bezant*,³ it was held by the High Court of Bombay that an order rejecting the application as the applicant did not wish to proceed with the same amounted to an order of refusal within the meaning of the corres-

Note 2

9 (1896) 20 Bom 86 (96)

Note 3

151]

3 (1895) 7 All 661 (664) (F B)

4 (1896) 20 Bom 86 (91-95)

N)l.

- (3) Under the Transfer of Property Act there was no provision for the passing of a final decree where payment was made in accordance with the preliminary decree. This omission has been rectified in this Order.

In suits relating to mortgages, Courts should be guided by the provisions of O 34 and not by the English practice.² The High Court on its original side is also governed by these provisions.³

This order applies not only to mortgages of *immovable property* but also to mortgages of *chattels*⁴ and to charges.⁵ See R 15 below. The provisions of this order have no application to suits under S 12 of the Redemption of Mortgages Act. Punjab Act 2 of 1913.⁶

2 Transfer of Property Act S 85

This Rule corresponds to S 85 of the Transfer of Property Act with the following material alterations —

- (1) The words "all persons having an interest either in the mortgage security or in the right of redemption" have been substituted for the words "All persons having an interest in the property comprised in a mortgage".
- (2) The words "provided that the plaintiff has notice of such interest which occurred at the end of S 85" have been omitted.
- (3) An explanation has been added.

The omission of the proviso to S 85 in the present Rule shows that a person may be a necessary party to a mortgage suit though the plaintiff may not be *aware* of that person's interest in the mortgaged property.¹ Cases under S 85 of the Transfer of Property Act bearing on the question of notice are only of academic interest now.²

The other effects of the changes introduced by the Rule have been discussed in their proper places in the commentary on this Rule.

3 Scope and object of the Rule

The object of the present Rule as to joinder of parties in mortgage suits is to avoid multiplicity of suits.¹ The Rule applies only to suits relating to mortgages (*i.e.* suits for sale, foreclosure or redemption) and to suits to enforce *charges* but not to suits for *ejectment*.² The Rule does not *prohibit* the joining of any party but merely lays down that all persons interested in the mortgage security or in the right of redemption should be made parties.³

² (1906) 13 G. Oudh 113 (113)

³ (1910) 11 Cal 307 (310)

⁴ (1915) 131 Cal 161 (161) 42 Cal 455
[See also Note 20 to R 2 (1902) 1932 Cal 324 (333) 39 Cal 66. Rule as to costs applicable to mortgage of chattels.]

[But see (1903) 1133 Bom 51 (54, 55)]

(1905) 1 Nag L R 117 (190)

⁵ (1933) 133 Lah 173 (181) 14 Ind 218

Note 2

¹ (1910) 7 Ind Cas 302 (304) 33 All 71

² (1908) 12 Cal W N 911 (918)

(1907) 6 Cal L Jour 113 (192)

(1878) 3 Cal L Jour 12 (13, 14)

(1909) 3 Ind Cas 300 (301) 5 Nag L R 117

(1915) 1315 Cal 123 (130)

(1915) 1915 Cal 423 (423)

(1914) 1914 P C 136 (137)

Ind App 216 (P C)

(1899) 21 All 195a

(1909) 21 All 193 (194)

(1899) 1899 All W N 34 (34)

Note 3

¹ (1891) 13 All 432 (439) (K B)

(1897) 19 All 373 (381)

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- (1915) 1915 Cal 432 (433)
(1914) 1914 P C 136 (13) 36 All 383 41
Ind App 216 (P C)
(1899) 21 All 195a
(1899) 21 All 193 (194)
(1899) 1899 All W N 34 (34)

Note 3

- 1 (1801) 13 All 432 (450) (F B)
(1837) 19 All 373 (381)
(1901) 28 Cal 517 (530)

to costs applicable to mortgage of
chattels]
[But see (1933) 1933 Bom 51 (54,
55)]

- (1905) 1 Nag L R 117 (120)
(1933) 1933 Lah 179 (181) 14 Lah 218

Note 2

- 1 (1910) 7 Ind Cal 202 (204) 33 All 71
(1905) 12 Cal W N 911 (913)
(1907) 6 Cal L Jour 119 (22)
(1877) 3 Cal L Jour 12 (13 14)
(1900) 3 Ind Cal 70 (71) 5 Nag L R 117
(1915) 1915 Cal 123 (30)

- 2 (1909) 1 Ind Cas 60 (6) 12
3 (1920) 1920 Nag 24 (2)

4 'Subject to the provisions of this Code

This expression has been substituted for the words Subject to the provisions of the Code of Civil Procedure S 437 (now O 31 R 1) which occurred in the Transfer of Property Act S 85 Hence the present rule is subject not only to O 31 R 1 but also to other provisions of the Code as for instance O 1 R 9¹ or O 30 (Suits by or against firms)²

5 Persons having an interest either in the mortgage security or in the right of redemption

Under S 85 of the Transfer of Property Act the plaintiff in a suit relating to a mortgage was bound to implead all persons having an interest in the "Property comprised in the mortgage" This gave rise to a conflict of decisions According to one view the words Property comprised in the mortgage referred to the *interest*, as distinguished from the *physical property* which the mortgagor was competent to transfer by way of mortgage at the date of the transaction¹ In other words, no person according to this view, who had no interest either in the *mortgage security* or in the *right of redemption* could be made a party The High Court of Allahabad on the other hand held that the word property meant the *physical property* mortgaged and that it was therefore necessary to implead all persons claiming interest in the property though they had no interest in the mortgage security or in the right of redemption² The present rule has adopted the former view and the Allahabad view is now no longer law

All the High Courts were however agreed, even in cases coming under S 85 of the Transfer of Property Act that a person claiming adversely to the mortgagor and the mortgagee *i e* a person claiming a *paramount* title was not a necessary or a proper party to a suit relating to a mortgage³ The same principle has been held to apply under the present rule also⁴ Thus a person impleaded as the legal representative of a deceased mortgagor cannot have a paramount title to the property which he sets up adversely to the mortgagor determined in the suit⁵ A person who in a redemption suit claims

Note 4

- 1 (1924) 1924 All 107 (108)
(1933) 1933 Cal 325 (328) 6
[See also (1932) 1932
(See also Note 19 P
2 (1911) 12 Ind Cas 679 (630) (All)]

Note 5

- 1 person entitled to redeem but setting up paramount title in himself cannot be added as a party under O 1 R 10
(1932) 1932 Notes 18e 33 Pun L R 240 (241)
5 (1906) 1926 Rang 208 (203) 4 Rang 214
(1930) 1930 Lah 1068 (1069)
(1911) 1921 Cal 343 (343)
(1927) 1927 Snd 265 (266 267)
(1926) 1926 Mad 744 (746)
(1918) 1918 All 81 (84) 40 All 584
(1918) 1918 Cal 577 (578)
(1916) 1916 P C 18 (19) 43 Ind App 187
33 All 468 (P C)
(1914) 1914 All 205 (207)
(1914) 1914 Oudh 184 (185)
(1909) 31 All 11 (13)
(1931) 1931 Pat 61 (68) 10 Pat 234
(1927) 1927 Oudh 607 (608)
(1927) 1927 Mad 301 (301)
- (1927) 1927 Mad 345 (346)
(1921) 1921 Mad 701 (704) Investigation of mortgagor's title to land is not

the right of redemption in opposition to the plaintiff cannot be said to be claiming a title paramount to that of the mortgagor and the mortgagee and may be a proper party to the suit.⁶ The High Court of Madras seems to draw a distinction between a suit for redemption and a suit for the enforcement of a mortgage and is inclined to hold that persons claiming the property adversely to the mortgagor and mortgagee can be joined as parties to a suit for redemption. But the judgments in these cases do not show why the general rule as to the exclusion of questions relating to paramount or adverse title from mortgage suits should not apply to suits for redemption. On the other hand, it has been held by the Patna High Court⁸ that even in suits for redemption persons asserting a paramount title to the mortgaged property should not be joined as parties. Where a person asserting a paramount title to the property has been erroneously made a party to a suit relating to a mortgage he should be discharged from the suit.⁹ But an objection on the ground of the joinder of such a person is not one affecting jurisdiction but is only an irregularity in the matter of the joinder of parties and can be cured under S. 99 of the Code.¹⁰ Where therefore a party allows the suit to go on and the Court adjudicates on his claim to paramount title he will be bound by the decision and cannot subsequently contend that the question was not within the purview of the suit.¹¹ Moreover the rule as to the exclusion of paramount title is not an inflexible one and in proper cases persons asserting a paramount title to the property can be conveniently made parties to a mortgage suit and their claims can be adjudicated upon in such suit.¹² Thus, where the person claiming paramount or adverse title is in possession of the mortgaged property and is likely to resist the claim of the plaintiff if the latter succeeds in the suit, it may be convenient to join him as a party so as to avoid a multiplicity of suits.¹³ Similarly where

(1909) 13 Cal 67 (68) 33 Cal W N 603
 (1918) 1918 Cal 333 (334) 44 Cal 425
 (1906) 23 Mad 217 (221)
 (1907) 5 Oudh Cas 34 (35)
 (1908) 12 Cal W N 31 (32) 36
 [But see (1910) 7 Ind Cas 321 (322) (Cal)]

[See also (1932) 1932 Cal 12 (13) 58 Cal 12 (22)]

(1916) 1916 Oudh 25 (27) 26 Ind Cas 61 (65)
 1) O C 58 Mortgage suit against the manager of Hindu joint family. S. implicated—Sons can contend that the mortgage does not bind the family title

6 (1910) 8 Ind Cas 95 (104) (Lah)
 (1868) 3 Agra H C R 144 (145)
 (1924) 1924 Pat 34 (201) 21 at 100

7 (1916) 1918 Mad 705 (706)
 [See also (1910) 8 Ind Cas 665 (686) (Mad)]

8 (1927) 1927 Pat 45 (45)

9 (1924) 1924 Oudh 13 (23)
 (1920) 1926 Cal 1132 (1132) 1193

(1914) 1914 Cal 143 (145) 19 Ind Cas 686 (688) 41 Cal 69

10 (1928) 1928 Nag 306 (307)
 (1925) 1925 Cal 973 (976) 978
 (1918) 1918 Mad 705 (705)

11 (1924) 1924 Oudh 19 (23)
 (1934) 1934 Oudh 50 (54) 9 Luck 291

(1921) 1921 Nag 67 (68) 17 Nag L R 176

(1929) 1929 Pat 678 (679) 9 Pat 539

(1924) 1924 Mad 193 (196)

(1918) 1918 Cal 933 (937) 44 Cal 425

(1916) 1916 Cal 173 (173)

(1907) 5 Cal L Jour 90 (104)

[See also (1926) 1926 Cal 1192 (1192) 1193] Plaintiff impleading person claiming paramount title—He can not subsequently claim at late stage that such person should be discharged]

12 (1918) 1918 Pat 356 (363)

(1935) 1935 Nag 63 (68)

(1914) 1914 Mad 332 (333)

(1911) 11 Ind Cas 826 (826) (Cal)

(1917) 1917 Oudh 159 (159) Suit on mortgage—Persons alleging that they are owners of property and executors of the subsequent mortgage, the mortgagee in which, was impleaded by the plaintiff are proper parties

(1931) 1931 Nag 20 (23) 26 Nag L R 359

(1904) 8 Cal W N 365 (368)

(1910) 7 Ind Cas 921 (922) (Cal) Defendant mortgagor's legal representative can set up his own title to the property

13 (1924) 1924 Pat 613 (610) 3 Pat 244

(1935) 1935 Nag 63 (68)

it is alleged that the person claiming paramount title is only a *benamudar* for the mortgagor, he can be joined as a party to the suit and the question can be decided therein.¹⁴ So also in the case of mortgage of joint family property by the manager of joint Hindu family the other members of the family, who are joined as defendants to a suit on the mortgage can question the validity of the mortgage.¹⁵

Where a person is dismissed from a suit on a mortgage on the ground of his claiming a paramount title to the property, he cannot subsequently sue for redemption.¹⁶

The question whether a person other than one claiming a paramount title, may be made a party to a suit relating to a mortgage and whether the questions raised by him can be gone into in such suit will depend upon the applicability of the provisions of Orders 1 and 2 thereto. As has been seen in Note 30 to O 1, R 10 *ante*, questions raised purely as between the plaintiffs or between the defendants *inter se* and in which the opposite side is not concerned, are not questions involved in the suit and need not be gone into in the suit. Thus in a suit on a mortgage in favour of a deceased person a person claiming the estate of the deceased mortgagee in opposition to the plaintiff is not a necessary party to the suit.¹⁷ Similarly where the plaintiff mortgagee dies and some of his legal representatives are brought on the record, a person who claims also to be another legal representative cannot be added as party on that ground only and allowed to raise questions purely between himself and the rival claimants *inter se*.¹⁸ It has also been held similarly that a question of the relative liability of each of several co-mortgagors cannot be gone into in a mortgage suit.¹⁹

6 Parties to a suit for foreclosure, sale or redemption

As has been seen in Note 5 *ante*, all persons having an interest in the mortgage security or in the right of redemption should be made parties to any suit relating to the mortgage. The interest should be one *subsisting* at the time of the suit.¹ Thus the owner of a *contingent* interest like that of a Hindu

(See also (1910) 8 Ind Cas 883 (88C) 18
(Mad)]

14 (1928) 1928 Mad 2 (4 5) 19
(1925) 1925 Cal 973 (97C)

15 (1916) 1916 Oudh 25 (26)
(1928) 1928 Mad 764 (76J)
(1928) 1928 Mad 199 (200)

(Similarly (1921) 1921 P C 118 (119)
(P C) Mortgage by Hindu widow—
Suit on mortgage—Reversioner joined
as party—Reversioner can question
binding nature of mortgage against
him.]

(See also (1930) 1930 Nag 69 (90)
Suit on mortgage—Subsequent
mortgagee joined—He can dispute
the binding nature of the mortgage
against him on the ground that it
was not made with his consent
which was requisite under the law,
he being manager of the fund.]

1 (188C) 12 Cal 414 (421, 422) 12 Ind App
171 (P C)

11 (19C) 191C Nag 120 (121) 19 Nag LR 19
1 (1915) 1915 Mad 974 (97J)

(See also (1931) 1931 Nag 161 (165)
27 Nag LR 312 Subsequent pur-
chaser—Impleaded—Disclaimer by
him of any interest—To be dis-
charged immediately without rais-
ing issue between defendants *inter
se*.)

Note 6

1 (1883) 13 Bom 51 (53)
(1932) 16 Bom 599 (602) Cession of in
(1913)

[Presenting, the mortgagor in the
suit—Mortgagor not necessary party
unless he can show he has been
impleaded
(See also (1871) 3 Bom H C O C 1
(19) Decedent mortgagor having
equity transferred to another

receiver is not a necessary party to the suit.² Similarly a transferee pending a suit on the mortgage is not a necessary party to the suit.³

The following are necessary parties as being interested in the mortgage security —

- (1) The heirs and assignees of the mortgagee's interest
- (2) Co-mortgagees⁴

The following are necessary parties as being interested in the equity of redemption —

- (1) All persons mentioned in S 91 of the Transfer of Property Act.⁵ Thus the mortgagor,^{5a} all co-mortgagors,⁶ purchasers of the equity of redemption,⁷ subsequent mortgagees,⁸ and other

the mortgagee's property — His legal representatives are necessary parties.

- (131) 1911 Nag 161 (169) 27 Nag L R 312 Subsequent purchaser—Disclaiming all interest to be discharged at once
- (1308) 50 All 47 (1308)
- (1327) 1927 Nag 222 (223) L R of mortgagor
- (1330) 21 All 149 (1311)
- (1353) 18-3 All W N 31 (32)
- (1376) 1926 Jour 142 (4) 35 I C 213 (Oudh)
- (1321) 1921 Cal 601 (603) Prior mortgagee is in no way bound or affected by the subsequent encumbrance created by the mortgagor
- (1313) 1913 P C 24 (26) 46 Ind App 272 47 Cal 175 (P C)
- (1333) 1933 Cal 621 (622) 60 Cal 777 All mortgagees or heirs of mortgagees must be parties to suit — Necessary party joined after limitation—Whole suit fails
- (1302) 21 All 22 (224)
- (1351) 9 All 63 (73) (P B) Sole mortgagee dying—Several heirs left—All must be joined
- (1313) 20 Ind Cas 321 (370) (Cal)
- (1314) 1914 Cal 783 (784)
- (1314) 1914 All 20 (225)
- (1316) 1916 Pat 411 (414) Suit by one co-heir of a mortgagee — All other co-heirs should be joined as parties
- (1306) 1926 Cal 416 (417) Heirs of co-mortgagee are necessary parties to the suit
- (1327) 1927 Mad 773 (775) Kurichit deed executed by stake holder of chit fund transactions *Quære* whether all the subscribers to the fund were necessary parties to the suit [See also (1932) 1932 Cal 34 (35, 36) Some heirs of mortgagee suing — Others consenting — Decree for former correct]
- (1333) 1933 Lah 173 (181) 14 Lah 218 Suit by mortgagees to set aside order of Collector for redemption on payment of a specified sum — Under S 12 of Punjab Redemption of Mortgages Act II of 1913—Death of one of the

entirety

- 5 (1323) 1923 Nag 311 (313)
- (1312) 17 Ind Cas 432 (432) (Cal)
- (1920) 1920 Nag 247 (248)
- (1926) 1926 All 46 (47) 46 All 171
- (1901) 23 All 467 (469)
- 5a (1892) 15 Mad 54 (56)
- (1898) 23 Bom 287 (231)
- (1931) 1931 Oudh 410 (410 411)
- 6 (1897) 11 Bom 423 (428)
- (1892 1893) Upp Bar R Vol II, 586
- (1874) 21 Suth W R 423 (429)
- (1855) 7 All J G (378)
- (1893) 3 L B R 15 (17)
- (1855) 9 Bom 128 (131)
- (1856) 10 Bom 648 (655 Gou)
- (1903) 20 Mad 461 (467)
- (1913) 18 Ind Cas 141 (182) (L B)
- (1926) 1926 All 46 (47) 46 All 171
- (1929) 1929 All 814 (814)
- (1923) 1923 Bom 451 (453)
- (1892) 16 Bom 466 (491) Auction purchaser in execution of money decree
- (1897) 19 All 441 (442)
- (1871) 14 Moo Ind App 144 (147) (P C)
- (1920) 1920 Nag 247 (248) Transferee of mortgaged property in breach of covenant against alienation is a necessary party
- (1930) 1930 Mad 1017 (1020) Purchaser from Government of mortgaged property attached under Cr P C, S 68, is entitled to be made party to mortgage suit and has the right to redeem
- 8 (1908) 1908 Pun Re No 64 Page 309
- (1316) 1916 Lah 713 (219) 1916 Pun Re No 86
- (1892) 15 Mad 457 (460)
- (1894) 21 Cal 116 (120)
- (1886) 10 Bom 83 (91)
- (1890) 12 All 537 (539)
- (1884) 8 Bom 163 (173)

it is alleged that the person claiming paramount title is only a *benamidar* for the mortgagor, he can be joined as a party to the suit and the question can be decided therein.¹⁴ So also in the case of mortgage of joint family property by the manager of joint Hindu family the other members of the family who are joined as defendants to a suit on the mortgage can question the validity of the mortgage.¹⁵

Where a person is dismissed from a suit on a mortgage on the ground of his claiming a paramount title to the property he cannot subsequently sue for redemption.¹⁶

The question whether a person other than one claiming a paramount title may be made a party to a suit relating to a mortgage and whether the questions raised by him can be gone into in such suit will depend upon the applicability of the provisions of Orders 1 and 2 thereto. As has been seen in Note 30 to O 1, R 10 *ante*, questions raised purely as between the plaintiffs or between the defendants *inter se* and in which the opposite side is not concerned are not questions involved in the suit and need not be gone into in the suit. Thus in a suit on a mortgage in favour of a deceased person a person claiming the estate of the deceased mortgagee in opposition to the plaintiff is not a necessary party to the suit.¹⁷ Similarly where the plaintiff mortgagee dies and some of his legal representatives are brought on the record a person who claims also to be another legal representative cannot be added as party on that ground only and allowed to raise questions purely between himself and the rival claimants *inter se*.¹⁸ It has also been held similarly that a question of the relative liability of each of several co mortgagors cannot be gone into in a mortgage suit.¹⁹

6 Parties to a suit for foreclosure, sale or redemption

As has been seen in Note 5 *ante* all persons having an interest in the mortgage security or in the right of redemption should be made parties to any suit relating to the mortgage. The interest should be one *subsisting* at the time of the suit.⁴ Thus the owner of a *contingent* interest like that of a Hindu

[See also (1910) 8 Ind. Cas. 889 (886) (Mad.)]

11 (1928) 1928 Mad 2 (4 5)
(1925) 1925 Cal 573 (976)

15 (1916) 1916 Oudh 25 (96)
(1928) 1928 Mad 764 (169)
(1928) 1928 Mad 159 (200)

[Similarly (1921) 1921 P C 118 (119) (P C) Mortgage by Hindu widow—Suit on mortgage—Reversioner joined as party—Reversioner can question binding nature of mortgage against him.]

[See also (1900) 1930 Nag 89 (90) Suit on mortgage—Subsequent mortgagee joined—He can dispute the binding nature of the mortgage against him on the ground that it was not made with his consent which was requisite under the law he being *malguzar* of the land.]

14 (18 C) 12 Cal 414 (421 422) 12 Ind App 11 (P C)

(1910) 1910 Nag 120 (121) 13 Nag L R 69

1 (1 24) 1928 Ma 178 (979)

18 (1921) 1927 Mad 1041 (1047)

[See also (1933) 1933 Cal 329 (328)]

19 (1927) 1927 Pat 117 (120)

(1923) 1923 Pat 193 (201)

[See also (1931) 1931 Nag 161 (165) 27 Nag L R 312 Subsequent purchaser—Impleaded—Disclaimer by him of any interest—To be discharged immediately without raising issue between defendants *inter se*]

Note 6

1 (1888) 12 Bom 11 (33)

(1897) 16 Bom 593 (602) Cessation of interest due to partition

(1910) 1910 Mad 1205 (1203) A ct on sale of mortgagor's rights—Murcher joined as party and effectively representing the mortgagor in the suit—Mortgagor not necessary party unless he can show he has been prejudiced

[See also (18 1) 8 Bom H C O C 1 (19) Deceased mortgagor having completely transferred to another

receiver is not a necessary party to the suit.² Similarly a transferee pending a suit on the mortgage is not a necessary party to the suit.³

The following are necessary parties as being interested in the mortgage security —

- 1 The heirs and assignees of the mortgagee's interest
- 2 Co-mortgagees.⁴

The following are necessary parties as being interested in the equity of redemption —

- (1) All persons mentioned in S 91 of the Transfer of Property Act.⁵ Thus the mortgagor,⁶ all co-mortgagors,⁶ purchasers of the equity of redemption,⁷ subsequent mortgagees,⁸ and other

the mortgagee's property. His legal representatives if not necessary parties.

plaintiffs and failure to implead his LRs — Each holds a well defined and divisible share — Order 1 not applicable and suit does not abate in entirety.

- 3 (1123) 1923 Neg 311 (313)
- (1112) 17 Ind Cas 432 (432) (Cal)
- (1920) 1120 Neg 247 (246)
- (1926) 1926 All 46 (47) 48 All 171
- (1901) 23 All 467 (469)
- 5a (1897) 12 Mad 54 (56)
- (1848) 23 Bom 257 (291)
- (1931) 1931 Oudh 410 (410 411)
- 6 (1957) 11 Pom 425 (428)

- (1897 1898) Upp Bur R Vol II 586
- (1874) 21 Suth W R 423 (428)
- (1885) 7 All 16 (378)
- (1895) 7 L B R 15 (17)
- (1865) 9 Bom 128 (131)
- (1866) 10 Bom 618 (650 656)
- (1903) 20 Mad 461 (462)
- (1913) 18 Ind Cas 191 (182) (L B)
- (1926) 1926 All 46 (47) 48 All 171

re-chaser
in execution of money decree

- surety party
- (1930) 1930 Mad 1017 (1020) Purchaser from Government of mortgaged property attached under Cr P C S 63, is entitled to be made party to mortgage suit and has the right to redeem.

- 8 (1903) 1903 Pun Re No 61 page 309
- (1916) 1916 Lah 219 (213) 1916 Pun Re No 86
- (1892) 15 Mad 497 (489)
- (1894) 21 Cal 116 (120)
- (1886) 10 Bom 89 (91)
- (1890) 12 All 537 (539)
- (1884) 8 Bom 168 (173)

- (1131) 1911 Neg 101 (105) 27 Neg R R 312
- Suit against purchaser — Disclaiming all interest — To be discharged at once

- 2 (1908) 20 All 447 (448)

- 3 (1927) 1927 Neg 39 (399) Decree of mort

- (1899) 21 All 143 (144)

- (1883) 18 J All W N 31 (32)

- (1906) 1906 Jour 112 (4) 95 I C 213 (Oudh)

- (1921) 1921 Cal 801 (803) Prior mortgagee

- is in no way bound or affected by the subsequent encumbrance created by vendente lite

- 4 (1919) 1919 P C 24 (36) 46 Ind App 272

- 47 Cal 175 (P C)

- (1933) 1933 Cal 631 (632) 60 Cal 777 All

- mortgagee or heirs of mortgagees must be parties to suit — Necessary party joined after limitation — Whole suit fails

- (1902) 21 All 226 (228)

- (1847) 9 All 63 (73) (P B) Sole mortgagee

- dying — Several heirs left — All must be joined

- (1910) 20 Ind Cas 321 (330) (Cal)

- (1914) 1914 Cal 783 (784)

- (1914) 1914 All 225 (226)

- (1916) 1916 Ind 411 (414) Suit by one co

- heir of a mortgagee — All other co

- heirs should be joined as parties

- (1906) 1906 Cal 416 (417) Heirs of co mort

- gagee are necessary parties to the

- suit

- (1927) 1927 Mad 773 (774) Kurukh died

- executed by stake holder of chit

- fund transactions *Qiaero* whether

- all the subscribers to the fund were

- necessary parties to the suit

- [See also (1912) 1912 Cal 31 (35 36)

- Some heirs of mortgagee suing —

- Others consenting — Decree for for

- mer correct]

- (1933) 1933 Lah 173 (181) 14 Lah 218 Suit

- by mortgagees to set aside order of

- Collector for redemption on payment

- of a specific sum — Under S 12 of

- Punjab Redemption of Mortgages

- Act II of 1913 — Death of one of the

persons interested in the equity of redemption⁹ and in the proper taking of accounts,¹⁰ are all necessary parties

- (2) Prior to the amendment of the Transfer of Property Act by Act XX of 1929, there was a conflict of decisions as to whether an *attaching creditor* (who was one of the persons mentioned in S 91 of that Act) was a necessary party to the mortgage suit. The amended S 91 does not mention an attaching creditor as one of the persons entitled to redeem a mortgage and he is therefore no longer a necessary party to a mortgage suit.

The following are not necessary parties to a suit relating to a mortgage —

- (a) A prior mortgagee. See the explanation.
- (b) A person merely in possession of the mortgaged property.¹²
- (c) A person whose name is merely entered in the village papers as having some title to the plots in question, but who is in no way connected with the mortgage.¹³
- (d) A person who has a right to be maintained out of the income of the mortgaged property when such right is not made a *charge* on the property.¹⁴
- (e) A person having merely an inchoate title to the property.¹⁵
- (f) A receiver appointed in a partition suit previous to the mortgage suit.¹⁶

9 (1927) 1927 Bom 474 (477) 51 Bom 771 Heirs of intestate Parsi who intermeddle with his estate are his legal representatives and proper parties to suit on mortgage executed by the deceased Parsi.

Bourke Cas 319 Suit for foreclosure—Personal representatives of the mortgagor are necessary parties.

(1892) 15 Mad 487 (489)

(1920) 1926 Nag 496 (497) Person interested — The test is whether the party will be prejudiced by foreclosure or sale.

10 (1874) 6 N W P H C R 208 (210)

(1888) 15 Cal 35 (38)

11 (1912) 17 Ind Cas 432 (433) (Cal) He is a necessary party.

(1933) 1933 Nag 333 (334) (Do)

(1923) 1923 Nag 311 (313) (Do)

(1928) 1928 Nag 97 (98) 23 Nag L R 164

(Do)

(1914) 1914 Mad 439 (439) 15 Ind Cas 334

(1931) 1931 Cal 703 (66 770) 58 Cal 538

bution gets right to redeem and is a necessary party — But after purchase in Court sale himself ceases to be a necessary party.

[See also (1932) 1932 Cal 661 (663) 59 Cal 827 Attachment raised on security being furnished — Attaching decree holder ceases to be a necessary party.]

12 (1924) 1924 Nag 191 (193)

(1921) 1921 Nag 67 (66) 17 Nag L R 176

Trespasser not a necessary party [See also (1932) 1932 Nag 144 (147, 148) 25 Nag L R 69 Redemption—Trespassers in possession — Decree against — Not binding on real heirs of deceased mortgagor.]

13 (1925) 1925 All 593 (593)

14 (1900) 22 All 191 (199) 27 Ind App 51 (PC)

(169)

19 Sind L R 268 Mortgagee's property under management of manager under Sind Encumbered Estates Act—Suit for redemption—Manager not a necessary party because the claim for redemption is not a claim

(1931) 1931 Rang 108 (109) (Do)

(1920) 1920 Mad 126 (128) 48 Mad 696

(Do)

(1929) 1929 All 861 (861) (Do)

(1921) 1921 Mad 30 (34) 44 Mad 232 (Do)

- (g) Where one of two co-owners of a property mortgages his undivided share and a suit is brought in relation to such mortgage, the other co-owner is not a necessary party thereto¹⁷
- (h) Where a number of persons own the equity of redemption in distinct shares and the mortgagee, in his suit on the mortgage, exempts one or more of such shares, and claims only a decree for a proportionate part of the mortgage debt, the owners of the exempted shares are not necessary parties¹⁸ The same rule applies where the mortgagee has released from the mortgage any portions of the property¹⁹
- (i) Where a mortgagee has through negligence, allowed strangers to trespass upon, and acquire parts of the mortgaged property, such persons are not necessary parties to a suit for redemption²⁰ The general rule is that a mortgage is indivisible and hence suits cannot be brought for the redemption or enforcement of a mortgage part by part^{20a}

As to the parties to suits, other than suits for redemption, foreclosure or sale by or against mortgagors or mortgagees, see the undermentioned cases⁻¹

- for any debt against the mortgagee]
- 17 (1905) 32 Cal 746 (749)
- 18 (1905) 2 Cal L Jour 202 (216)
- (1905) 31 Mad 333 (336)
- (1903) 30 Cal 755 (757)
- [See (1931) 191 Nag 41 (45) 27 Nag L R 4 If mortgagee claims the whole debt from the rest, the exempted sharer in the equity of redemption would be a necessary party]
- (1906) 23 All 174 (177)
- (1905) 190a All W N 156 (156) Portions already redeemed by paying proportionate amount — Owners of such portions are not necessary parties [See also (1913) 19 Ind Cas 614 (614) 35 All 247]
- (1903) 1 Ind Cas 80 (81) (Mad)
- 19 (1905) 30 Cal 755 (757)
- (1905) 190a All W N 156 (156) Where one item has been already redeemed its owner is not necessary party to suit as to other items See also the following cases holding that where a mortgagee has lost his rights against the owner of a portion of the property or has released such portion from his mortgage he cannot throw the whole burden on the rest of the

- [But see (1913) 20 Ind Cas 41 (42, 43) 35 All 441]
- (1895) 1898 All W N 120 (120)
- [Compare (1913) 19 Ind Cas 423 (423) (Cal) Released part being property which mortgagor was not entitled to mortgage — Mortgagee can claim the whole debt from the rest of the property]
- [Compare also (1909) 1 Ind Cas 264 (277) (Cal)]
- (1891) 18 Cal 320 (321) Where whole property is included, mortgagee is not bound to apportion mortgage debt [See also (1903) 25 All 79 (82) 1902 All W N 203 Mortgagee's right to

20a (1875 78) 1 All 297 (300)

- (408) (P C) Purchaser of portion of equity of redemption in a portion of mortgaged premises entitled to redeem that portion on payment of proportionate amount]
- (1918) 1918 Mad 1142 (1144) Suit by one co owner for redemption of whole mortgage — Court can in suitable case pass decree for both reliefs viz, for partition and redemption of plaintiff's share.
- 21 (1870) 2 N W P H C R 72 (73) Suit for

7 Trustees executors or administrators

The rule is made "subject to the other provisions of the Code." This would include O 31, R 1 under which the trustee, executor or administrator in whom the property is vested can effectively represent the persons beneficially interested. The latter need not therefore be joined as parties to a suit relating to the mortgage.¹ But the Court has a discretion to join the beneficiaries in a proper case,² as for example when, in the case of an executor, the estate has been fully administered,³ or in the case of a trustee or an executor, his interest is adverse to that of the beneficiaries.⁴ In the case of joint-trustees however all of them should be impleaded in any suit relating to the mortgage.⁵

8 Benamidar

It is now well settled that a benamidar can sue or be sued in his own name and that the rule applies to mortgage suits also. The real owner is not a necessary party to such a suit. The contrary view, held in the undermentioned cases,² is not good law. There is, however, no impropriety in adding the real owner as a party in proper cases.³

- possession by mortgagee against third party who denies mortgagee's title—Mortgagor is a necessary party
- (1868 C.J.) 5 Bom H C (O C) 76 (81, 82) Suit by puisne mortgagee against first mortgagee who has been paid the amount due to him to recover the mortgaged premises—Mortgagor is a necessary party
- (1874) 22 Sutr W R 539 (533) Suit by mortgagee for possession—Subsequent mortgagees and purchasers who opposed him in obtaining possession are proper parties
- (1876) 25 Sutr W R JJ (40) Mortgagee's suit for possession of undefined area of the mortgaged land co-mortgagees are necessary parties
- (1912) 17 Ind Cas 87 (88) 36 Bom 624 Suit by puisne mortgagee to establish his mortgage and to set aside the order passed against him in claim proceedings in suit brought by prior mortgagee—Mortgagor is necessary party to puisne mortgagee's suit
- (1888) 15 Cal 35 (38) Suit to determine the rights of the puisne and prior mortgagees inter se mortgagor is necessary party
- (1901) 5 Cal W R 493 (425) Mortgagee purchasing a portion of the property in

- possession though not parties to the suit
- (1931) 1931 Bom 533 (537)
- 2 (1881) 10 Cal 713 (718) Executor finding it difficult to sue debtor—Legatee may sue
- (1927) 1927 Bom 49 (50) 51 Bom 16
- 3 (1866) L R 3 Eq 368 (374), *Clegg v Roulan*
- 4 (1883) 13 Mad 197 (206, 207)
- 5 (1908) 34 Mad 408 (414)
- (1912) 13 Ind Cas 234 (234) (Mad)
- (1903) 26 Mad 649 (653) (F R)

Note 8

- 1 (1896) 18 All 69 (74)
- (1933) 1933 Mad 685 (686) A transferee from the heirs of a benamidar mortgagor can maintain a suit for redemption
- (1899) 21 All 380 (382)
- (1906) 28 All 44 (46)
- (1838) 22 Bom 672 (678)
- (1897) 24 Cal 644 (645)
- (1922) 15 Mad 267 (268) Presumption is that benamidar instituted suit with the authority of real owner and lat

- not necessary party
- (1931) 1931 P C 229 (291) (P C) Suit for account, by some mortgagors against assignee decree holder purchaser—Other co-mortgagors previously held entitled jointly to accounts not impleaded—Suit bid for non joinder

Note 7

- 1 (1902) 6 Cal W R 488 (489) Foreclosure decree against executor binds bene

- (1900) 13 C P L R 33 (37)
- (1918) 1918 P C 140 (143) 46 Cal 566 46 Ind App 1 (P C)
- (1924) 1924 Pat 453 (459) 3 Pat 81
- (1897) 24 Cal 34 (36)
- (1895) 22 Bom 820 (823)
- (1925) 1925 C L 973 (978, 979)
- (1908) 30 All 30 (32)
- (1910) 7 Ind Cas 160 (170) (Cal)
- 2 (1889) 16 Cal 364 (366)
- (1898) 25 Cal 98 (99)
- (1903) 30 Cal 260 (272)
- (1907) 30 Mad 245 (246)
- 3 (1929) 1929 Mad 268 (269)

9 Sub mortgagee

Where a mortgagee creates a mortgage of his rights in favour of another he is said to create a sub-mortgage. The sub-mortgagee is entitled to bring to sale the *interest* of the sub mortgagor in the mortgage¹ and the original mortgagor is not a necessary party to such a suit². Where the mortgagor is also made a party to the suit, the sub mortgagee may sue for sale or foreclosure of the *mortgaged property itself* in cases and in the circumstances which would have entitled the sub mortgagor on the date of the sub-mortgage to claim that relief, for the purpose of working out his rights against the sub-mortgagor³. The mortgagor is not a necessary party to a suit for redemption by the sub-mortgagor against his sub-mortgagee,⁴ though there is no impropriety in making him a party thereto⁵. In a suit for redemption by the mortgagor against his mortgagee, the sub mortgagee as being interested in the mortgage security (is a necessary party)⁶. But where the mortgagor, not having notice of the sub-mortgage, fails to implead him in such suit and pays off the mortgage amount to the mortgagee, the sub-mortgagee cannot, after that redemption, bring the right mortgaged to him to sale⁷. The reason is that he has only a terminable interest in the mortgage-right of his sub mortgagor and when that right has been legally terminated his security so far is gone.

10 Prior mortgagees—Explanation

Under S. 85 of the Transfer of Property Act it was held in some cases that a prior mortgagee was a necessary party to a suit to enforce or redeem a puisne mortgage¹. These cases have been superseded by the explanation

Note 9

- 1 (1907) 29 All 355 (406) (F B)
- (1911) 9 Ind Cas 763 (765) (Bom)
- (1921) 1921 Lah 253 (254)
- (1903) 5 All L J 402 (403)
- (1905) 27 All 472 (477, 478)

Court which held that he could get only a money decree against the sub mortgagor is no longer good law

- (1836) 18 All 113 (114)
- (1901) 21 All W N 153 (154)
- (1903) 25 All 46 (47)
- (1905) 27 All 361 (370)
- (1905) 27 All 511 (512)

- 2 (1909) 4 Ind Cas 433 (434) (Cal)
- (1910) 5 Ind Cas 654 (655) (Cal). It is now ever open to him to implead original mortgagor

- (1911) 9 Ind Cas 763 (765) (Bom)
- (1921) 1921 Lah 253 (254)

- 3 (1908) 5 All L J 402 (404)
- (1909) 2 Ind Cas 615 (616) (Cal)

- (1837) 20 Mad 35 (36, 37)
- (1904) 26 All 611 (617)

- (1913) 18 Ind Cas 389 (390) (Oudh)
- (1905) 27 All 472 (477, 478) Sub-mortgagee can redeem (under Transfer of Property Act S. 91) prior mortgage
- [See also (1900) 1900 Pun Re No. 31,

page 10² Sub-mortgagee is entitled to retain possession until amount

- (1891) 15 Bom 632 (633, 634) Form of decree given

- (1896) 20 Bom 543 (553)

- (1927) 1922 Bom 350 (351) 16 Bom 993

- (1927) 1927 Mad 703 (704)

[See (1910) 5 Ind Cas 151 (152, 153) 37 Cal 239 37 Ind App 19 (P C)

Sub mortgagee by deposit of title deeds not impleaded—Not bound by decree or sale]

- 7 (1932) 1382 Mad 115 (117) 30 Mad 320
- (1921) 1921 Mad 374 (376)

Note 10

- 1 (1904) 14 Mad L Jour 467 (468)

- (1897) 13 All 513 (515)

- (1895) 92 Cal 33 (39)

- (1906) 30 Bom 156 (167)

- (1898) 22 Bom 701 (707)

- (1898) 20 All 110 (114, 115)

- (1891) 13 All 432 (465) (F B)

- (1900) 22 All 212 (214)

- (1891) 13 All 581 (585) Property cannot be

- 1, to the present rule under which a prior mortgagee or his transferee is not a necessary party to a suit relating to a puisne mortgage.² But there is no prohibition against joining a prior mortgagee in such a suit,³ and the equities of a particular case may even demand that he should be so made a party.⁴

Where a decree for sale is passed on foot of a puisne mortgage, without making the prior mortgagee a party to the suit the rights of the prior mortgagee are in no way affected and the sale under the decree can only be subject to the prior mortgage.⁵ Even if the prior mortgagee is made a party to the puisne mortgage's suit he is not bound to assert his prior right, if *no relief* is claimed against him and *the priority of his right is not in any way impugned* and the decree in the suit cannot affect his rights.⁶ But where he is impleaded and his prior right impugned or sought to be postponed in any way, he is bound to assert his right under the prior mortgage. Otherwise his right will be barred by constructive *res judicata*.⁷ When a prior mortgagee who has also purchased the equity of redemption and is in possession of the mortgaged property is made a defendant to a suit upon the puisne mortgage the decree may direct the puisne mortgagee to redeem the prior mortgage before bringing the property to sale.⁸

A holds a first and a third mortgage on a property B the holder of the second, *i e*, the intermediate mortgage impleads A as a defendant to the suit on the ground that he as a *third* mortgagee A is not bound to set up his prior mortgage inasmuch as the prior mortgage is not impugned.⁹ But

(1899) 21 All 272 (273) Failure to acknowledge prior lien of a defendant not fatal to suit

(1901) 1901 All W N 68 (69) Suit by subsequent mortgage for sale—Prior mortgage ignored—Offer to redeem if prior mortgage found valid Suit maintainable

[See however (1907) 29 All 205 (206) Sale subject to prior charge for maintenance allowed]

2 (1926) 1926 Nag 135 (136)

(1916) 1316 Pat 113 (114) 2 Pat L Jour 118

(1912) 13 Ind Cas 182 (182) (1912) 1 Mad W N 41

(1909) 36 Cal 193 (210)

(1920) 1920 Pat 630 (631)

(1898) 1 Oudh Cas 105 (111 112)

(1909) 1 Ind Cas 139 (139) (Cal)

(1897) 1 Cal W N 453 (454)

(1914) 1914 Bom 268 (265) 21 Ind Cas 39 (41) 38 Bom 24 Non joinder of prior mortgagee in suit by puisne mortgagee does not affect latter's

[But see (1929) 1929 All 296 (298) Subsequent mortgagee—Paying prior mortgagee—Suit by intermediate mortgagee—Subsequent mortgagee cannot insist on prior mortgage being paid—Property can be sold subject to prior mortgage]

[See (1933) 1933 Mad 595 (596) Prior mortgagee impleading second mortgagee and obtaining decree—Property purchased by private sale and satisfaction of decree entered—Subsequent suit by second mortgagee impleading prior mortgagee—Decree directing sale of property subject to his lien—Property purchased in execution—Second mortgagee purchaser is entitled to possession]

(1931) 1931 All 76 (79)

(1926) 1926 All 449 (449) 48 All 554

9 (1926) 1926 All 449 (449) 48 All 554

(1909) 9 Cal L Jour 78 (81)

he is not precluded from setting up the prior mortgage and if he so acts it up it should be adjudicated upon by the Court^{9a} Where *A's* claim to the priority rests not on a prior mortgage in his favour but on the fact of his being *sub-rogated* to the rights of a prior mortgagee by payment, he must assert the right to such priority on pain of being precluded by *res judicata* from putting it forward in a subsequent suit¹⁰ The reason is that in such a case he fills only *one role*, *i.e.*, that of puisne mortgagee and must put forward all the defences open to him Where a person holds two mortgages on the same property, he can, by force of the explanation to the rule, sue on the later mortgage subject to his rights under the earlier mortgage¹¹ though according to the High Court of Allahabad he must *expressly reserve* his rights under the prior mortgage^{11a} The High Court of Bombay has, however, held that he cannot sue on the subsequent mortgage alone unless, perhaps, he reserves his rights on the first mortgage^{11b} But according to the general trend of decisions he cannot sue on his *earlier mortgage* only and afterwards sue to enforce the second mortgage¹² But a contrary view has also been taken in the undermentioned cases¹³ which proceed upon the ground that inasmuch as the two mortgages constitute different causes of action, there is nothing to prevent their being sued on separately without regard to the question whether the mortgage sued on it is an earlier or a later one

It was held by the High Court of Patna in the undermentioned cases¹⁴ that a mortgagee can *bring the property to sale* subject to a prior mortgage in his own favour, at any rate, when he was not able to sue on the first mortgage But the consensus of opinion seems to be that though the mortgagee may be allowed to sue separately on the mortgages and obtain decrees, he cannot be allowed to bring the property to *sale twice* or under one of his mortgages subject to the other,¹⁵ the reason being that it would not be equitable to the mort-

[Contra —

(1915) 1915 Cal 373 (374)

(1903 04) 8 Cal W N 385 Puisne mortgagee being a necessary party must, when impleaded set up his prior as well as subsequent mortgages]

9a (1911) 9 Ind Cas 643 (643) (Mad)

10 (1916) 1916 Cal 808 (808)

(1912) 14 Ind Cas 496 (504) 39 Cal 527

39 Ind App 68 (P C)

(1909) 3 Ind Cas 686 (688) (Cal)

(1931) 1931 Pat 33 (33) 9 Pat 316

[But compare (1927) 1927 Nag 38

(39) Decision by Court on question

sale over same property, by same person—Separate foreclosure decrees can be passed

(1920) 1920 Mad 1026 (1029) Suit on second mortgage without reservation of rights under first mortgage—Decree—Subsequent suit on first mortgage—Maintainable as an independent cause of action so long as properties not sold away and mortgage rights not extinguished

(1920) 1920 L B 160 (160) 10 L B R 300 Suit on later mortgage—Subsequent suit on earlier one—Independent cause of action

14 (1916) 1916 Pat 113 (114) 2 Pat L Jour 118

15 (1921) 1921 Cal 321 (326)

(1921) 1921 Pat 77 (80) 2 Pat 874 Property already sold under prior decree cannot be allowed to be sold under later decree

(1908) 20 All 322 (324 325)

(1909) 3 Ind Cas 175 (176) (Cal) Property cannot be sold under second decree subject to the first.

[But see (1931) 1931 All 549 (549)

53 All 631 He is not bound to declare his prior mortgage]

11b (1915) 1915 Bom 54 (55) 39 Bom 138 30

(1902) 25 Mad 108 (113, 114)

(1901) 24 All 179 (184)

gagor to allow the mortgagee to do so, as a fair price cannot be obtained for the property at such a sale. The conflict has now practically been set at rest, in cases of mortgages coming into existence after the 1st April 1930, by the enactment of the new S 67-A of the Transfer of Property Act by which a mortgagee holding two or more mortgages shall, in the absence of a contract to the contrary be bound to sue on all the mortgages. *See also* Note 40 to S 11 *ante*

11 Mahomedan co heirs

Where a Mahomedan mortgagor or mortgagee dies leaving a number of heirs the ordinary rule is that all the heirs should be made parties to a suit relating to the mortgage.¹ But the failure to join some of the heirs is not fatal to the suit and the decree passed will bind all the heirs.² It was so held by their Lordships of the Privy Council in *Khairajmal v Daim*.³ The reason is, as has been already seen in Note 63-B to S 11 and Note 5 to S 52, *ante*, that the representatives actually brought on the record must, in the absence of fraud or collusion be deemed to be litigating in the common interest of themselves and of all the other heirs within the meaning of Expl VI of S 11 of the Code. Where however *pending the suit* objection is raised as to the non joinder of some of the heirs but the plaintiff refuses to make them parties the decree can bind only the right title and interest of the persons actually on the record.⁴ In view of the Privy Council decision referred to above the views expressed in the undermentioned cases⁵ that a decree against only some of the legal representatives of a deceased Mahomedan mortgagor is not binding on the other representatives or that there is some difference in principle between Mahomedan co-heirs and the members of a joint Hindu family in this respect cannot be accepted as correct especially as those cases do not advert to the Privy Council decision.

12 Joint Hindu family

There is a conflict of decisions as to whether, in a suit by or against the manager of a joint Hindu family to enforce or redeem a mortgage, the other members of the family are necessary parties in the sense that their interests will not be bound if they are not individually joined as parties. On the one hand, it has been held by the High Courts of Madras¹ and Patna² and in several cases of the other High Courts³ that in such a case the manager

(1904) 26 All 14 (17 18)

Note 11

1 (1887) 11 Bom 425 (428)

(1870) 14 Suth W R 21 (216)

[See also (1932) 1932 Cal 34 (35)]

2 (1915) 1915 Bom 272 (277) 39 Bom 729

3 (1904) 32 Cal 296 (313) 32 Ind App 23

(P C)

[See also the observations in (1925)

1925 All 479 (480) 17 All 466]

4 (1919) 1919 Bom 135 (137) 43 Bom 575

(1923) 1923 Bom 411 (412) 43 Bom 712

(1915) 1915 Cal 203 (205)

5 (1919) 1919 Bom 135 (137) 47 Bom 575

Note 12

1 (1914) 14 Mad 388 (393)

2 (1914) 14 Mad 222 (225)

3 (1914) 14 Mad 207 (208)

4 (1914) 14 Ind 874 (878 879) 35 Mad

685

(1930) 1930 Mad 61 (71)

(1920) 1920 Mad 814 (814) Father—Manager not precluded from suing in his own name merely because he purports to execute the document also

effectively *represents* the other members of the family and that the latter cannot impugn the proceedings as not binding on them merely on the ground of their not having been individually made parties to the suit. But in many other decisions,⁴ it has been held that the other co-parceners are necessary parties to the suit and that their interests cannot in any way be affected by the result of the suit. In this connection the following decisions of the Privy Council should be referred to.⁵ In *Kishan Prasad v. Har Narain*⁶ it was held that the manager of a joint Hindu family business effectively represents the family in all litigation by or against the family in connection with the joint family business. In *Sheo Shankar v. Juddoo Kunwar*⁷ the Privy Council observed as follows —

There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions, including foreclosure suits when the managers of joint Hindu families so effectively represent all other members of the family that the family as a whole is bound.

In *Ganpat Lal v. Bindleasin Prasad*⁸ a minor co-parcener sued for a declaration that his right to redeem a mortgage was unaffected by a sale under a decree passed against the manager without impleading him (the minor) as a party. Their Lordships rejected that claim holding that, after the purchase under his decree the mortgagee was in the position of a purchaser and that unless the sale and the decree were attacked in a properly constituted suit his possession could not be disturbed. In *Langan Gouda v. Basan Gauda*⁹ the Privy Council held that S. 11 Expl. VI was applicable to a joint Hindu family. In view of the foregoing decisions of the Privy Council the Madras and Patna view must be accepted as correct. See also Note 61 to S. 11 *ante*. Even granting that the son is a necessary party to a suit against the father, where he is impleaded as a legal representative of his father he cannot object to the decree in the executing Court on the ground of the plaintiff's failure to implead him.¹⁰ Nor does the plaintiff mortgagee lose his right to sue the son separately by his failure to join him in the suit against the father.¹¹

On the question whether in a suit by or against the manager of a joint Hindu family the manager should be *expressly* and *specifically* stated as swung

(1913) 18 Ind. C. 1848 (852) 9 Nag. I. R. 1

(1906) 30 Bom. 477 (486)

(1908) 30 All. 256 (257)

(1907) 21 All. 311 (315, 317)

(1898) 24 All. 211 (213)

(1895) 17 All. 537 (568)

(1898) 15 All. 70 (93) (F. D.)

5 (1911) J. Ind. C. 789 (741) 33 All. 272 38

Ind. App. 45 (P. C.)

(1914) 1914 P. C. 190 (197) 36 All. 385 41

Ind. App. 91 (P. C.)

(1910) 1920 L. C. 1 (2, 3) 47 Cal. 924 47

Ind. App. 91 (P. C.)

(1927) 1227 L. C. 66 (6, 57) 51 Bom. 450 54

Ind. App. 122 (P. C.)

6 (1911) 9 Ind. C. 709 (741) 32 All. 272 38

Ind. App. 45 (P. C.)

I) 7 (1914) 1914 P. C. 130 (197) 36 All. 383 41

Ind. App. 116 (P. C.)

8 (1910) 1920 P. C. 1 (2, 3) 47 Cal. 924 47

Ind. App. 91 (P. C.)

9 (1927) 1227 P. C. 66 (6, 57) 51 Bom. 450 54

Ind. App. 122 (P. C.)

(1901) 24 Cal. 517 (511)

(1900) 27 Cal. 791 (750)

9a (1901) 21 All. 306 (37, 354)

9b (1901) 21 All. 701 (507)

1. or as being sued in his representative capacity as manager, there is a conflict of decisions some cases holding that such express mention is not necessary,¹⁰ and others holding that it is.¹¹ The better view, it is submitted, is that the question whether a manager sues or is sued in a representative character is a question of fact in each case and his specific description as manager is not essential]

Although it may not be legally necessary to implead the other coparceners in a suit by or against a manager, yet, they would be *proper* parties to such a suit¹² Further the right of the other coparceners to object, not on the ground of their non-joinder but on the ground of the debt being not binding on them, or as being tainted with illegality or immorality, is not affected by proceedings to which they have not been parties¹³ But in a suit on a mortgage of joint family property where the *manager* is not made a party *all* the others are necessary parties¹⁴ Similarly, where the father is impleaded but he does not, or cannot, act in a representative character, the other members should be joined if their interests are sought to be affected¹⁵

To a suit to enforce the mortgage of the share of one co parcnor alone, the other co parcnors are not necessary parties.¹⁶ Similarly, where the mortgage is not a *joint family transaction* but one entered into by a member of the family in his *individual capacity*, the others are not necessary parties.¹⁷

Where the parties are not governed by Hindu Law, and the son, under the Customary Law is entitled only to a reversionary interest for the protection of which he has the right to interfere to prevent unnecessary alienations of the property the son's interest is not sufficient to entitle him to be made a party to a suit on the mortgage.¹⁹

13 Assignee of mortgage

In a suit for redemption of a mortgage against the assignee thereof, the original mortgagee is not a necessary party¹. But in a suit to enforce the mortgage brought by the assignee of the mortgage, the original mortgagee is a necessary party where the mortgagor denies receipt of consideration².

14 Receiver in insolvency

Where the mortgagor becomes insolvent after the date of the mortgage, the mortgagee bringing a suit on his mortgage is bound to implead the Official Receiver

- 10 (1930) 1930 Pat 233 (237)
(1923) 1923 All 284 (284)
(1912) 15 Ind Cas 126 (129) 34 All 549
(1921) 1921 Pat 377 (378) 6 Pat L Jour 640
11 (1916) 1916 Bom 278 (279) 40 Bom 248
(1916) 1916 Pat 310 (311) 1 Pat L Jour 468
(1916) 1916 Bom 278 (279) 40 Bom 248
12 (1903) 25 All 162 (164)
(1931) 1931 Bom 408 (409) 33 Bom L R 608
(1902) 24 All 459 (460)
13 (1903) 25 All 214 (223)
(1910) 34 Bom 354 (357)
(1916) 1916 Cal 279 (282) 42 Cal 1068
- the father cannot sue on behalf of
his son
[See also (1933) 1933 Nag 44 (46)
29 Nag L R 77]
16 (1913) 21 Ind Cas 68J (690) (Lom)
17 (1902) 1902 Pun Re No 15 page 53
(1904) 1 All L J 367 (368) Mortgage of pro
- - - - -
entitled to sue without joining
other co parcnern
[See also (1889) 13 Bom 51 (53)
Divided members of the family not
necessary parties]
18 (1919) 1919 Lrh 40 (40) 1919 Pun Re No 125
- Note 13
1 (1926) 1926 Sind 145 (147)
2 (1910) 7 Ind Cas 69 (69) (All)

or Assignee as a party thereto¹ The undermentioned cases to the contrary² are no longer law in view of the decision of the Privy Council in *Kala Chand v Jagannath*³ referred to above See also O 22, R 10, ante

15 Lessee.

A lessee who has been inducted on the land by the mortgagor or by the mortgagee and whose interest will be affected by the result of the suit is a necessary party to a suit relating to the mortgage¹ But a person having merely a *rayati* interest in the land is not entitled to redeem a mortgage or to be joined as a party to a suit on the mortgage²

16 Landlord.

Although the general rule is that a person claiming a paramount title is not a necessary party to a suit on the mortgage, yet, in some cases, it may be convenient to join the landlord of the mortgagor as a party thereto¹ (See Note 5, *supra*) Where the landlord is in possession of the mortgaged property not by virtue of a supreme title but by virtue of a title improperly and collusively obtained from the tenant under a decree for ejectment, he is a necessary party to the suit on the mortgage²

17 Kanomdar.

In an appeal by sub tenants against a decree for redemption of a *Kanom*, obtained by a *jenmi*, the *Kanomdar* is a necessary party¹ Where a *melcharathdar* along with the *jenmi* obtains a decree for the redemption of a *Kanom*, and the *Kanomdar* appeals against the decree, claiming compensation for improvements, the *jenmi* is a necessary party to the appeal²

18 Parties to appeal—The provisions of this Rule apply also to appeals¹

Note 14

- 1 (1927) 1927 P C 108 (109) 54 Ind App 190
54 Cal 595 (P C) Reversing 1925 Cal
785 (786)

(1935) 1935 Lah 316 (318)

(1902) 25 Mad 405 (422)

- 2 (1927) 1927 Mad 609 (610) Decided before
the decision in 1927 I C 108

(1930) 1930 Lah 791 (792) Which simply
follows 1925 Cal 785 which was re-
versed by the Privy Council

- 3 (1927) 1927 P C 108 (109) 54 Ind App 190
54 Cal 595 (P C)

Note 15

- 1 (1924) 1926 Bom 522 (523) Lessees under
mortgage

(1919) 1919 Pat 325 (326) Lease granted by
mortgagee

(1907) 29 All 679 (682) Lessee under per-

manent mortgage granted by mortgagor not entitled to
redeem and not necessary party]

- 2 (1901) 5 Cal W N 83 (85)

Note 16

- 1 (1929) 1929 Pat 222 (227) 8 Pat 439 Suit

a mortgage of a non transferable
occupancy holding the landlord is a
proper but not a necessary party

(1930) 1930 Nag 89 (90) Suit on prior mort-

his consent " " "

- 2 (1912) 16 Ind Cas 703 (705) (Cal)

Note 17

- 1 (1902) 25 Mad 568 (571)

- 2 (1911) 9 Ind Cas 940 (940) (Mad).

Note 18

- 1 (1897) 7 Mad L Jour 266 (267)

(1899) 9 Mad L Jour 49 (50)

(1900) 2 Cal L Jour 202 (216)

(1916) 1916 Mad 828 (829)

[But see (1927) 1927 Cal 479 (480)
Redemption suit dismissed—One
only of the mortgagors appealing—
Others are not necessary parties].

Permanent lessee

- (1927) 1927 Pat 411 (411, 412) Moharaidar
[But see (1883) 9 Cal 643 (644)
Holder of Mourasi Mokurasi patia

no relief could be given at all even as regards the parties actually on the record ⁴ If the party on the record effectually represents others not joined the decree will bind the interests of the latter also ⁵ The Court has also ample powers under O 1, R 10 to add, in proper cases, any parties it considers necessary for the disposal of the suit ⁶ In this connection reference may also be made to S 99 of the Code which lays down that a misjoinder (which includes non joinder) is not, in itself, a ground for reversing or varying a decree ⁷

But, although, the non joinder of persons who ought to have been joined as parties under this Rule is not fatal to the suit, the result of this cannot, in any way, affect the rights of such persons ⁸ Simple, as this proposition is its application to the complicated facts arising in mortgage suits has been the subject of a great diversity of judicial opinion In order to appreciate the various views properly, it is necessary to remember the following important principles —

- (1) Where an owner C mortgages his property to A by way of a simple mortgage, the mortgagee gets nothing more than a right to obtain from the Court an order that the property be sold for the recovery of the debt The mortgagor retains, in himself,

(a) a right to redeem the mortgage, and

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| <p>4 (1927) 1927 All 230 (230)
(1933) 1933 Cal 621 (622) 60 Cal 777
(1918) 1918 Pat 154 (154 155) Withdrawal of suit against a necessary party—Suit should be dismissed
(1916) 1916 Mad 825 (829)
(1914) 1914 All 109 (111) In redemption suit all the mortgagees or their representatives are necessary parties [See also (1934) 1934 Pat 38 (40) Suit for sale of mortgage property—Mortgaged property wholly transferred by mortgagor—Transferee made party after limitation—Suit must be wholly dismissed] [See (1906) 30 Bom 156 (161) Necessary parties defendants are those without whom no decree at all can be rendered]</p> <p>5 (1925) 1925 Cal 94 (95)
(1927) 1927 Mad 1071 (1072)</p> | <p>(1887) 9 All 125 (125)
(1888) 10 All 520 (523)
(1897) 19 All 379 (381)
(1901) 23 All 25 (31)
(1903) 25 All 446 (453) (FD)
(1906) 28 All 279 (280)
(1906) 1906 All W N 283n (286n)
(1904) 1 All L J 207 (208)
(1891) 18 Cal 164 (179) 17 Ind App 201 (P C)
(1894) 21 Cal 70 (79) 20 Ind App 165 (P C)
(1910) 37 Cal 239 (250) 37 Ind App 19 (P C) Right to question priority etc, not affected
(1900) 4 Cal W N 507 (508)
(1884) 1884 All W N 136 (136)
(1897) 20 Mad 82 (83)</p> |
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tion sale under O 21 R 90 because

non joinder S 99 cannot be invoked

1006 Mortgage by father and son—In partition suit mother allotted a share—Suit by mortgagee without impleading her—Her right of redemption not lost]

- (1934) 1934 Pat 648 (650) 13 Pat 364 Sub-
led—
(P C)
led by
ity

- (1912) 13 Ind Cas 874 (875 876) 1 Upp Bur R92 Unimpleaded person is entitled to declaration that his rights are not affected by decree
(1912) 14 Ind Cas 496 (504) 33 Cal 527.
39 Ind App 68 (P C)
(1912) 14 Ind Cas 299 (300) 39 Cal 925

- (b) a right to the physical possession and enjoyment of the mortgaged property⁹
- (2) Where the mortgage is a usufructuary one *A* will get a right to be in possession of the property until his debt is discharged, and *C* will retain only the right to redeem
- (3) Where *C* the mortgagor, sells his interest in the property to *D*, then, if the mortgage is a simple one *D* gets *C*'s rights, viz, the right to redeem and the right to possession of the mortgaged property, if the mortgage is a usufructuary one he will get only the right to redeem the mortgage¹⁰
- (4) Where *C* after creating a mortgage in favour of *A*, creates a further mortgage in favour of *B* then, if the mortgage is a simple one, *B* will get
- a right to redeem the prior mortgage and
 - a right to obtain from the Court an order that the property be sold subject to the prior mortgage, for the recovery of his debt
- C* will retain the right to redeem both the mortgages plus the right to possession
- If *B*'s mortgage is a usufructuary one, he will be entitled to a right to redeem the prior mortgage and a right to the possession of the property and *C* will be entitled only to a right to redeem both the mortgages
- (5) Where *C* makes several mortgages successively, in favour of different persons the later mortgagee is entitled to redeem the earlier one but the earlier ones cannot redeem the later ones, according to the maxim 'Redeem up and foreclose down'¹¹

We now proceed to consider the various classes of cases illustrating the application of the above principles —

- (1) *C* executes a simple mortgage in favour of *A* and then sells his interests in the mortgaged property to *D*. *A* files a suit on his mortgage, against *C* without impleading *D*, and, in execution of the decree obtained therein, purchases the property himself. Being obstructed by *D* in the possession proceedings, *A* sues *D* for possession. Is the suit maintainable? No¹². The reason is that *D* not having been made a party in *A*'s suit on the mortgage, is not affected in any way by the decree and execution proceedings in such suit, and his right to possession cannot be disturbed. On the same principle, if *D* is dispossessed by *A* in execution, he can, in a suit

party Act
 12 (1897) 19 All 541 (542) (F B)
 (1923) 1923 Cal 274 (277) 49 Cal 1048
 (1929) 1929 Cal 253 (236) Suit was also
 barred by limitation in this case
 (1931) 1931 Mad 542 (547)
 (1927) 1927 Pat 411 (411 412)
 (1916) 1916 L B 99 (J J)
 (1921) 1921 L B 61 (63) 11 L B R 113
 (1926) 1926 Rang 183 (184) 4 Rang 96
 (1926) 1926 Nag 495 (495) Lessee not made
 party
 (1925) 1925 Nag 246 (250) 25 Nag L R 19
 (1923) 1923 Nag 273 (274) 19 Nag L R 18

[But see (1886) 8 All 324 (329) Ob
 soleite law]

9 (1918) 1918 Sind 26 (27) 12 Sind L R 1

10 (1918) 1918 Sind 26 12 Sind L R 1

11 See S 94 of the Amended Transfer of Pro

by him against *A*, recover back possession unconditionally.¹³ There is no difference in principle in this respect even if *D* is a purchaser of *C*'s interest in execution of a money decree against him, instead of in a private transfer.¹⁴ The remedy of *A* in such cases would be to file a fresh suit on his mortgage against *D*.¹⁵ He cannot, however, bring a fresh suit where his claim on the original mortgage is barred by limitation.¹⁶

It was, however, held in the undermentioned cases¹⁷ that the result of not impleading *D* or other person entitled to be in possession would be to make the decree so obtained *ineffectual only against the right of redemption* vested in such persons so that *A* would be entitled to possession against them subject to their right of redemption. It is submitted that this view is not correct. *D* has not only got a right of redemption but a *right to the possession* of the property as well. A decree to which he was not a party cannot affect him even in respect of the latter right.

(ii) The principles above stated in Class (i) will equally apply to cases where *D*, instead of being a purchaser of *C*'s interest, is a usufructuary mortgagee in possession.¹⁸

(iii) *C* executes simple mortgages first in favour of *A* and then in favour of *B*. *B* sues on his mortgage without impleading *A* and, in execution of the decree obtained therein, purchases the property in Court auction and enters into possession. Thereafter, *A* sues on his mortgage without impleading *B* and purchases the same property in execution of his decree. It will be seen that, at the time of the suit by *A* the right to redeem and the right to possession of

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|---|---|
| Transfer by way of lease | (1901) 5 Cal W N 423 (425 426) |
| (1925) 1925 Sind 193 (19J) 17 Sind L R | (1931) 1931 Lah 438 (438) |
| 231 Vendeo of equity of redemption, | (1929) 1922 Lom 334 (335) |
| | (1885) 12 Cal 614 (620) |
| | (1931) 1931 Mad 542 (549) |
| | (1928) 1923 Rang 183 (190) 6 Rang 297 |
| | (1904) 26 All 464 (467) |
| [See also (1892) 4 Mad 213 (216) | (1932) 1932 All 305 (355) |
| Puisne mortgagee in possession— | (1892) 16 Bom 483 (491) |
| Prior mortgagee who had obtained | (1913) 16 Ind Cas 457 (459) (Cal) |
| money decree purchasing the pro- | (1927) 1927 Cal 209 (260) Where it was held |
| perty in execution depriving puisne | that disposed purchaser can only |
| mortgagee of his possession—latter | redeem and cannot sue for posses- |
| can sue prior mortgagee for interest | sion |
| | (1916) 1916 Cal 771 (771) (Do) |
| | (1921) 1921 Cal 157 (158) (Do) |
| | (1924) 1924 Pat 472 (453) 3 Pat 114 |
| | [See (1895) 21 Mad 61 (66) Where |
| | defendant was willing to redeem] |
| (1922) 1932 Cal 561 (562) | (1908) 6 Cal L Jour 612 (616) |
| 15 (1931) 1931 Mad 542 (549) | (1892) 17 Mad 17 (16) Puisne mortgage in |
| (1930) 1930 Rang 175 (176) | possession |
| (1907) 30 Mad 500 (502) | (1891) 13 All 310 (311) Subsequent usufruc- |
| (1927) 1927 Pat 411 (411 412) | tuary mortgagee in possession |
| (1923) 1923 Nag 273 (274) 19 Nag L R 18 | (1886) 10 Bom 24 (226) (Do) |
| Transferee a lessee | (1902) 7 Cal W N 11 (19 20) Case of puisne |
| | mortgagee who had purchased in |
| | execution of his decree |
| | (1901) 23 All 1 (3) |
| (1921) 1924 Mad 650 (655) 47 Mad 511 | 18 (1911) 9 Ind Cas 513 (515) (Mad) Overruling |
| (1923) 1923 All 232 (232) | (1903) 76 Mad 337 |
| | (1957) 1857 All W N 125 (125) <i>A</i> cannot sue |

the property being already vested in *B* cannot be affected by *A*'s suit to which he was not a party. It follows that *A* cannot maintain a suit for possession against *B*¹⁹ or a suit for possession subject to a redemption by *B*²⁰. He can, however, bring a fresh suit for sale on his mortgage against *B* provided of course that, on the date of such suit the claim on the mortgage is not barred by limitation.²¹

- (11) *C* executed simple mortgages first in favour of *A* and then in favour of *B*. *A* obtains a decree upon his mortgage without impleading *B* and in execution thereof purchases the property himself and obtains possession. *B* thereafter files a suit on his mortgage purchases the same property in execution of his decree and then sues *A* for possession. Does the suit lie? No.²² The reason is that at the time of *B*'s suit on the mortgage the right to redeem and the right to possession having both already vested in *A* the latter cannot be affected by anything done in *B*'s suit. *B* has, however, two remedies open to him, viz., (a) to redeem²³ and (b) to sue *A* for sale on the subsequent mortgage subject to the prior mortgage.²⁴ If *B* adopts the former remedy and redeems *A* the latter, in his turn, as owner of the equity of redemption can redeem *B*.²⁵ Both these rights can, however, be adjusted on equitable grounds in the same suit.²⁶ If *B* adopts the latter remedy, *A* can,

t recover possession from puisne
as if actually mortgagee
(1894) 21 Cal 116 (120)
(1916) 191 Cal 41 (110) 19 Oudh Cas 34
(1910) 1915 L B 49 (50 51) 5 L B R 206
Puisne mortgagee entitled to sue for

1 to
base

Decree must be for possession subject to redemption by *B*—Submitted

24 30

(1926) 1926 All 480 (483 480) Remedy on

again on his mortgage if within time]
23 (1923) 1923 Nag 225 (226)
(1924) 1924 Nag 198 (199) *B* has the first right to redeem and not *A* to redeem

(1904) 23 Bom 153 (162) *A* was held entitled to redeem *B* first
[See also (1935) 1935 Bom 25 (20)
Prior simple mortgages in possession under sale in enforcement of his mortgage—Subsequent mortgagee not made party—Latter can redeem and obtain transfer of security but cannot get possession—His remedy is to sue for sale if not barred.]

24 (1903) 30 Cal 599 (604 605) (F B)
(1917) 1917 Pat 214 (217) But purchaser cannot dispossess *A* without redeeming him
(1920) 1920 Mad 650 (651)
(1924) 1924 Pat 484 (486) 3 Pat 435
(1920) 1920 Nag 201 (253) 16 Nag L R 215
(1912) 14 Ind Cas 496 (504) 39 Cal 527 39 Ind App 68 (P C)

25 (1927) 1922 All 135 (137) 44 All 462 Prior mortgagee who has foreclosed his mortgage without impleading puisne mortgagee can deposit under Transfer of Property Act S 53 and sue for redemption
[See however (1932) 1932 Pat 270 (272) 11 Pat 415.]

26 (1927) 1922 All 135 (137) 44 All 462 Prior

is impleaded in *B*'s suit *A*'s remedy is to avail of Rules 12 and 13 of this Order or to redeem *B*. If not the only other remedy of *A* is to sue

in equity claim that *B* should redeem the prior mortgage rights vested in him before disturbing his possession.²⁷ In other words *A* can set up his prior mortgage as a shield against the claim of *B*.²⁸ This right of *A* is a weapon of defence and not of attack,²⁹ and can be set up notwithstanding the claim on the mortgage itself is barred by limitation.³⁰

(i) *C* makes a mortgage in favour of *A*. Thereafter in execution of a money decree against *C* the mortgaged property is attached and sold and is purchased by *D*. Pending the attachment *A* purchases by private sale the property from *C* in satisfaction of the mortgage and enters into possession. In a suit by *D* against *A* for recovery of possession can *A* set up his mortgage as a shield as a defence to the suit? No.³¹ The reason is that the private purchase of *A* pending attachment is void against all claims of *D* arising under the attachment and does not convey the equity of redemption to *A*. The prior mortgage can be used as a shield only for the purpose of protecting a possession to which the person setting it up has become lawfully entitled and since in the case above referred to *A* had no valid title to such possession as against *D* he cannot use his prior mortgage as a shield in *D*'s suit to recover possession.

(ii) *C* executes simple mortgages first in favour of *A* and then in favour of *B*. *A* sues *C* on his mortgage without impleading *B*. *B* also institutes a parallel suit on his own mortgage without impleading *A*. *A* purchases, pending *B*'s suit, the mortgaged property in execution of his decree and thereafter *B* purchases the same property in execution of his decree. If the doctrine of *lis pendens* applies to the case then *A*'s purchase cannot take effect as against *B*'s and therefore *B* will be entitled to possession as against *A*. *A*'s remedy will then be to file a fresh suit for sale against *B*.³² Further on the analogy of the principle stated in Class (v) above, *A* not being entitled to possession cannot hold up his prior mortgage as a shield against *B*'s suit for possession. The undermen

mortgagee was allowed to redeem having regard to equities.

(1922) 1922 Nag 83 (31 J) (1 B). *A* was given a decree for possession subject to *B*'s right of redemption. [See also (1931) 1931 Pat 431 (435 466) prior mortgagee suing without impleading subsequent mortgagee of portion and becoming purchaser in Court auction—Second suit against subsequent mortgagee for possession—Second mortgagee allowed to redeem that portion alone.]

27 (1931) 1931 All 466 (481)
28 (1922) 1922 P C 11 (13) 48 Ind App 460
43 All 469 (P C)
(1933) 1933 All 412 (413)
(1881 82) 6 Lom 11 (13)
(1922) 1922 All 104 (106) 44 All 416
(1883) 1883 All W N 133 (193)
(1904) 31 Cal 737 (443)
(191-) 14 Ind Cas 537 (539) (Lab)

(1922) 1922 Mad 249 (253)
(1931) 1931 Rang 106 (106 107) J Rang 1
(1923) 1923 Rang 107 (108)
[But see (1917) 1917 Mad 51 (753)
40 Mad 77 Disented from in 62 Mad
L Jour N R C 25 and also contrary
to 1922 P C 11.]
(1932) 1932 I It 2 O (271) 11 I It 415
29 (1931) 1931 All 466 (481) (F B)

465
ation
See
n in

31 (1929) 1929 P C 288 (59) (P C)
[But see (1976) 1926 Nag 21 (23 24)
Transferee *lis pendens* held entitled
to set up prior mortgage as shield.]
32 (1907) 31 Bom 112 (118)
(1930) 1930 Mad 570 (571 572)
[See also foot note 26 *infra*]

tioned cases however, while holding that the doctrine of *lis pendens* applies to such cases, have nevertheless come to the conclusion that *A* can get a decree for possession *subject to redemption* by *B*.³³ The High Court of Allahabad has in a recent Full Bench case³⁴ held that the doctrine of *lis pendens* applies to such cases but has in a somewhat contrary manner come to conclusions which can only follow on the basis that the doctrine does *not* apply. Thus it has formulated the following conclusions —

If *A* sues *B* as plaintiff for possession, then

- (1) if he was the earlier purchaser (*i e* purchaser pending *B*'s suit) in point of time he can redeem *B* and recover possession even though his (*A*'s) mortgage is barred by time,
- (2) if he is the later purchaser (*i e*, if *B*'s purchase is pending *A*'s suit) then his suit even for redemption cannot be decreed

If *B* sues *A* as plaintiff for possession then

- (1) if *B* is the earlier purchaser in point of time he must redeem *A* and *A* cannot compel *B* to submit to redemption by him
- (2) if *B* is the later purchaser in point of time he must first redeem *A* but *A* will have the right to redeem *B* next and regain possession

The High Courts of Madras³⁵ and Calcutta³⁶ have held that the doctrine of *lis pendens* does not apply to legal proceedings to enforce mortgages and that therefore a sale in pursuance of a mortgage decree the mortgage having been executed before the institution of the suit is not affected by the doctrine of *lis pendens*. According to this view the *first* purchaser will be entitled to possession as against the later purchaser a result which is practically the same as that of the Full Bench case of the Allahabad High Court referred to above.

In the principles discussed in the several classes of cases discussed above, there is no distinction between the case of a mortgagee purchaser and a stranger purchaser as can be seen from an examination of the cases above referred to.³⁷ When the puisne mortgagee who has not been impleaded in a suit on the prior mortgage seeks to redeem a prior mortgage it was held before the Transfer of Property Act was passed that he should pay the amount due under the prior mortgage without any reference to the decree that was passed in the prior mortgage.³⁸ But S 89 of the said Act provided that when once a final decree was passed on a mortgage the mortgage security and the right to redeem were both extinguished, with the result that thereafter the rights of the parties fell to be a decree.³⁹ Even subsequent to the Transfer of Pro

36 (1903) 32 Cal 591 (304)
(1933) 1933 Cal 181 (182)
(1880) 5 Cal 263 (269)

37 (1928) 1928 Rang 183 (190) 6 Rang 297
(1922) 1922 Bom 234 (330) Assignee from
decree holder purchaser

38 (1891) 18 Cal 164 (180) 17 Ind App 201
(1 C)

39 (1920) 1920 P C 79 42 All 364 47 Ind
App 71 (P C)

(1900) 22 All 391 (397 253)
[See also (1918) 1918 P C 34 (35) 40
All 407 43 Ind App 130 (P C)]

1924) 2 300 and L R 64
[But see (1926) 1926 All 450 (486)
Lis pendens does not apply Prior
mortgagee cannot compel unimplea
ded puisne mortgagee to redeem
him]

34 (1931) 1931 All 406 (481 482) (F B)
35 (1933) 1933 Mad 583 (584 590 594) 36 Mad

party Act the earlier view is adopted in many cases⁴⁰ In O 34 R 5 which has taken the place of S 89 of that Act the words as to the mortgage security being extinguished have been omitted The result now is the same as was held by the decisions prior to the Transfer of Property Act namely, that the puisne mortgagee seeking to redeem the prior mortgagee should pay the amount due under the prior mortgage and not merely the amount due under the decree thereon⁴¹ He is not however bound to pay for any improvements made by the purchaser⁴² Where a puisne mortgagee is impleaded in a suit to enforce a prior mortgage and a decree for sale or foreclosure is passed on the mortgage the effect is to extinguish his security if he does not exercise his right of redemption or his security is not expressly saved⁴³ It was held in the undermentioned cases⁴⁴ that the puisne mortgagee is not entitled in such a case to insist that the mortgagor should redeem his mortgage also his cause of action being altogether different from that of the prior mortgagee Similarly it was held if the puisne mortgagee pays off the prior mortgage he cannot apply for an order absolute for the amounts of both the mortgages⁴⁵ But the said case is of doubtful authority now since express provision is made in Rr 2 and 4 for the adjudication of the rights of subsequent mortgagees who are joined as parties to a suit on the prior mortgage See also Forms Nos 9 10 and 11 of App D These legislative changes only give effect to an old practice as can be seen from the case mentioned below⁴⁶ See also the undermentioned cases⁴⁷

- 40 (163) 19 All 22 (Jod)
- (1903) 25 All 388 (Jalga)
- (190) 24 All 185 (IS)
- (1907) 16 Bom 455 (491)
- (1906) 33 Cal 500 (Jod)
- (1894) 21 Mad 64 (67 68)
- (1903) 26 Mad 484 (485)
- (1905) 31 Mad 425 (428)
- (1903) 31 Mad 258 (259 260)
- (190) 5 Cal L Jour 315 (319 3 0)
- (1904) 1 All L J 707
- 41 (1922) 1922 Cal 23 (25 27) 49 Cal 6 6
- (1926) 1926 Nag 214 (214 215) 21 Nag L R 165
- (1932) 1932 Pat 2 0 (271) 11 Pat 485
- (1933) 1933 Lah 75 (6) But credit should be given for profits recovered by
- 42 (1912) 17 Ind Ca 211 (292) (Mad)
- (1916) 1916 Lah 219 (220) 1916 Pun Re No 88
- (1916) 1916 All 2 3 (27)
- (1914) 1914 Bom 268 (269) 38 Bom 21
- (1914) 1914 All 42 (42) 36 All 123
- (1911) 9 Ind Cas 670 (6 1) 33 All 3 0 Not entitled to redeem by simply paying the price for which the property was sold—Must pay the full amount due on the prior mortgage
- (1932) 1932 Lat 2 0 (2 2) 11 Pat 415 (Do)
- 43 (1922) 1922 All 104 (105) 44 All 418
- (1908) 31 Mad 42, (4 0)
- (1897) 20 Mad 120 (123)
- 44 (1904) 7 Oudh Cas 243 (246)
- (1906) 1906 All W N 112 (113)

- (1922) 1922 Mad 307 (38)
- (1928) 1928 Lah 505 (507)
- (1916) 1916 Pat 64 (65) 1 Pat L Jour 761
- (1915) 1915 All 29 (295) Puisne mortgagee's rights are not affected when only a money decree is obtained on the prior mortgage
- (1932) 1932 Cal 196 (199) 59 Cal 117 Rights of puisne mortgagee indicated—Redemption or remedy against surplus sale proceeds—Remedy for sale in case of satisfaction of prior mortgage before sale or for sale of properties not included in prior mortgage only by separate suit of his own
- 44 (1904) 1 Cal L Jour 31 (36)
- 45 (1904) 26 All 504 (506)
- 46 (1894) 24 Cal 190 (197)
- 47 (1920) 1920 Nag 146 (1 6) 16 Nag L R 180 Lessee not joined in suit on mortgage—Mortgagor foreclosed—Lessee redeeming mortgage—Mortgagor's rights not revived and he cannot redeem lessee
- (19) 1927 Mad 304 (309 310) Legal representative of deceased party not brought on record proceedings do not bind him
- (1910) 5 Ind Cas 339 (340) (Mad) Legal representatives of deceased defendant not brought on record of application for sale—Sale set aside
- (19 5) 1925 Lat 27 (28) 31 Lat 518 Defendant opposing the impleadment of any person is estopped from objecting to the proceedings on the ground of failure to make him a party
- (1930) 1930 Mad 535 (537) 53 Mad 581

20 A person cannot be both a plaintiff and a defendant

Suppose *A* and *B* are the first mortgagees and *I* and *C* are the puisne mortgagees of a property. In a suit by *A* and *B* for foreclosure of their mortgage, *C* alone can be joined as defendant as a puisne mortgagee because *A* cannot be both plaintiff and defendant in the same suit¹. The same person cannot be both plaintiff and defendant in a suit even in different capacities².

21 Joinder of parties

A misjoinder of plaintiffs in a mortgage suit, some of whom are not entitled to any relief, is a mere defect of form and is not fatal to the suit¹. This Rule does not prohibit the joinder of any person² whom it is proper to add under the provisions of O 1 Rr 1 and 3. Where, after the commencement of the trial of a suit, an application is made to the Court for adding persons alleged to be interested in the subject matter of the suit, the matter is in the discretion of the Court, it may, in a proper case decline under O 1, R 10 to add the parties sought to be impleaded³. As to the effect of joining new parties after the period of limitation, see Limitation Act S 22, and the undermentioned cases⁴.

22 Revision

It has been held by the High Court of Patna that S 115 does not apply to the case of a mere refusal to add a person as a plaintiff in a mortgage suit but that, if the result amounts to a denial of a fair trial, the High Court can interfere under S 107 of the Government of India Act¹. An order discharging necessary parties from the suit is open to revision².

R. 2. [*Neu*, Act IV of 1882, S 86] (1) In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree—

(a) ordering that an account be taken⁶ of what was due to the plaintiff at the date of such decree for—

(i) principal⁷ and interest⁸ on the mortgage,

(ii) the costs of suit¹¹, if any, awarded to him, and

Charge decree—Non party cannot intervene in the execution of the decree and resist execution—His

Note 20

- 1 (1902) 24 All 173 (183 184)
2 (1901) 25 Bom 606 (612)

Note 21

- 1 (1925) 1925 Nag 366 (368)
2 (1920) 1920 Nag 247 (248)
3 (1924) 1924 Oudh 33 (33 34) 26 Oudh Civ 317 Party sought to be impleaded after preliminary decree—Application for joinder refused
(1905) 1905 All W N 35 (36) In this case it was held that the Court ought to have granted the application for the addition of parties
4 (1914) 1914 Nag 73 (80) 10 Nag L R 173
(1931) 1931 Pesh 38 (40) Mortgagee transferring whole property before suit by mortgagee—Transferee impleaded after limitation—Suit must fail

Note 22

- 1 (1926) 1926 Pat 207 (208) 4 Pat 723
2 (1931) 1931 Oudh 410 (410 411)

establish priority—Court should decide according to equity having regard to the real position of the parties

(1903) 30 Cal 142 (151 153) Party to suit omitted in execution proceeding—Sale is not nullity but may be set aside by appropriate proceedings

(1932) 1932 Cal 126 (129) 9 Cal 117 Rights of puisne mortgagee indicated—Redemption or remedy against surplus sale proceeds—Remedy for sale in case of satisfaction of prior mortgage before sale or for sale of properties included in prior mortgage, only by private suit of his own

- (iii) other costs, charges and expenses¹² properly incurred by him up to that date in respect of his mortgage security, together with interest thereon, or
- (b) declaring the amount so due at that date; and
- (c) directing—

(i) that, if the defendant pays into Court¹⁶ the amount so found or declared due on or before such date as the Court may fix within six months¹⁷ from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in Rule 10, together with subsequent interest⁹ on such sums respectively as provided in Rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant at his cost free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree¹⁹ debarring the defendant from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time¹⁸ fixed for the payment of the amount found or declared due under Sub-Rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest

(3) Where, in a suit for foreclosure, subsequent mortgagees¹⁵ or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights

and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

[See Rr. 3, 10 and 11 below]

Local Amendment

BOMBAY

Substitute for Cl (d) the following —

'(d) that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall be entitled to apply for a final decree for foreclosure under R 3

Synopsis

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Other Topics

Instalment decrees in mortgage suits See Note 5, Pts (1) and (2)	Rights of mortgagees after preliminary decree See Note 4 Pt (3)
Irregular decrees See Note 5 Pt (3)	Subsequent mortgagees subrogation and effect See Note 15, Pt (3)
Personal decree See Note to R 6 below, — see also Note 5 Pt (3) to R 4 below	Validity of part of mortgage See Note 7, Pts (6) and (7)
Right of redemption See Note 3, Pt (1) and Note 18, Pts (7) to (9)	

1 Legislative changes

The Rule has been extensively amended by 'the Transfer of Property (Amendment) Act, (XXI of 1929) The old Rule ran as follows —

'2 In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a decree—

- ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage and for the costs of the suit (if any) awarded to him on the day next hereinafter referred to, or
- declaring the amount so due at the date of such decree and directing—
- that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, but

- (d) that if such payment is not made on or before the day to be fixed by the Court the defendant shall be debarred from all right to redeem the property

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The following important changes may be noted —

- (1) The present Rule makes it clear that the decree under it is a *preliminary decree*
- (2) Under the old Rule it was not clear when accounts were directed to be taken whether they were to be taken up to the date of declaring in Court the amount due or up to the date fixed for payment. It is now provided that the accounts are to be taken up to the date of the preliminary decree
- (3) The provision as to other costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage security is new
- (4) The new Rule makes it clear as to when the period fixed for payment commences to run
- (5) The provision in (c) (i) relating to subsequent costs and subsequent interest is new
- (6) The same Sub Rule makes it clear that the re-transfer is to be at the mortgagee's costs
- (7) Under the same Sub Rule the mortgagee has to apply for a final decree on default by the mortgagor
- (8) The provision as to the Court's power to extend time which was contained in the proviso to Sub R (2) in the old R 3 has been enacted as Sub R (2) of this Rule
- (9) Sub R (3) makes express provision for the form of decree in cases where subsequent mortgagees are made parties

2 Analogous law — T P Act S 86

This Rule corresponds to S 86 of the Transfer of Property Act, with the following differences —

- (1) Under R 2 payment has to be made in all cases *into the Court* while under S 86 payment could be made to the *plaintiff* or into the Court
- (2) The words "if so required" have been added to Sub R (1) (c) (i) as it was found that, in the moffusal Courts it was not the practice for the mortgagee to execute a re-conveyance of the property to the mortgagor

3 Scope and object of the Rule

The scheme and object of this order is "that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal interest and costs due on a fixed day and that after the expiration of that day, if the property be not redeemed, the matter shall pass from the domain of contract to that of judgment and the rights of the mortgagee should thenceforth depend not on the contents of the bond but on the directions in the decree"¹

The object of the Rule is to prevent mortgagees from realising their securities otherwise than in the mode prescribed by the Rule²

4 Persons entitled to the right of foreclosure

Under S 67 of the Transfer of Property Act, as it existed before it was amended by Act XX of 1929, the remedy by way of foreclosure was available only in the case of

- Order 34 Rule 2—Note 1**
1 (1923) 123 Com 420 (421) Where the opinion was expressed under the old Rule that the point should be made clear by amendment

Note 3

- 1 (1907) 34 Cal 150 (161) 34 Ind App 9 (P C)
Observations were with reference to

- the old Transfer of Property Act sections but apply equally to the present Order
(1919) 1919 Pat 420 (422) 4 Pat L Jour 306
(1921) 1921 U B 5 (7) 4 Jpp Bur R 1
(1919) 1917 All 17 (20) 29 All 506
2 (1895) 22 Cal 518 (516)

- (1) a mortgagee by conditional sale,
- (2) an English mortgage, and
- (3) an equitable mortgage by deposit of title-deeds in Bombay¹

The newly amended S 67 now provides that no mortgagee "other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose," can institute a suit for foreclosure². It follows that neither a mortgagee under an English mortgage, nor an equitable mortgagee by deposit of title deeds in Bombay can sue for foreclosure. Then remedy is only to sue for sale. By S 15 of the Amending Act XXI of 1929, however the remedy of the equitable mortgagee in Bombay to proceed by way of foreclosure was kept open till 1st April 1932.

The characteristic of a foreclosure decree is that it completely extinguishes the mortgagor's right to redeem and thereafter makes the mortgagee owner of the property. A mortgagee who has obtained a preliminary decree for foreclosure is entitled to apply for setting aside an execution sale under O 21, R 90 on the ground of material irregularity³.

5 Form of preliminary decree

See also appendix D, Forms 3, 3-A, 9 and 10

In a preliminary decree for foreclosure, the Court cannot, except with the consent of parties, direct payment of the mortgage money by instalments¹. But where a preliminary decree allowing payment by instalments is passed by consent of parties, it does not necessarily fall outside the scope of R 2, the provisions of Rr 2 and 3 may still apply to such a decree². A preliminary decree for foreclosure which does not conform to the form prescribed by this Rule is irregular, but after it is made absolute, the defendant cannot object to delivery of possession under the decree to the decree holder³.

6 'Ordering that an account be taken'

The amount (whether the accounts are directed to be taken or not) is to be calculated up to the date of the preliminary decree. The object of the Rule is that a general account should be taken of all amounts due between the parties once for all and that the aggregate amount should be declared as due to the plaintiff on payment of which the property is to be redeemed¹. The accounts have to be taken before the final decree, they cannot be directed to be taken in execution of the final decree². In the taking of such accounts, not only sums due by the mortgagor but also those due by the mortgagee should be taken into consideration³. If the decree is silent as to the person selected to take the accounts, the

Note 4

- 1 (1890) 14 Bom 263 (273)
- 2 (1896) 19 Mad 249 (252 and 253) 23 Ind App 32 (P C) Simple mortgagee not entitled to foreclose
- (1913) 1935 All 778 (781)
- (1920) 1920 Oudh 204 (206) Foreclosure decree can only be passed in the case of a mortgage by conditional sale
- 3 (1886) 13 Cal 346 (348)

Note 5

- 1 (1878 80) 2 All 320 (321, 322)
- (1884) 7 Bom 32 (35)
- (1882) 5 Bom 404 (407)
- 2 (1928) 1928 Nag 333 (335)
- 3 (1906) 4 Cal L Jour 533 (535)

Note 6

- 1 (1926) 1926 All 113 (120)
[See (1932) 1332 Pat 332 (334) The rule contemplates declaration, (a) at time of judgment, or (b) after taking account, of amount due on date of decree]
- 2 (1912) 15 Ind C15 363 (363) (Mad)
- 3 (1917) 1917 Cal 853 (854)
- (1881) 6 Cal 877 (778) Mortgagee not entitled to withdraw from the taking of accounts when they appeared to be going against him
- (1889) 16 Cal 692 (631) 16 Ind App 107 (P C) If the mortgagor fails to set up any equity in his favour, he cannot subsequently sue on it.

parties may themselves select a person to do so and his award will be binding on them⁴. The accounting is however to be restricted to the mortgage transaction in question in the suit and should not be extended to other transactions between the parties⁵. For other cases on this part of the subject see the undermentioned cases⁶.

7 Principal

The *onus* of proving the amount due to him is initially on the mortgagee. Hence if the mortgage deed is not properly stamped and the mortgagee refuses to pay the stamp duty and penalty with the result that the mortgage deed is inadmissible in evidence the mortgagee cannot recover anything, beyond what the mortgagor admits to be due¹.

The statement in the mortgage deed is *prima facie* proof of the amount due². But the mortgagor can plead a total or partial discharge of the debt or that the recital is to consideration in the bond is wholly or partially untrue³. But in such a case the burden will be upon him to substantiate his allegations. It is not for the mortgagee to prove that the consideration stated in the bond was actually paid by him⁴. But recitals in deeds are not evidence against third parties⁵.

Where only part of the alleged consideration is proved to have been paid, the mortgage is valid to the extent of the part so paid⁶. Similarly in the case of a mortgage of property belonging to a Hindu joint family, where it is proved that only a part of the consideration was supported by legal necessity, the mortgage is valid and binding to that extent⁷.

8 Interest

By the Act XVI of 1929, a new Rule (Rule 11) has been enacted which deals specially with the power of the Court to order payment of interest in mortgage suits. See the notes under that Rule for full information on the subject. According to Section 58 (a) of the Transfer of Property Act mortgage money includes interest on the principal secured by the mortgage. This principle is recognised by the present Rule which *inter alia* makes the payment of the interest, provided in the mortgage deed, a condition of redemption. In the absence of anything to the contrary in the mortgage deed,¹ interest as well as the

4 (1909) 33 Bom 216 (218-219)

5 (1924) 1927 Oudh 170 (173)

(1925) 1925 Pat 59 (63) 3 Pat 820

6 (1927) 1927 P C 17 (17) (P C) Failure to direct accounts to be taken not serious error when the result of taking accounts would be to give the same sum as that for which decree was passed

(1914) 1914 Lah 64 (65) Mortgagee undertakes stating his real claim—Further deductions not to be allowed

Note 7

1 (1882) 6 Bom 669 (670)

2 (1914) 1914 All 319 (319) 36 All 475

3 (1896) 20 Bom 636 (645)

(1920) 1920 Cal 883 (888) Plea of partial adjustment

4 (1915) 1915 Lah 221 (222)

(1896) 23 Cal 970 (975) 23 Ind App 92 (PC)

(1905) 27 All 71 (72)

(1902) 15 C P L R 24 (25) Onus of promisor not shifted by promisor's admission

that actual consideration was different from that stated in bond

[See (1881) 6 Cal 263 (277-278)]

Transaction not honest and bona fide—The recital is to payment of consideration entitled to little *bona fide*

7 (1929) 1929 All 10 (15 and 16)

Note 8

1 (1925) 1925 Lah 182 (187) Mortgage deed providing for redemption on payment of principal sum only interest stipulated is not a charge

(1911) 1911 Bom 23 (29) 45 Bom 573 Mortgage not for interest but mortgagee to take possession of property—Mortgagee making no attempt to obtain possession cannot claim interest

principal constitute a charge on the property ²

9 Interest subsequent to the date fixed for payment

Before the amendment of the Rule by Act XXI of 1929 there was no provision either in R 2 or R 3 for the payment of interest subsequent to the date fixed for payment. Hence there was lack of uniformity in the decisions on the question¹. Express provision has now been made for the inclusion in the preliminary decree for foreclosure of a direction for the payment of "subsequent interest up to the date of actual payment". For fuller information on the subject see Notes under R 11 below.

10 Rule of damdupat—See Note 16 to S 34

11 Costs of the suit

The general rule in all suits relating to mortgages is that the mortgagee is entitled to his costs. But it is within the power of the Court, in view of the mortgagee's conduct and the peculiar circumstances of any case, to refuse to award him any costs¹. Ordinary costs awarded against a mortgagor are part of the mortgage money and are recoverable from out of the mortgaged property². But the Court can in the exercise of its discretion under S 35, make such costs recoverable from the mortgagor personally³. Where a defendant in a mortgage suit claiming title paramount to that of the mortgagor is struck off from the array of parties and is awarded costs the mortgagor who is in no way responsible for it or the mortgaged property should not be made liable for such costs^{4a}.

A puisne mortgagee who is made a party to a suit on the mortgage is also entitled to his costs against the mortgagor⁴. Similarly a co-mortgagee is also entitled to his costs even though he refused to join the plaintiff in a suit on a

2 (1924) 1974 P L 193 (193 153) 5 Loh 420
51 Ind App 37 (P C)

Both parties maintaining pleas for
ata—

Note 9

1 (1916) 1916 Mad 1202 (1202) Court has power to provide for future interest in its preliminary decree

2

s 34

(1917) 1917 Pat 582 (583 594) Provision for payment of interest may be made at the time of enlarging the period fixed for payment

(1904) 16 All 263 (2 0) Future interest not charge on property

[See also (1921) 1921 U B 5 (1) 4 Upp Bur R 1 Appellate Court confirming lower Court's decree—No provision for subsequent interest therein nor in the final decree—Review or appeal only remedy—Allowing subsequent interest on aggregate amount by way of amendment to meet ends of justice is invalid]

Note 11

1 (1878 '9) 3 Bom 202 (203) Costs refused on ground of usurious nature of transaction

(1884) 8 Bom 190 (193) Defendant in *re demption* suit is ordinarily entitled to costs unless he has refused a

459
(1918) 1918 Oudh 440 (445)
(1918) 1918 All 306 (306) 40 All 103
(1880) 2 C P L R 94 (98)

[But see (1909) 4 Ind Cas 515 (515) (Cal)]

(1888) 10 All 179 (181)

(1888) 10 All 124 (129) Judgment debtor in a foreclosure decree is personally liable for the costs of the suit

3 (1887) 14 Cal 185 (187)

(1907) 3 Nag L R 94 (100)

(1919) 1919 All 237 (238 279) 41 All 473

(1909) 3 Ind Cas 33 (33) (All)

(1918) 1918 Nag 185 (185)

(1888) 10 All 179 (181)

[See (1903) 20 All 523 (524) Mere separate order of costs under the Rules of the Code is not necessarily

mortgage and was therefore joined as a defendant in the suit.² It has been held that costs are to be awarded to the mortgagee on the scale of costs as between attorney and client.¹ The mortgagee is also entitled to his costs incurred subsequent to the preliminary decree up to date of payment. (See R 10 below)

12 Other costs charges and expenses

The Rule as amended by Act XXI of 1929 makes express provision for payment to the mortgagee of all expenses properly incurred by him in respect of the mortgage security, together with interest thereon.^{1a} Even prior to Act XXI of 1929 the mortgagee was entitled in a suit on the mortgage to claim as part of the mortgage money, expenses properly incurred by him for the preservation of the mortgaged property, the protection of his title to the property etc.¹ (See Transfer of Property Act, Ss 72 and 63 A) R 10 below also provides for the payment of such expenses incurred subsequent to the preliminary decree up to date of payment

13 Account against mortgagee in possession

Under S 77 of the Transfer of Property Act a mortgagee in possession of the mortgaged property is not liable to account for the rents and profits of the property where under the terms of the mortgage the mortgagee is to take rents and profits in lieu of interest or in lieu of interest and defined portions of the principal. In other cases a mortgagee in possession is liable to account for the rents and profits of the property. Under S 76 (g) of the Transfer of Property Act he must keep clear full and accurate accounts of all sums received and spent by him as mortgagee¹ and is bound to deduct the rents and profits realised by him from the amount claimed by him against the mortgagor.² Further he is liable to pay a reasonable occupation rent if he is personally in possession of the land.³ He must also in the absence of a contract to the contrary, pay the Government revenue and all charges of a public nature and all rents accruing due in respect of the property, and if owing to his default, the mortgagor has to pay any of these items of expenditure he is entitled to a set off in respect thereof.⁴ [See Transfer of Property Act, S 76 (c)]

14 Accounts in suits by or against sub mortgagee

A sub mortgagee is entitled to sue for sale or foreclosure to the same extent as the original mortgagee himself.¹ Where a sub mortgagee is a party to a suit

5 (1929) 1923 Cal 544 (544)

6 (1877) 1 Ind Jur (N 5) 22

(1891) 8 Cal L Rep 43, (438)

(1864 66) 2 Bom H C R 214 (218) Costs of improvements

(1905) 32 Cal 576 (580)

(1904) 28 Bom 181 (188) Mortgagee in possession can add sums spent for making good his title against mortgagor

Note 12

1a (1933) 1933 Rang 112 (117) Mortgagee paying Government revenue to save land may add it to the mortgage money

1 (1855) 9 Bom 430 (437)

(1898) 21 Mad 23 (31)

(1898) 92 Bom 410 (416)

(1891) 15 Bom 620 (633) Costs of proceedings against tenants of mortgaged property—Mortgagor not personally liable

(1880) 4 Bom 584 (59) Mortgagee in possession entitled to reasonable costs of repairs

(1898) 6 All 401 (408) Mortgagee in possession paying Government revenue payable by mortgagor. He has a right to tack on amount so paid to his mortgage debt

(1903) 7 Cal W N 514 (517) 25 All 237 30

(1905) 1 Cal L Jour 531 (537)

4 (1884) 4 All W N 92 (95) 6 All 308.

Note 14

1 (1891) 20 Mad 35 (40)

- 2, on the mortgage, the proper course is to direct accounts to be taken, both of the amounts due to the original mortgagee and of the amounts due to the sub mortgagee and to order that, out of the sum due to the original mortgagee, the sub mortgagee should be paid the amount due to him on his mortgage, that the balance should be paid to the original mortgagee and that, thereafter, both the mortgagees should re-convey to the mortgagor the mortgaged property² (See also Appendix D, form 11 and Notes under R 1)

15 Subsequent mortgagees

The form of the preliminary decree given in the present Rule should be adapted to the circumstances of each case. Where puisne mortgagees are impleaded as parties in a suit on a prior mortgage a form similar to the one in use in the Chancery Division in the High Court in England may be found useful¹ (See also Appendix D forms 9 to 11). The chief point to be noted in such cases is to give effect to the principle redeem up, and foreclose down. The first right of redemption belongs to the next puisne mortgagee. If he makes default, he is foreclosed and the right to redeem devolves on the next puisne mortgagee and in the event of his default the right belongs to the next mortgagee and the process goes on until the mortgagor is reached. If the mortgagor also fails to redeem he will be foreclosed².

A subsequent mortgagee who has been added as a party to a suit for foreclosure by a prior mortgagee and who pays off the decree amount can, on his being transposed as plaintiff apply for a final decree³.

16 Pays into Court

Under S 86 of the Transfer of Property Act the defendant could pay the mortgage money under the preliminary decree to the mortgagee plaintiff direct or into the Court¹. But the present Rule requires the payment to be made only into the Court in all cases². As to when and how far a payment made out of Court can be recognized by the Court dealing with an application to pass a final decree, see Note 14 to R 5 *infra*.

17 On a day within six months

The Rule only fixes the outer limit for the period to be fixed for the payment of the mortgage money under the preliminary decree. The Court has a discretion to fix any smaller period it thinks fit¹. Where accounts are directed to be taken, the six months period should be calculated not from the date of the preliminary decree, but from the date on which the Court confirms and countersigns the accounts taken under its decree². [See Sub R (1) Cl (c) and Sub Cl (i)]. As to the question whether, when the preliminary decree is appealed against, the period fixed for payment runs from the date of the first Court's decree or from the date of the appellate decree (See also Note 5 to R 3 and Note 9 to S 148).

² (1891) 15 Bom 632 (693 and 694)

Note 15

1 (1905) 27 All 320 (330) 32 Ind App 193 (P C)

2 (1883) 7 Bom 526 (529)
(1911) 10 Ind Cas 174 (175) (Oudh)

(1905) 27 All 325 (330) 32 Ind App 123 (P C)

3 (1929) 1929 Nag 145 (146) 24 Nag L R 119
(But see (1905) 9 Cal W N 577 (583)
32 Ind App 123 27 All 325 (P C)
Case under Transfer of Property Act)

Note 16

1 (1901) 8 Cal W N 102 (101)
(See also (1903) 16 C P L R 111)

2 (1918) 1918 Cal 472 (473)
(1919) 1919 Mad 792 (792) 48 Ind Cas 196
(197) 42 Mad 61
(1912) 16 Ind Cas 987 (987) 1913 P R No 12
(1930) 1930 Mad 105 (107, 108)

Note 17

1 (1927) 1927 P C 17 (17) (P C) But held that in the circumstances the full est possible term should be given
2 (1915) 1915 Cal 503 (503)

See also the undermentioned case¹ under the Co-operative Societies Act of 1912

18 Extension of time

Sub R (2) of this Rule which corresponds to the proviso to the old Sub R (2) of R 3 empowers the Court on good cause being shown to extend the time fixed for payment of the mortgage money under the preliminary decree¹ But the mortgagor is not entitled to an extension of time *as of right*² The Rule itself provides that extension of time may be granted on good cause shown³ It is not a good ground for extending the time that the mortgagor was under a misconception that payment within the period fixed was unnecessary⁴ As to what constitutes good cause see the undermentioned cases^{4a} Time may be extended even after the expiry of the period originally fixed⁵ provided a *final decree* has not been passed⁶ As the right to redeem continues until the final decree is actually passed⁷ the mortgagor may pay in the money at any time before the final decree is passed though there may not be an *express* order extend-

- 3 (1933) 1933 Nag 211 (213) Rules under S 43 depriving right of six months under O 34 R 2 are not *ultra vires*

Note 18

- 1 (1922) 5 C P L R 54 (55)
(1897) 5 C P L R 104 (106)
(1914) 1914 All 95 (99) 40 All 579
(1971) 1921 Oudh 135 (135) Decree was construed as extending time for payment
(See also (1933) 1933 Nag 164 (166) Preliminary decree—Compromise—Undertaking by mortgagor not to oppose application for final decree—Statutory right to ask for extension is not taken away]
2 (1919) 1919 Lit 497 (500) 4 Pat L Jour 347
(1916) 1916 Mad 562 (552) 39 Mad 882
3 (1897) 13 All 160 (185)

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- (1930) 1930 Nag 178 (179) No sufficient cause for extension of time shown—Final decree must be passed
(1910) 8 Ind Cas 592 (593) (L B) Question of good cause to be decided in view of

rued

- (1919) 1919 Oudh 331 (352) Fact that mortgagee does nothing by extension of time may be good cause
(1930) 1930 Nag 12 (13) No evidence of *bona fide* efforts to secure loan—Good cause entitling applicant to extension held not shown
(1929) 1929 Nag 263 (264) Semble difficulty in raising money is good cause
(1928) 1928 Nag 301 (303) Failure of crop—Consequent inability to pay—Time extended
(1925) 1925 Nag 258 (258) *Bona fide* attempt to raise money—Time may be extended
(1932) 1932 Nag 177 (179) 28 Nag L R 221 Time extended—One third amount deposited—Time again asked for refused and final decree passed in ignorance of deposit—On review time extended—Held justified as balance also deposited in meantime
5 (1920) 1920 Nag 24 (25)
(1902) 26 Bom 121 (126)
(1902) 25 Mad 244 (289) (F B)
(1898) 22 Bom 771 (773)
(1899) 22 Mad 133 (136)
(See however (1891) 13 All 400 (409))
6 (1918) 1918 Cal 424 (424) Court cannot accept payment after final decree has been passed
7 (1921) 1921 Jour 22 (1) 70 Ind Cas 152 (Cii)
(1889) 16 Cal 246 (249)
(1902) 25 Mad 200 (307) (F B)
(1931) 1931 All 223 (223)
(1931) 1931 Oudh 121 (122)
(1903) 25 All 231 (239)
(1898) 1 Oudh Cas 91 (93)
(1910) 7 Ind Cas 50 (50) (All)
(1914) 1914 Oudh 209 (211) 17 Oudh Cas 347
(1920) 1920 Bom 29 (29) 44 Bom 939
(1914) 1914 Bom 200 (201) 39 Bom 41

be exercised liberally—Time to be extended to enable money being

C P C 301 & 302

ing the period⁸ This is made clear now by the substitution of the words 'before a final decree has been passed' at the beginning of R 3 in place of the words "on or before the day fixed" which occurred in the old Rule. Even where a preliminary decree is passed by consent of parties, the Court can exercise its power of extending the period fixed for payment if there is nothing in the decree excluding such power.⁹

An express application for extension of time is not necessary.¹¹ Nor need the application where one is made be in writing.¹¹ But the Court cannot postpone the passing of a final decree on the application of a third party.¹²

19 Plaintiff to apply for final decree

The Rule [Sub R (1) (c) Sub Cl (ii)] makes it clear that plaintiff has to apply for a final decree for foreclosure if the defendant fails to pay the mortgage money within the time fixed by the Court. In one case it was contended that a final decree passed on the application of the transferee from the mortgagee was not binding on the mortgagor. It was held that as the decree was passed in the presence of the mortgagor he could not subsequently object to it.¹

20 Mortgage of chattels and intangible property

It has been held by the High Court of Calcutta that a mortgagee of chattels is entitled to sue for foreclosure.¹ The High Court of Bombay, the Judicial Commissioners Courts of Nagpur² and Oudh³ on the other hand have held that he is not so entitled. A mortgagee of a turn of worship is entitled according to the Calcutta High Court to sue for foreclosure of that right⁴ the turn of worship being regarded as intangible property.

21 Res judicata See Notes to S 11 Note 40 *supra* See also Notes under Rr 7 and 9 *infra*

22 Equitable mortgage of personal property See Note 4 *ante*.

23 Appeal

An appeal lies from a preliminary decree.¹ Under O 43, R 1 (a) an appeal lies from an order refusing to extend time under this Rule but not from an order granting an extension of time.² An application for revision may however lie

8 (1909) 1 Ind Cas 780 (782) 36 Cal 192
[Contra (1884) 1884 All W N 178
(178) Case superseded by amendments introduced by Act XXI of 1923]

(1897) 14 All 529 (530-531) Observations as to right of redemption not being available after expiry of time fixed [Compare (1900) 8 Oudh Cas 33 (35) Mortgagee obtaining possession of the mortgaged property before the expiry of the period fixed in preliminary decree for payment of mort

10 (1904) 98 Bom 107 (108)

11 (1907) 26 Bom 121 (120)

19 (1902) 6 Cal W N 654 (655)

Note 19

1 (1919) 1919 Pat 497 (500) 4 Pat L Jour 317

Note 20

1 (1915) 1915 Cal 161 (164) 21 Ind Cas 400 (400) 47 Cal 435 Following the decision of the House of Lords in *Harrison v Hart* (1776) 1 Comb 393

Fancourt v Polls 2 Fonblaque on Equity 5th Edn 261n and *Ke p v Westbrook* (1443) 1 Ves Sen 215 (279)

2 (1916) 1916 Bom 77 (80)

3 (1911) 10 Ind Cas 863 (873) See *g L R* 11

4 (1901) 4 Oudh Cas 201 (307) It was held that the provisions of S 56 to 59 of the Transfer of Property Act corresponding to O 34 Rr 2 to 5 did not apply to the mortgage of moveable property

5 (1915) 1915 Cal 111 (115) 42 Cal 155

Note 23

1 (1918) 1918 Nag 185 (187)

(1897) 13 Cal 461 (467)

2 (1931) 1931 Nag 1 (11)

(1887) 3 All 500 at 1500

9 Tah 53 Parties compromising—Mortgagee given possession—One year allowed for redemption—After one year mortgage automatically becomes full owner

See however (1931) 1931 Oudh 44 (11) 31 Cal 349

from such orders.³ No appeal lies against an order refusing to extend time *after a final decree has been passed*.⁴ See also S 97, ante.

R 3. [New Act IV of 1882, S 87] (1) *Where, before a final decree debarring the defendant from all right to redeem⁵ the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of Rule 2, the Court shall on application made by the defendant in this behalf, pass a final decree—*

(a) *ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary,—*

(b) *ordering him to re-transfer at the cost of the defendant the mortgaged property as directed in the said decree, and also if necessary—*

(c) *ordering him to put the defendant in possession of the property.*

(2) *Where payment in accordance with sub-rule (1) has not been made⁶ the Court shall on application made by the plaintiff in this behalf pass a final decree⁷ declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.*

(3) *On the passing of a final decree under sub-rule (2), all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged.⁸*

Synopsis

	Note No		Note No
I Transfer of Property Act S 87	1	VII Final decree for foreclosure	7
II Transfer of Property (Amendment) Supplementary Act XXI of 1929	2	(a) Partial foreclosure	8
III Where before a final decree has been passed debarring defendant from all right to redeem	3	(b) Discharge of debt etc., on foreclosure	9
IV Power to enlarge time See Note 13 to 12 in S 118 Note 1	4	(c) Delivery of title deeds	10
V Effect of appeal on time fixed for payment	5	(d) Limitation for application for final decree See Note 12 to R 5	11
VI Where payment in accordance with sub rule (1) has not been made	6	(e) Application for execution of final decree	12
		VIII Appeal	13
		IX Court fee	14

(1837) 14 All 520 (521)

(1901) 26 Bom 121 (12) Under the Transfer of Property Act such an order was held to come within S 244 of the Code (now S 4) in *Indra* 11

11 (116) 1316

(1914) 1914 Nag 8 (3) 10 Nag L R 100

3 (1931) 1931 Nag 1 (1)

4 (1) 01 1920 Nag 240 (240)

Other Topics

Application by plaintiff and (4)	See Note 7 Pts (2)	Notice	See Note 7 Pts (7) to (10)
Costs	See Note 12 Pt (5) R 2 and Note 11 above	Payment after date fixed but before final decree	See Note 3 Pts (1) and (2)
Court to which application is to be made	See Note 7 Pt (3)	Payment before time fixed	See R 2 Note 17 Pt (1)
Form of decree	See Appendix D Form No 4	Payment under R 2 Sub R (2)	See R 2 Note 16 above
Nature of proceedings suit and not execution	See Note 7 Pt (5)	Right to interest	See Note 6 Pt (3) and R 11 Notes

1 Transfer of Property Act S 87

This Rule corresponds to S 87 of the Transfer of Property Act with the following differences —

- (1) The present Rule provides for the *passing of a decree* when the defendant pays up the mortgage money within the time allowed. But, S 87 merely provided that in such a case the defendant should if necessary be put in possession of the mortgaged property.
- (2) Under the present Rule if the defendant does not pay the mortgage money within the time allowed a *final decree* is passed. But under S 87 the procedure was to pass an *order absolute* for foreclosure.

2 Transfer of Property (Amendment) Supplementary Act XXI of 1929

The present Rule has been amended by Act XXI of 1929. The chief points of distinction between the old Rule and the new Rule are —

- (1) The words *before a final decree debarring the defendant from all right to redeem the mortgaged property* has been passed have been substituted for the words *on or before the day fixed*.
- (2) Under the amended Rule the defendant mortgagee has to *apply* to the Court for a decree in his favour if he pays the mortgage money within the time allowed. The old Rule did not require this.
- (3) The new Rule makes it clear that the decree to be passed under it is a *final decree*.
- (4) The proviso to Sub R (2) of the old Rule regarding the Court's power to extend the time fixed for payment of the mortgage money has been transferred to R (2) above.
- (5) Sub R (3) makes it clear that the passing of a final decree for foreclosure discharges not only the mortgage debt but all liability of the defendant in respect of the mortgage or on account of the suit thereon.

3 Where before a final decree has been passed debarring defendant from all right to redeem

The substitution of the words 'before a final decree has been passed' etc for the words *on or before the day fixed* now makes it clear that though a mortgagee has not paid the mortgage money under the preliminary decree for foreclosure within the time allowed by the Court he does not lose his right to redeem but can exercise the right till a final decree for foreclosure is actually passed¹. In view of this the under mentioned decisions² prior to the Transfer of Property

Order 34 Rule 3—Note 3

¹ (1931) 1931 Oudh 121 (122)

² In the following cases the mortgagee was held entitled to redeem till order absolute or final decree for foreclosure was actually passed —

(1878 18 9) 3 Cal 503 (504 510)
(1893) 72 Mad 133 (134)
(189) 22 Bom 71 (73)
(18 9) 16 Cal 246 (247)
(1895) 22 Cal 931 (934)
(1900) 27 Cal 703 (705)

(Amendment) Supplementary Act XXI of 1929 which disclose a conflict of judicial opinion are only of academic interest now. Where a mortgagee after the date fixed for payment but before a final decree for foreclosure is passed enters into possession of the mortgaged property he does so in his capacity as mortgagee and not as owner³. But if he remains in possession and the mortgagor keeps quiet for a long time the mortgagor will be held to have acquiesced in the mortgagee holding the property as his own and may thus be deprived of his right on the ground of estoppel⁴.

4 Power to enlarge time—See Note 1b to R 2 above and S 148 Note 9

5 Effect of appeal on time fixed for payment

O 41 R 5 expressly provides that an appeal shall not operate as a stay of proceedings under a decree or order appealed from, except so far as the appellate Court may order to that effect. Hence the mere *pendency* of an appeal from the preliminary decree does not extend the time fixed, and is no bar to the passing of a final decree¹ unless the appellate Court expressly or by necessary implication extends the period for payment². Nor is it a ground for enlarging the time fixed by the preliminary decree for payment³.

As to the effect of a decree passed in, or dismissal of, the appeal on the time fixed by the preliminary decree, see S 148, Note 9, and the undermentioned cases⁴.

6 Where payment in accordance with Sub R (1) has not been made

A mortgagee is not bound to accept a smaller sum than that due as part satisfaction of his decree but is entitled to insist on a final decree for foreclosure being passed in his favour where the *whole* of the amount found due to him is not paid into the Court¹. But this principle only applies where there is no dispute as to the sum due². Thus, where the mortgagor deposits in Court the sum found

- (1902) 25 Mad 744 (289)
 (1893) 16 Mad 214 (219)
 (1907) 25 Mad 300 (306, 307)
 (1909) 1 Ind Cas 160 (752) 36 Cal 122
 (1904) 1 All L J 300
 (1910) 7 Ind Cas 50 (50) (All)
 (1893) 20 All 446 (447)
 (1898) 20 All 315 (377)
 (1902) 24 All 419 (480)
 (1903) 25 All 231 (233)
 (1903) 27 All 501 (504)
 (1913) 18 Ind Cas 357 (358) (Cal)
 (1914) 1914 Oudh 209 (210) 17 Oudh Cas

Note 5

- 1 (1930) 1930 Pat 227 (229)
 (1897) 1 Cal W N 197 (198)
 2 (1896) 18 All 453 (457)
 (1918) 1918 Cal 494 (424)
 (1906) 1906 All W N 703 (203)
 (1893) 20 Cal 279 (281)
 3 (1906) 10 Cal W N 110 (912)
 (1889) 13 Bom 106 (109)
 (1893) 17 Lom 547 (553, 554)
 (1892) 16 Bom 243 (248)
 (1891) 1 Mad L Jour 745 (746)
 (1912) 18 Ind Cas 747 (749) (Cal)
 4 (1915) 1915 Mad 913 (920) Appellate Court confirming decrees of lower Court—Time not extended
 (1912) 16 Ind Cas 799 (99 800) (Mad) (Do)
 (1921) 1921 U B 5 (") 4 Upp Bur R 1 (Do)
 (1896) 11 C P L R 115 (190 121) No extension of time unless expressly granted in appellate decree
 (1914) 1914 Cal 323 (324) High Court in second appeal while restoring decree of first Court which had been reversed by lower appellate Court, fixed fresh date for redemption
 [Put see (1835) 22 Cal 467 (472)]

the time]

- (1907) 3 Nag L R 146 (155) The Court can in its discretion refuse to extend

1st, afterwards—

- (1930) 1930 Nag 55 (55)
 (1930) 1930 Nag 178 (179)
 3 (1905) 8 Oudh Cas 33 (35)
 4 (1926) 1926 Bom 273 (277)

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paid by him

- 2 (1910) 5 Ind Cas 165 (169) (Cal)

due by the lower Court, but the sum is increased by the appellate Court, the payment by the mortgagor reduces the debt *pro tanto* and interest is payable afterwards only on the balance.³ The mortgagee is not bound to accept payment after the passing of the final decree for foreclosure.⁴

7 Final decree for foreclosure

The Rule makes it clear that the decree to be passed under this Rule is a final decree. The procedure under the Transfer of Property Act was to obtain an order absolute for foreclosure or sale.⁵

An application for a final decree for foreclosure should be made by the plaintiff⁶ and he should make it to the Court of first instance even though the preliminary decree was modified in appeal.⁷ But a defendant who is present and allows a final decree to be passed on the application of a transferee from the plaintiff will be estopped from questioning the validity of the decree afterwards.⁸

The legal representatives of a party who dies after a preliminary decree can and should be brought on record under the provisions of O 22 in the proceedings to obtain the final decree inasmuch as the suit must be deemed to be pending till a final decree is passed.⁹ But a person, who was not a party to the preliminary decree, cannot be added as a party to the proceedings to obtain a final decree.¹⁰

No notice is necessary to be given under this Rule to the defendant before a final decree is passed,⁷ though, in practice, it is generally given on grounds of justice and equity.⁸ Notice is, however, necessary where the defendant happens to be a minor.⁹ But the failure to give notice is, if anything, only an irregularity and, unless the merits of the case are affected, will not invalidate the proceedings.¹⁰

3 (1910) 5 Ind Cas 165 (169) (Cal)

(1912) 16 Ind Cas 374 (375) (Cal)

4 (1918) 1918 Cal 424 (424)

Note 7

1 (1920) 1920 Mad 286 (287) Right to order absolute already accrued at the time of coming into force of Code of 1908 not affected by the Code

[See (1914) 1914 P C 66 (67) 36 All 350 (P C) Execution of order absolute barred before Code of 1908—Not revived by passing of new Code]

2 (1919) 1919 Pat 497 (500) 4 Pat L Jour 347

3 (1901) 23 All 89 (81)

(1900) 23 Mad 521 (527)

(1910) 6 Ind Cas 323 (325) (Cal)

[See (1881) 6 Cal 513 (515) Court passing preliminary decree—Jurisdiction transferred to another Court—Application for final decree

7 (1902) 25 Mad 506 (507)

(1901) 29 Cal 644 (646)

(1923) 1923 Nig 17 (15)

(1906) 4 Cal L Jour 17 (114)

(1896) 9 C P L R 3 (8)

In some cases under the Transfer of Property Act, notice was held to be necessary if the application for order absolute was made more than one year after the decree the lien being that such an application was an application for execution see the following cases —

(1903) 27 Mad 40 (42)

[But see (1893) 6 C P L R 1 (3)]

8 (1935) 1935 Mad 716 (717)

(1930) 1930 Mad 105 (107 108)

(1917) 1917 Oudh 320 (321) 20 Oudh Cas 263

215 But where mortgaged property is transferred after preliminary decree the final decree is binding on the transferee even though he was not a party—He is affected by his *pendens* and the decree can be executed against him]

An *ex parte* final decree can be set aside under O 9, R 13 if 'sufficient cause' within the meaning of that Rule is established¹¹. The dismissal for default of an application for a final decree does not preclude a fresh application for the same purpose¹².

The procedure for obtaining a final decree applies to preliminary decrees passed in compromise between the parties¹³ unless the decree by its terms provides for execution on default without any fresh decree being passed¹⁴. A *confit* or decree for foreclosure is not contemplated by the Rule¹⁵.

Where a party is entitled to pre-emption on foreclosure the right arises not on the expiry of the period fixed for payment but on the passing of the final decree for foreclosure¹⁶ as until then the ownership of the mortgaged property vests in the mortgagor¹⁷.

An omission to draw up a final decree is only an irregularity so that where a Court erroneously passed an order absolute instead of a final decree it was held that the order could be enforced by execution¹⁸. See also the undermentioned cases¹.

8 Partial foreclosure

The nature of the proceedings for foreclosure is such that a mortgage must be foreclosed as a whole and not at all. Thus where a suit for foreclosure is decreed only with respect to some of the properties but dismissed with regard to others and an appeal is filed from that portion of the decree which dismisses the suit, the mortgagor cannot first obtain a final decree in respect of the portion of the decree favourable to him and then on succeeding in the appeal as to the rest another final decree in respect thereof¹.

9 Discharge of debt etc. on foreclosure

The present Rule makes it clear that on the passing of a final decree for foreclosure not only the mortgage debt but all the defendant's liabilities in respect of the mortgage as well as for the costs of the suit become discharged¹. The

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| <p>Amount of notice to mortgagee
(1100) 1913 Mad 710 (17)
(1100) 1913 All 133 (17)
(1101) 1913 Bom 337 (347) 27 Ind App 216 (P.C.)
[See also (1902) 1903 All 638 (633) 60]</p> <p>11 (1100) 1913 All 279 (280) 51 All 674
(1100) 1913 Cal 23 (26) (F.L.)
(1100) 1913 Cal 516 (516)
[See (1901) 4 Oudh C.S. 238 (240)
Want of notice is no ground for setting aside a final decree under O 9, R 13]
[See also (1899) 12 C.I.L.R. 52 (53)
Suit lies to set aside order absolute on ground of fraud]</p> <p>12 (1907) 1257 Oudh 43 (0)
13 (1912) 1322 Nag 152 (184)
14 (1911) 10 Ind C.S. 570 (535) (C.I.)
(1911) 1931 Cal 516 (516)
(1907) 1913 Bom 303 (0) 310
15 (1911) 1931 Oudh 138 (139)
[But see (1899) 12 C.P.L.R. 103 (103) 106] Posession obtained under conditional decree for foreclosure cannot be disputed on ground of final decree not having been passed]</p> | <p>16 (1898) 20 All 315 (319)
(1898) 20 All 358 (361)
(1898) 20 All 370 (377)
[See also S. 4 Cl. (2) S. 6 and S. 11
1911 Pre-emption Act (11 of 1922)]</p> <p>17 (1896) J.C.P.L.R. 140 (131)
18 (1927) 1927 Bom 131 (133) 51 Bom 120
19 (1903) 1923 Nag 130 (132) Interpretation of final decree for foreclosure
(1914) 1914 All 177 (178) 36 All 376 Foreclosure—Preliminary decree—Effect of agricultural title—Finding negative plea by Collector—Case referred to Civil Court—Decree absolute for foreclosure must inevitably be passed</p> <p>(1881) 7 Cal 394 (400) Suit in nature of foreclosure suit—Defendant not to be ordered to pay deficiency in principal interest etc. which the moneys to arise from the sale may be insufficient to meet</p> <p>Note 8
1 (1900) 27 All 301 (301)</p> <p>Note 9
1 (1900) 4 Ind C.S. 545 (545) (C.I.) Case under Transfer of Property Act—On order absolute for foreclosure mortgage</p> |
|---|---|

mortgagor's right to redeem revives if notwithstanding the foreclosure the mortgagee pursues his personal remedy against the mortgagor. Where a person holding several mortgages on the same property forecloses under the first mortgage, it will be inequitable to allow him to sue the mortgagor personally for the debt secured by the second mortgage.³

See the undermentioned case⁴

10 Delivery of title deeds

A mortgagor can institute a separate suit to recover compensation for loss of title deeds the Court may also grant in the mortgage decree itself an alternative relief for damages for such loss. But if no such alternative relief for damages is provided for in the preliminary and final decrees the Court cannot grant it in execution.¹

11 Limitation for application for final decree—See Note 12 R 5 infra

12 Application for execution of final decree

An application for the execution of a final decree is governed by Art 182 of the Limitation Act.¹

A final decree in a mortgage suit may be adjusted out of Court like any other decree and O 21 R 2 applies thereto. Where a mortgage decree is time barred it cannot be enforced, the mortgage itself having merged in the decree.³ S 48 of the Code applies to a final decree under O 34 though the preliminary decree on which it was based had been passed under the Transfer of Property Act.⁴ Where in a foreclosure decree against the defendants costs are awarded to the defendants O 21 R 19 is no bar to their executing the decree for costs.⁵ Where a foreclosure decree contains no direction for delivery of possession the mortgagee cannot obtain possession by applying in execution. The proper course is to apply for an order for possession.⁶

13 Appeal

It is clear under O 34 that a final decree is a decree and appealable as such. Even under the Transfer of Property Act an order absolute was held to be appealable as a decree.¹

14 Court fee

Ad valorem Court fee is payable on an appeal against a final decree in a mortgage suit.¹

ability for

105 (706)

[See also (1914) 1914 P C 66 (97)

36 All 300 (P C)]

2 (1923) 1923 Nag 20 (21)

3 (1913) 16 Ind Cas 223 (95) 33 All 200

4 (1924) 1924 All 636 (636)

5 (1903) 16 C P L R 73 (576)

6 (1904) 17 C P L R 62 (61)

1) Sub e

quent mortgagee made party to decree under R 2 but not made party to decree under R 3 and redeeming prior mortgage—Mortgage ceases to have any interest in the property and cannot redeem the subsequent mortgage

Note 10

1 (1922) 1922 Mad 299 (300)

Note 12

1 (1977) 132 1st 215 (217) 61st 780

Note 13

1 (1901) 3 Nag L R 146 (152 153)

(1900) 12 All 61 (62)

[See also (1932) 132 Lah 714 (215)

Order dismissing application for final decree amounting to dismissal of suit—appealable as decree]

Note 14

1 (1928) 1928 Nag 146 (147)

(1915) 1915 Oudh 121 (121) 19 Oudh C14

114

R. 4. [New ; Act IV of 1882 S 88] (1) In a suit for sale, if the plaintiff succeeds the Court shall pass a preliminary decree³ to the effect mentioned in clauses (a) (b) and (c) (i) of sub rule (1) of Rule (2), and further directing⁴ that in default of the defendant paying as therein mentioned the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff together with such amount as may have been adjudged due in respect of subsequent costs¹² charges, expenses and interest,¹¹ and the balance if any be paid to the defendant or other persons entitled to receive the same

(2) The Court may, on good cause shown and upon terms to be fixed by the Court from time to time, at any time before a final decree for sale is passed, extend the time⁸ fixed for the payment of the amount found or declared due under sub rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest

(3) In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the Court may, at the instance of any party to the suit or of any other person interested in the mortgage-security or the right of redemption, pass a like decree⁹ (in lieu of a decree for foreclosure) on such terms as it thinks fit including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms

(4) *Where*, in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from or subrogated to the rights of any such mortgagees, are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication⁶ of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No 9, Form No 10 or Form No 11, as the case may be, of Appendix D with such variations as the circumstances of the case may require

Local Amendments

ALLAHABAD

⁴ (2) After the words the Court may insert the words of its own motion or

CALCUTTA

Re number Sub Rules (3) and (4) as Sub Rules (4) and (5) respectively and insert the following as Sub Rule (3) —

(3) The Court may in its discretion direct in the decree for sale that if the proceeds of the sale are not sufficient to pay the mortgage debt the mortgagee shall pay the balance personally.

Synopsis

	Note No		Note No
I Transfer of Property Act S 88	1	V Decree for sale in foreclosure suit Sub R (3)	9
II Amendments subsequent to 1908	2	VI Order in which properties should be sold	10
III Who may obtain a decree for sale	3	VII Interest—see Notes under O 34, R 11	11
IV Decree for money in suit for sale	4	VIII Costs	12
(a) Form of decree	5	IX Succession certificate	13
(b) Contents of decree in suit for sale by first mortgagee	6	X Award	14
(c) Court's power to adjust equities	7	XI Consent decrees	15
(d) Power to extend time in suit for sale Sub R (2)	8	XII Appeal	16

Other Provisions

Anomalous mortgage See Note 3 It (1) also Note 9 and S 38 Cl (g) of T P Act	R 5 to 7
Amount fixed—Lump sum once for all See Note 6 It (1) to (2) above	
Charges See Note 4 Its (2) and (3)	
Construction of mortgage decrees See Note Its (2) to (4)	
English mortgage See Note 3 It (1) also S 38 Cl (e) of T P Act	
Liquidable mortgages or mortgage by deposit of title deeds See Note 3 It (1) also S 38 Cl (f) of T P Act	
Final decree—Direction to take accounts in execution—Against law See Note 3 It (4)	
Person having two or more mortgages See Note 10 It (3) to (15) to R 1 above	
For civil decree not to be included See Note 3 It (1)	
Right of subsequent mortgagee See Note 6 and Note 5 Pt (6)	
Suit mortgages See R 1 Note 9	

1 Transfer of Property Act S 88

The provision as to the payment of subsequent costs and interest to the mortgagee out of the sale proceeds of the mortgaged property is new. The present Rule is not retrospective in effect so as to affect decrees already passed under the Transfer of Property Act at the time of coming into force of the new Code¹

2 Amendments subsequent to 1908

The present Rule has been amended extensively by the Transfer of Property (Amendment Supplementary) Act, XXI of 1923. The material changes introduced by the amendment are as follows—

- (1) The new Rule makes it clear that the decree under it is a *primary* decree.
- (2) If the mortgagor makes default in payment the mortgagee has to *apply* for a final decree for sale.
- (3) The Rule makes it clear that the mortgagees should be paid out of the sale proceeds not only subsequent costs and interest but also *subsequent charges and expenses properly incurred* in respect of the mortgage security.
- (4) Sub R (2) enables the Court to *extend the time* fixed for payment. There was no such provision in the old Rule.
- (5) Sub R (3) corresponding to Sub R (2) of the old Rule is now expressly limited to *anomalous mortgages* while Sub R (2) of

the old Rule applied to *all* mortgages other than mortgages by conditional sale

- (b) Sub R (4) makes express provision for the adjudication of the rights of subsequent mortgages who are joined as parties to a suit by a prior mortgage

3 Who may obtain a decree for sale

The right to sue for sale or foreclosure is conferred by S 67 of the Transfer of Property Act. A decree for sale cannot be obtained by a usufructuary mortgage as such a mortgage by conditional sale as such. Such a decree can be obtained only by a simple mortgage in English mortgage, an equitable mortgage and in anomalous mortgage. See Note 4 to R 2 and the under-mentioned cases.¹ As to the rights of sub mortgages see Note 9 to R 1

The High Court of Madras has held that a mortgagee of chattels is entitled to obtain a decree for sale in enforcement of his mortgage quite as much as a mortgagee of immovable property.² See also Note 1 to Rule 1 and Note 20 to Rule 2 *out*

4 Decree for money in suit for sale

In a suit on a mortgage it is open to a mortgagee to relinquish his security and to content himself with a simple money decree.¹ A money decree for money which creates a charge on immovable property for the decretal amount² or which authorises the decree holder to enforce the decree by selling certain property³ is not a preliminary decree on a mortgage under this Rule

5 Form of decree

The forms in Appendix D for decrees in suits relating to mortgages have been recently changed by the Transfer of Property (Amendment) Supplementary Act XXI of 1929. For the form of preliminary decree in suit for sale, see Appendix D 1 in Nos 5 and 5 A

In framing decrees in mortgage suits the provisions contained in O 34 should not be overlooked.¹ A preliminary decree in a mortgage suit must fix a period within which the mortgagor should pay the mortgage money and the decree should direct a sale of the property *only* if the mortgagor fails to pay the money within the period fixed.

Note 3

- 1 (1884) 11 All 267 (570) Usufructuary mortgage not entitled to sue for sale
(1935) 1935 All 778 (741) In the case of an anomalous mortgage Court has discretion to grant a decree for sale in lieu of a decree for foreclosure
(1893) 17 Bom 425 (425) (Do)
(1885) 11 Mad 88 (90) (Do)
(1894) 12 Mad 109 (110 111) (Do)
(1891) 14 Mad 232 (234) (Do)
(1897) 24 Cal 677 (680) (Do)
(1896) 20 Bom 246 (248) (Do)
(1894) 17 Mad 131 (133) Personal covenant in usufructuary mortgage — Mortgagee entitled to sue for sale
(1891) 11 All W N 164 (169) (Do)
(1904) 27 Mad 226 (525) Combination of a simple and usufructuary mortgage the mortgagee has a right to a decree for the mortgage money and for sale
(1888) 8 All W N 171 (172) (Do)

- (1886) 8 All W N 212 (217) (Do)
(1891) 24 Cal 245 (250) Equitable mortgage appropriate remedy is a decree for sale
(1878 80) 2 All 527 (530) Simple mortgage can sue for sale
(1901) 1 All L J 20 (20)
2 (1935) 1935 M d 241 (241 242)

Note 4

- 1 (1902) 24 All 456 (457)
2 (1925) 1925 M d 1101 (1107)
3 (1925) 1925 M d 1073 (1084)

Note 5

- 1 (1914) 1914 Lch 24 (25) 27 Ind Cas 429
(192) 1915 Pun Re No 23
(1911) 11 Ind Cas 192 (195) 5 Sind L R 71

sold in execution of the decree—
Sale confirmed—Held that right to redemption was barred]

It will be noted that the form of a preliminary decree for sale under this Rule does not contain any provision regarding the mortgagor's personal liability. Any decree which contains such a provision is in contravention of the Rules which contemplate the determination of the question only when the sale proceeds of the mortgaged property are *not sufficient* to pay off the mortgage debt.³ Accounts between the mortgagor and the mortgagee should be taken before passing the final decree. A direction in the decree for taking accounts in *execution* is against law.⁴ A decree directing sale of the mortgaged property in default of the mortgage money being paid within a fixed time⁵ or a decree for the debt which provides that the mortgaged property shall be liable for the debt⁶ is in substantial compliance with the present Rule. Where a decree purporting to be a decree on a mortgage is ambiguous it should be construed so as to accord with the law.⁷ See the following cases as regards the construction of mortgage decrees.⁸

6 Contents of decree in suit for sale by first mortgagee

For the form of a preliminary decree in a suit for sale impleading the mortgagor and a *paisne mortgagee* see Appendix D, Form 9. For the form of a decree in a suit by *paisne mortgagee* for redemption of a prior mortgage and for foreclosure or sale on the *paisne mortgage*, see Form 10 in Appendix D. In a suit on a prior mortgage in which *paisne mortgagees* are also impleaded as parties, each of them is entitled to an order that an account be taken of the amount due to him and to a declaration of his right to participate in the surplus sale proceeds remaining after paying off the prior mortgagees in the order of his priority.¹ But the *paisne mortgagee's* right is dependent on a *sale being held under the prior mortgage*. Hence where the prior mortgage is paid off before the sale under it is held the *paisne mortgagee* cannot ask for a sale of the property.² Where the *paisne mortgage* includes some properties in addition to those mortgaged to the prior mortgagee the *paisne mortgagee* cannot ask that if the sale proceeds of the properties subject to the prior mortgage are not sufficient to pay off both the prior and the *paisne mortgages* the additional properties subject to the *paisne mortgage* should also be sold. His right is only to have his mortgage debt satisfied out of the sale proceeds of the properties subject to the prior mortgage.³ In a suit by

(See also (1933) 1933 Cal 316 (318) Court holding mortgage lien proportionately to property in possession of mortgagee discharged—Decree directing account due to plaintiff and in default of payment sufficient property to be sold—Decree held to be one under O 34 R 4.)

- 3 (1917) 1919 Pat 363 (866) Decree providing that if sale proceeds of mortgaged property falls short of mortgage debt there should be a personal decree against mortgagor. Held that it was not a preliminary decree on a mortgage in the strict sense of the term.
- (1915) 1914 Cal 214 (215) 23 Ind Cts 353 (390) Preliminary decree should not

(1904) 31 Cal 737 (795) Combined decree under Ss 89 and 90 of the Transfer of Property Act contravenes provisions of the Act

(1900) 22 All 442 (443)
Note 6

- 1 (1906) 33 Cal 92 (111)
2 (1910) 37 Cal 907 (910 911)
(1912) 1919 Vid 100 (102) 49 Ind Cts 6 (38) 42 Md 130
[See (1932) 1932 Cal 126 (129) 53 Cal 117 He must file a separate suit]
3 (1910) 37 Cal 907 (910 911)

113) v. ver R 6
1235 f h 610 (641) A combined
decree ver R 4 and 6 is in contra-
vention of the rule.

a prior mortgagee impleading both the mortgagor and the puisne mortgagee the mortgager cannot be called upon to pay off both the mortgages on pain of his property being sold. The puisne mortgagee's right to have his mortgage debt satisfied out of the surplus sale proceeds is not affected by such sale proceeds being withdrawn from the Court by a person having notice of the puisne mortgagee's title.⁵

7 Court's power to adjust equities

Where a sale of the mortgaged properties is impossible as where the mortgaged properties have been sold for arrears of revenue or of rent the decree must be suitably modified. The Court has inherent power, in such cases to give appropriate directions for the disposal of the fund which represents the property.¹ See also Note 19 to R 1

8 Power to extend time in suit for sale—Sub R (2)—See also Note 15 to R 2

The provision in Sub R (2) enabling the Court to extend the time fixed for payment of the mortgage money under the preliminary decree is new. There was no such provision before the amendment of the present Rule by Act XXI of 1929.¹ Hence, it was held that the Court had no power to extend the period fixed for payment of the mortgage money under a preliminary decree for sale.² It was, however, open to the mortgagor to prevent a sale at any time before it was actually held, by payment under O 21, R 69.³ Even after the sale it was open to him to have the sale set aside at any time before it was confirmed, by applying under O 21, R 89.³ But in some cases it was held that the provisions of the Code as to execution of decrees were not applicable to mortgage decrees.⁴ This view is no longer tenable especially since the transfer to the Civil Procedure Code, of the provisions of the Transfer of Property Act relating to suits on mortgages. O 21, R 83 expressly provides that that Rule does not apply to decrees on mortgage.⁵

In a suit for sale by a puisne mortgagee he was given a decree conditional on his redeeming a prior mortgage within two months from the decree. He failed to redeem the prior mortgage within the period fixed but did so about four months after the decree. It was held that as the defendant had not taken any steps to redeem, the plaintiff was entitled to the benefit of the payment though made after the prescribed time and to a decree absolute for sale.⁶

9 Decree for sale in a foreclosure suit—Sub R (3)

Sub R (3) has been taken from S 25 of the English Conveyancing Act, 1881.¹ The provision occurred even in S 88 of the Transfer of Property Act and was repeated in O 34 Sub R (2) [now Sub-R (3)]

(1.04) 26 All 504 (506)

[See (1932) 1932 Cal 126 (129) 59 Cal 117 But he must bring a suit of his own]

4 (100.) 1 Cal L Jour 31 (35) Prior to T P Act (Amendment Act) of 1929

5 (1921) 1921 All 312 (314) 43 All 268

Note 7

1 (191.) 191. Cal 203 (207) Mortgage security lost or converted — Court has inherent jurisdiction over conversion which represents property

Note 8

1 [See (1931) 1931 All 396 (337) 53 All 283]

1. (1911) 9 Ind Cas 771 (772) (L B)

(1900) 24 Bom 300 (302)

(1837) 19 All 205 (207)

(1911) 11 Ind Cas 528 (530) 14 Oudh Cas 147

2 (1908) 31 Mad 354 (358)

(1904) 31 Cal 863 (868)

(1878) 20 All 354 (356)

(189.) 19 All 205 (208)

(1888) 10 All 1 (4)

3 (1908) 31 Mad 354 (358)

(1902) 25 Mad 244 (258)

(1893) 22 Mad 286 (288)

(1901) 25 Bom 101 (106 107)

4 (1902) 29 Cal 651 (653)

5 (1921) 1921 Lah 331 (335)

[See also Note 20 to R 5 of O 34]

6 (1902) 24 All 419 (421)

Note 9

1 (1885) 11 Mad 83 (90) (41 and 45 Vict, C 41 S 25)

The Transfer of Property Act (Amendment) Supplementary Act, XXI of 1929, has made a slight change in the language of the Sub Rule and it is this. The old Rule applied to mortgages other than mortgages by conditional sale. The new Rule applies only to anomalous mortgages. The doubt that was felt under the old Sub Rule as regards its applicability to anomalous mortgages² can thus no longer exist. In such cases, the Court in order to protect the interests of all parties concerned can in the exercise of its discretion under this Sub Rule pass a decree for sale instead of one for foreclosure, although the suit may be for foreclosure.¹ But the Court will not pass a decree for sale instead of for foreclosure under this Sub-Rule where it does not appear that the property was undervalued.⁴

Where a plaintiff mortgagee sues for foreclosure on the allegation that the mortgage is one by conditional sale, and it is found that the mortgage is not one by conditional sale the proper course is not to dismiss the suit but to grant relief under Sub R (3).⁵

10 Order in which properties should be sold

Prima facie the decree-holder is entitled to have the mortgaged properties sold in any order he likes.^{1a} There are however, two important exceptions to this general rule—

- (1) the doctrine of marshalling securities as laid down in the Transfer of Property Act, and
- (2) The Court's power under O 34 R 4 to adjust the equities between the parties

Doctrine of marshalling—S 56 of the Transfer of Property Act as it stood before its amendment applied only as between the seller and his buyer.¹ The Section has now been recast by Act XX of 1929 and it is now provided that the buyer can claim the right of marshalling against not only the seller but also against the mortgagee but not so as to prejudice his rights. Similarly the old S 81 of the Transfer of Property Act provided for marshalling where there were two properties only. The scope of the Section has now been widened by Act XX of 1929 by providing that the Section should apply to cases where there are more than two properties and to all subsequent mortgages.

Court's power to adjust equities—Even if the doctrine of marshalling above referred to is not strictly applicable, the Court has, under this Rule, the power to direct the order in which the various mortgaged properties should be sold, for the purpose of protecting the equities that may exist in favour of any of the parties.²

2 (113) 18 Ind Cas 21 (25) (Oudh) Provision does not apply to anomalous mortgage
[See (132) 1329 Oudh 252 (252) R 4 Cl 3 applies to anomalous mortgage]

(1867) 8 South W R 373 (382)
(1907) 34 Cal 13 (17)
(1893) 17 All 491 (495)
(1911) 12 Ind Cas 413 (413) 440 (M 1)
(1924) 1321 Pat 700 (703)
1 (1934) 1321 1 at 484 (485) 487, 511 at 435
(1908) 31 M 1 413 (421) 428 (F 1)
2 (1334) 1321 Pat 453 (464) 3 Pat 72
(1313) 1313 Pat 751 (752) 4 Pat 1 Jour 207
(1311) 19 1 Neg 21 (24) 13 N 1 L R 213
(1908) 31 M 1 413 (421) 422 (23) (1 1)

will be exercised only on the evidence of some distinct advantage to accrue thereby to the party in whose favour the discretion is called to be exercised without injury to the reasonable and equitable claim of the mortgagee

(1883) 1883 All W N 722 (320)

Note 10

1 (113) 18 Ind Cas 21 (25) (Oudh) 47 M 1 Cas
(1329) 1329 Oudh 252 (252) R 4 Cl 3

(1311) 12 Ind Cas 413 (413) 440 (M 1)
(1317) 1917 M 1 772 (773)

Thus where a son undertakes that where the sale of the father's share alone is insufficient to satisfy the mortgage he will agree that his own share also may be sold the Court may direct that the interest of the father alone may be sold first³

A and B mortgage certain items of property to C. B then mortgages to D his own items of the mortgaged property. In a suit by C D cannot claim that the items belonging to A alone should be sold first the reason is that the mortgage is not the same in both the mortgages⁴. If however the mortgagee has agreed that the properties should be sold in a particular order the agreement should be given effect to⁵.

See also Note 17 to R 5

11 Interest—See Note under R O 34 R 11

12 Costs

Costs awarded to a mortgagee in a suit for sale on a mortgage are part of the mortgage money¹ and are primarily recoverable from the mortgaged property and not from the mortgagor personally² unless the decree makes the mortgagor personally liable for the costs³.

Ordinarily in a mortgage suit a *pursue* mortgagee is not personally made liable for the costs⁴. But if he makes himself responsible for any unnecessary contest in the suit he may be made personally liable for the costs⁵. The utmost that he can be made liable for is the *extra* costs caused by his unnecessary contest.

13 Succession certificate

It has been held by the High Courts of Bombay¹ Calcutta² and Madras³ that S 4 of the Succession Certificate Act (now S 214 of the Succession Act 1925) does not apply to suits for sale on mortgages of immovable property, where no personal decree against the mortgagor is asked for. But a contrary view is held by the Allahabad High Court⁴.

14 Award

Rules 4 and 5 of O 34 do not apply to a decree passed on the award of an arbitrator and hence a *final decree* is not necessary in such a case before the decree can be executed¹.

(1903) 29 All 42 (45)

(1974) 1924 Mad 509 (510) Executing Court can also do so

(1932) 1932 All 85 (87 88 90) 53 All 391

3 (1911) 12 Ind Cas 949 (Jy2) 36 Bom 61

4 (1900) 1930 Mad 178 (180)

5 (1919) 1919 L it 281 (283) 4 Pat L Jour 307

Note 12

1 (1914) 1914 All 444 (445)

(1932) 1932 Cal 524 (533 534) 39 Cal 67

A case of mortgage of moveables

(See also (1933) 1933 Rang 81 (83))

left for In solvency Court to decide]

(1931) 1931 Rang 103 (109 100) 9 Rang 166

Persons other than mortgagors such as prior mortgagees implicated and unsuccessful—Ordered to pay costs personally

[See also (1933) 1933 Lih 9 2 (330)

Pre-emption of mortgaged property using false defence—Personal de

Note 13

1 (1904) 25 Ind 630 (634)

2 (1909) 10 Cal 833 (841 842)

(1909) 19 Cal 336 (337)

(1909) 27 Cal 143 (144)

[See however (1900) 21 Cal 300 (301)]

3 (1900) 29 Cal 17 (3)

4 (1884) 16 All 17 (18)

Note 14

1 (1927) 1927 Sind 103 (104) 19 Sind L R 602

[See also (1930) 1930 Bom 11 (11) Official Receiver disputing validity of mortgage—Ordered to pay costs the question of his right to reimbursement out of surplus being

4.

The Transfer of Property Act (Amendment) Supplementary Act, XXI of 1929, has made a slight change in the language of the Sub Rule and it is this. The old Rule applied to mortgages other than *mortgages by conditional sale*. The new Rule applies only to *anomalous mortgages*. The doubt that was felt under the old Sub-Rule as regards its applicability to anomalous mortgages² can thus no longer exist. In such cases, the Court in order to protect the interests of all parties concerned can in the exercise of its discretion under this Sub Rule pass a decree for sale instead of one for foreclosure, although the suit may be for foreclosure³. But the Court will not pass a decree for sale instead of one for foreclosure under this Sub Rule where it does not appear that the property was *undervalued*⁴.

Where a plaintiff mortgagee sues for foreclosure on the allegation that the mortgage is one by conditional sale, and it is found that the mortgage is not one by conditional sale, the proper course is not to dismiss the suit but to grant relief under Sub R (3)⁵.

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- (1) the doctrine of *marshalling* securities is laid down in the Transfer of Property Act, and
- (2) The Court's power under O 34, R 4 to *adjust the equities* between the parties.

Doctrine of marshalling—S 36 of the Transfer of Property Act as it stood before its amendment applied only as between the *seller* and his *buyer*¹. The Section has now been recast by Act XX of 1929 and it is now provided that the buyer can claim the right of marshalling against not only the seller but also against the *mortgagee*, but not so as to prejudice his rights. Similarly the old S 81 of the Transfer of Property Act provided for marshalling where there were two properties only. The scope of the Section has now been widened by Act XX of 1929 by providing that the Section should apply to cases where there are *more than two properties* and to all subsequent mortgages.

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2 (1113) 18 Ind Cas 24 (75) (Oudh) Provision does not apply to anomalous mort

^{1a} See (1929) 1927 Oudh 232 (257) R 4, Cl 3 applies to anomalous mort

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(1885) 1885 All W N 77 (321)

Note 10

1 (1121) 1924 All 363 (77) 45 All 65
(1899) 4 All 104 (113) (114)

(1867) 8 South W R 370 (332)

(1907) 34 Cal 13 (17)

(1899) 17 All 434 (435)

(1911) 12 Ind Cas 433 (434 440) (M 3)

(1924) 1924 Pat 700 (703)

1 (1924) 1924 L R 484 (485 486) Pat 493

(1909) 31 All 413 (421 423) (F 1)

2 (1924) 1924 Pat 433 (463) 3 Pat 22

(1910) 1910 L R 251 (252) 4 Pat 1 Jour 207.

(1931) 1931 Neg 31 (11) 13 N. L. R 213

(1908) 31 Mad 413 (421 422 423) (1 1)

(1906) 20 Mad 217 (223)

(1912) 1912 L R 433 (432) 31 Pat 433

(1917) 1917 All 772 (773)

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(1903) 20 All 112 (45)

(1924) 1924 Mad 509 (510) Executing Court
can also do so

(1939) 1932 All 55 (57 88 90) 53 All 331

² (1911) 12 Ind Cas 949 (322) 36 Bom 61

³ (1920) 1920 Mad 178 (180)

⁴ (1913) 1919 Pat 731 (233) 41 Lt L Jour 207

Note 12

¹ (1914) 1914 All 414 (442)

(1932) 1932 Cal 524 (533 534) 39 Cal 66

A case of mortgage of moveables

[See also (1932) 1933 Rang 81 (531)]

² (1925) 20 All 523 (526 527 528)

(1916) 1918 All 366 (366) 43 Ind Cas 57
(529) 40 All 109

left for Insolvency Court to decide]

(1931) 1931 Rang 153 (159 160) 9 Rang

156 Persons other than mortgagors

such as prior mortgagees impleaded

and unsuccessful—Ordered to pay

costs personally

[See also (1933) 1933 Lah 329 (330)]

1 redemption of mortgaged property

using file defence—Personal li

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Note 13

¹ (1904) 23 Bom 630 (634)

² (1899) 6 Cal 839 (841 842)

(1897) 13 Cal 386 (393)

(1895) 22 Cal 143 (147)

[See however (1900) 27 Cal 305
(307)]

³ (1904) 29 All 17 (73)

⁴ (1894) 16 All 1 (185)

Note 14

¹ (1924) 1927 Siml 103 (104) 19 Siml
207

² (1911) 1913 All 297 (235) 41 All 473

[See also (1930) 1930 Bom 11 (1)]

Official Receiver instituting suit

of mortgage—Ordered to pay costs

the question of his right to re-

imbursement out of surplus being

15 Consent decree

It is open to the parties to a mortgage suit to enter into a compromise and the Court can, in such a case, pass a decree in terms of the compromise. Such a decree need not conform to the provisions of O 34¹. For instance, instead of a lump sum being directed to be paid on a fixed day, a compromise decree may provide that the mortgage money should be paid in certain instalments and that in default the mortgaged property should be brought to sale. In such a case, it is not necessary to have a final decree passed under R 5 before bringing the property to sale². For it is open to the mortgagor to waive the benefit of the provision which requires that a final decree should be passed before the property can be sold and where by his agreement he has waived the benefit, a final decree which is intended only for his benefit is not necessary³. But the decree-holder is not precluded from applying for a final decree in such a case⁴. So also where the parties have agreed that the decree should be drawn up under R 4, a final decree under R 5 is necessary⁵. O 34 R 14 does not apply to a compromise decree⁶.

A compromise decree on a mortgage may fix a longer period than the six months allowed under the Rule, for payment by the mortgagor⁷. The Court has no power to extend the period fixed for payment by a consent decree⁸. Where a compromise mortgage decree authorises its enforcement against properties other than the mortgaged property, execution of the decree by the arrest of the mortgagor is permissible⁹.

See also Note 5 to R 5

16 Appeal

Under O 43, R 1 (c) an appeal lies from an order refusing to extend time for payment under this Rule. But no such appeal lies after the final decree has been passed¹. In an appeal from a preliminary decree, *ad valorem* Court fees is payable on the amount *found due* and not the amount claimed by the plaintiff². Under S 97 of the Code where a preliminary decree is not appealed from it

(1324) 1914 Pat 263 (264) 3 Pat 221

(1330) 1930 Lih 116 (117)

(1324) 1924 Cal 645 (646)

[But see (1833) 23 Bom 644 (650) S 89 of the Transfer of Property Act applies to the award of a commissioner under S 44 of the Dekkhan Agriculturists Relief Act]

Note 15

1 (1920) 1920 Pat 731 (183) 5 Pat L Jour

(1925) 1925 Cal 626 (628) 50 Cal 650

4 (1931) 1931 All 340 (341)

5 (1931) 1931 All 340 (341)

(1929) 1929 All 881 (883)

6 (1925) 1925 Sind 156 (157) Compromise provided for sale of property in execution

[See however (1932) 1932 All 439 (440) Case of a suit on a promissory note—Compromise hypothecation, properties for decree amount—No provision in compromise to sell hypothecary in execution—Held O 34, R 14 applied]

7 (1929) 1929 All 551 (553)

8 (1926) 1926 Nag 250 (251)

(1934) 1934 Oudh 44 (45)

9 (1929) 1929 Lah 56 (57)

[See also (1932) 1932 Cal 775 (780)]

(1932) 1932 All 439 (440) Consent de mortgage creating charge or mortgage—Silent as to mode of execution—Arrest or execution against other properties available in execution—But properties charged or mortgaged can be sold only by separate suit under R 14

Note 16

1 (1930) 1930 Nag 240 (240)

2 (1929) 1927 Sind 51 (252)

(1924) 1924 All 551 (553) 23 All 551

(1932) 1932 Pat 333 (334)

2 (1921) 1921 Lih 384 (385) 55 Ind Cas 816 (816)

(1934) 1934 Cal 735 (736)

(1929) 1929 Lih 390 (391)

(1909) 1 Ind Cas 677 (681) (Cal)

(1929) 1929 Cal 11 (12 14)

(1927) 1927 All 167 (168) 43 All 297 (E B)

3 (1907) 34 Cal 886 (890)

(1911) 10 Ind Cas 5 (534) (Cal)

(1911) 1914 P C 150 (151 152) 12 Cal 776

42 Ind App 55 (P C)

cannot be questioned in an appeal from the final decree³. Under the former Code it was held that an application for taking accounts on a mortgage directed by a decree thereon was one in execution and that an order on such application was appealable under S. 244 (now S. 41)⁴. This view is not tenable under the present Code.

R. 5. [New Act IV of 1882 S. 89] (1) Where on or before the day fixed or at any time before the confirmation of a sale¹³ made in pursuance of a final decree passed under Sub-Rule (3) of this Rule, the defendant makes payment into Court¹⁴ of all amounts due from him under Sub-Rule (1) of Rule 4, the Court shall on application made by the defendant in this behalf pass a final decree or if such decree has been passed an order—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree¹⁵

and if necessary —

(b) ordering him to transfer the mortgaged property as directed in the said decree

and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under Sub-Rule (3) of this Rule, the Court shall not pass an order under Sub-Rule (1) of this Rule, unless the defendant, in addition to the amount mentioned in Sub-Rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made the purchaser shall be entitled to an order for re-payment of the amount of the purchase money paid into Court by him together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with Sub-Rule (1) has not been made, the Court¹ shall, on application¹⁰ made by the plaintiff in this behalf, pass a final decree⁴ directing that the mortgaged property or a sufficient part thereof be sold¹⁷ and that the proceeds of sale be dealt with in the manner provided in Sub-Rule (1) of Rule 4.

[Cf O. 21 R. 89]

Local Amendment

MADRAS

Substitute the following for Sub-Rule (3) —

Where payment in accordance with Sub-Rule (1) has not been made the Court shall on application¹⁰ made by the plaintiff in this behalf pass a final decree⁴ directing that the mortgaged property or a sufficient part thereof be sold¹⁷ and that the proceeds of sale be dealt with in the manner provided in Sub-Rule (1) of Rule 4.

- 5, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale be dealt with in the manner provided in Sub Rule (1) of Rule 4

Synopsis

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Decree directing payment by instalments—Not a decree under R 4 See Note 5 Pt (1)	Order absolute and final decree—Effect of—Difference See Note 13 Its (4) and (5)
Defective applications—Final decree See Note 10 Pt (4) also Note 16 Pt (3)	Order in which properties are to be sold See Note 17 Its (1) also R 4 Note 10
Defective final decree—Final decree See Note 7 Its (1)	Partition subsequent to mortgage—Remedy of mortgagee See Note 17 Its (3)
Enlargement of mortgagor's interest See Note 19 Pt (3)	Preliminary decree not questionable in appeal from final decree See Note 24 also S 97 Notes 1 and 2
Mortgage suits—Decree for money can be passed See R 4 Note 4 Pt (1), also R 6 Note 10 Pts (3) (4) (6) and (7)	Sub mortgagee's rights See R 1 Note 1 Its (3)
	Who may apply for final decree See Note 10 Pts (1) and (5) also see Note 30 Its (2)

1 Transfer of Property Act S 89

This Rule corresponds to S 89 of the Transfer of Property Act. The chief points of distinction between the two provisions are the following—

- (1) Under S 89 an *order absolute* for sale was passed while under the present Rule a *final decree* is passed
- (2) Under S 89, payment of the mortgage money could be made either to the *plaintiff* or *into the Court*. Under the present Rule, payment has to be made only *into the Court*

(3) The words at the end of S 89, "and thereupon, the defendant's right to redeem and the security shall both be extinguished" have been omitted in the present Rule

(4) The provision for the passing of a *decree* in case of payment by the mortgagor within the proper time is new

2 Amendments after 1908

The chief changes introduced in the Rule by the Amendment Act, XXI of 1929, are as follows —

(1) The present Rule makes it quite clear that the decree under it is a *final decree*

(2) On payment of the mortgage money under the preliminary decree, the present Rule requires the mortgagor to *apply* for a *final decree*

(3) The provision in Sub R (1) as to the defendant paying the mortgage money at any time before the confirmation of the sale is new

(4) Sub R (2) is new

3 Scope of the Rule

The present Rule applies only where a preliminary decree has been passed under R 4¹

4 Final decree when can be passed

Order 34 contemplates the passing of a preliminary decree and a final decree in all mortgage suits. The final decree for sale is passed when the payment directed by the preliminary decree has not been made within the proper time. A final decree under R 5 is necessary only when the decree originally passed is a preliminary decree under R 4. Hence where only a money decree has been passed, a final decree under the Rule is not necessary although the decree may authorise the decree holder to realise the decree amount by sale of the judgment debtor's property.¹ Similarly where at the time of the coming into force of the present Code of Civil Procedure a decree had already been passed under Transfer of Property Act S 58 it has been held that a final decree under the present Rule is not necessary.² But where property is charged with the payment of the decretal amount it was held in the undermentioned case that the proper mode of realising the decree amount is to obtain a decree absolute for sale and that it was not necessary to *attach* the property.³

Where the plaintiff under a preliminary decree on a mortgage is directed to pay off a prior mortgage before bringing the mortgaged property to sale he is entitled to apply for a final decree for sale even though he has made the payment only *after* the time fixed by the decree.⁴

Where the purchaser of a portion of the equity of redemption is made one of the defendants to a suit on a mortgage and after the preliminary decree is passed, obtains an assignment of the mortgagee's rights he is entitled to apply for a final decree although only for a *proportionately reduced portion* of the mortgage amount.⁵ Although a final decree is necessary to be passed before execution, yet a mortgagor who allows execution to take place, without raising any objection, will be estopped from contending that the want of a final decree

Order 34 Rule 5—Note 3

1 (1903) 1 Ind Cas 617 (680) (Cal)

Note 4

1 (1925) 1925 M.L.J. 1083 (1084)

2 (1921) 1921 M.L.J. 603 (603)

(1917) 1917 M.L.J. 315 (316)

is fatal to the proceedings⁶ Similarly, it was held under the Transfer of Property Act that no objection as to the want of a formal order absolute for sale could be raised where execution had once proceeded without objection⁷

5 Consent decrees and decrees on award

We have already seen in Note 4 that this Rule applies only where a preliminary decree has been passed under R 4. A consent decree providing for payment by instalments is not a *preliminary* decree under R 4 and hence, a final decree under the present Rule is not necessary in such a case¹ Similarly, a decree on an *award* is not a preliminary decree under R 4 and no final decree is necessary to be passed² But a decree-holder is not *precluded* from applying for a final decree where a preliminary decree by consent has been passed³ See Note 15 to R 4 for further notes

Where a mortgage itself is invalid, as being opposed to a certain statute, it cannot be validated by a consent decree on the mortgage. The mortgagor can resist in application for final decree on the ground that the mortgage is not binding on him⁴

6 Only one final decree to be passed

This Rule contemplates the passing of only *one* final decree¹ Where the preliminary decree is appealed from, the final decree should be based on the appellate decree² From this it was concluded by the Allahabad High Court in the undermentioned case that a final decree cannot be passed pending an appeal from the preliminary decree and a final decree so passed is invalid and inexecutable³ But this view has not been accepted by the High Courts of Patna,⁴ Lahore⁵ and Calcutta⁶ and has been overruled by the Allahabad High Court itself subsequently⁷ Where a final decree is passed and subsequently the preliminary decree

6 (1918) 1918 Pat 41 (15) 4 Pat I Jour 211
(1914) 1914 Mid 365 (300) 23 Ind Cis 390 (331)

(1937) 1927 Bom 131 (178) 51 Bom 125

7 (1900) 2 Oudh Cas 337 (231 310)

(1902) 20 Mad 37 (539)

(1901) 31 Cal 340 (371 372)

(1901) 25 Cal 73 (77)

(1901) 18 Cal 180 (142)

(But see (1873) 9 Mil L Jour 31 (300))

Note 5

1 (1911) 10 Ind Cis 536 (537, 538) (Cal)

(1934) 1934 Cal 735 (736)

(1927) 1927 Pat 271 (277) 6 Pat 355

(1924) 1923 Mad 85 (33)

(1923) 1923 Pat 375 (374) 2 Pat 533

(1924) 1924 Mad 645 (646)

(1921) 1921 Lah 24 (280)

(1923) 1923 Cal 11 (14)

(1926) 1926 Cal 1177 (1180)

(1923) 1923 Cal 623 (626) 50 Cal 650

(1923) 1923 Bom 227 (228)

(1927) 1927 All 167 (168) 49 All 237

(1903) 1 Ind Cis 677 (680) (Cal)

(1922) 1922 All 533 (541) 44 All 665

(1931) 1931 Cal 546 (545) *Solenam* expressly stating that no final decree is needed

See also (1911) 1911 Pat 385 (395) 1

(1912) 1912 Sind 104 (104) 13 Sind L R 202

(1914) 1914 Pat 263 (263) 1 Pat 221

(1913) 11 Pat 14 (14) O 71 not applica

ble to decrees on an arbitration award

3 (1931) 1931 All 340 (341)

(1907) 34 Cal 866 (831)

4 (1919) 1919 Mid 47 (431)

Note 6

1 (1917) 1917 All 163 (164) 33 All 641

(1911) 9 Ind Cis 83 (833) (All)

2 (1917) 1917 All 163 (164) 33 All 641

(1931) 1931 All 31 (30 31) This principle will apply even if appeal is by some defendant only provided the appeal is against the whole decree

(1926) 1926 P C 33 (14) 53 Ind App 117 61 Pat 21 (P C)

(1926) 1926 All 43 (44)

[See also (1931) 1931 Mad 65 (65) Even when the appellate decree simply confirms the decree of the first Court]

[See also (1933) 1933 Nag 290 (297) 23 Nag L R 170 Appeal against preliminary decree dismissed—Appellate Court should fix a date for payment]

3 (1926) 1926 All 291 (292)

4 (1927) 1927 Pat 215 (218) 6 Pat 780

(1934) 1934 Pat 225 (227)

5 (1924) 1923 Lch 101 (90)

(1924) 1924 Nates 57 (2) 103 L C 751 (Mad)

6 (1906) 10 Cal W N 910 (912)

7 (1931) 1931 All 356 (358) 53 All 253 (P B)

1926 All 291 Overruled

is modified on appeal, the Court of first instance may either prepare a new final decree or amend the preliminary decree already passed.⁸

Under S 89 of the Transfer of Property Act, successive applications for an order absolute were maintainable such applications being proceedings in execution.⁹

7 Form of final decree for sale

For the form of a final decree for sale see Appendix D, Form 6. Nothing in R. 4 or in this Rule requires the specification of the mortgaged property in the decree.¹ Where the mortgage money is payable under the bond in a lump sum the Court is not justified in allowing it to be paid in instalments.²

Where a co-mortgagee was made a party-defendant to a suit for sale on the mortgage and the decree directed a payment to him of a part of the decretal amount, it was held that the form of the decree was correct.³ See also the under-mentioned cases.⁴

8 Court cannot go behind preliminary decree

When preparing a final decree under this Rule the Court has no power to go behind the preliminary decree.¹ Similarly the amount fixed in the preliminary decree cannot be varied except for some reason which may have happened subsequent to the preliminary decree.²

9 Court to which application for final decree is to be made

Though the preliminary decree may be modified by the appellate Court the application for final decree should be made only to the Court of first instance.¹ Under S 89 of the Transfer of Property Act it was held that the application for an order absolute under S 89 could be made to the Court charged with the execution of decrees, the proceeding being one in execution.²

10 Application for final decree if and when necessary

The Rule requires that the mortgagee must apply for a final decree.¹ But

(1909) 1929 All 267 (59) 51 All 640. 1920 All 221, Doubtful.

[See also (1921) 1932 All 258 (235) 54 All 944 Appeal from preliminary decree—Final decree not to be stayed but execution of final decree may be stayed under S 151, C P C.]

9 (1926) 1926 All 131 (154)

(1931) 1934 Ind 65 (68)

[But see (1902) 15 Nag L Jour 124 (127 178) Preliminary decree affirmed on appeal—Final decree passed—Amendment of preliminary decree not allowable.]

9 (1903) 25 All 212 (219)

(1903) 25 All 264 (265)

Note 7

1 (1917) 1917 All 413 (444) 53 All 534

2 (1920) 1930 Ind 192 (199)

3 (1900) 1920 All 674 (635)

4 (1903) 5 Poon L R 353 (392) Absence of the word 'absolute' after 'order' in order under S 89 was not fatal.

(1882) 8 Cal 357 (361 64) Apportionment of mortgage debt.

(1926) 1926 Ind 364 (364 50) Final decree made by endorsement on preliminary decree its effect—At issue of separate final decree is merely an irregularity.

Note 8

1 (1929) 1929 All 222 (233)

(1931) 1931 Oudh 45 (46) But Court can interpret preliminary decree and also correct accidental mistakes [See also (1931) 1931 All 657 (608 609) Order in which properties are to be sold—Put in issue and negatively—Not incorporated in preliminary decree—Not to be introduced in the final decree.]

[See also (1932) 1932 Lom 136 (146)]

2 (1927) 1927 All 589 (589) 49 All 509

(1933) 1933 Rang 323 (325) Mortgage decree with interest at contract rate till suit and at Court rate till realization—Judge on application by defendant allowing instalments and ordering that decree should cease to bear interest—Order is without jurisdiction [See also (1909) 4 Ind Cas 546 (547) (Cal) Provision for any further interest than that provided for in preliminary decree cannot be added.]

Note 9

1 (1900) 23 Mal 521 (523)

(1910) 6 Ind Cas 323 (325) (All)

2 (1891) 11 All 273 (270) (F B)

Note 10

1 (1915) 1915 Lom 217 (218 219) 50

it has been held that an application for sale of the mortgaged property may be treated as an application for a decree absolute². An application for a final decree in a mortgage suit need not, however, be in writing³. Nor need the plaintiff, in his application, describe the properties with respect to which he asks for final decree for sale and therefore if any item is omitted in the application, it cannot be contended that the final decree should not be passed in respect thereof⁴. A benami-dar-transferee of a preliminary decree may apply for a final decree⁵.

11 Notice to judgment debtor if necessary before passing final decree

As has been seen in the Note 7 to R 3, *ante*, this Rule also does not require any notice to be issued to the judgment debtor before the passing of a final decree though as a matter of practice, such notice should generally be given, on the principle that a party should be heard before any order is passed against him¹. Where a final decree has been passed *ex parte* against a mortgagor to whom no notice has been given of the application for final decree, the Court has inherent jurisdiction to set aside the *ex parte* decree in furtherance of justice and equity². For cases under S 89, Transfer of Property Act, see the undermentioned cases³.

See also Note 7 to R 3, *ante*

12 Limitation for application for final decree

An application for a final decree under O 34 is not an application for execution¹. The article of the Limitation Act applicable to such an application is Art 181 and time begins to run when the right to apply for a final decree accrues^{1a}. On this point however there was a conflict of opinion under the Transfer of Property Act. The reason for this was that, under that Act, the procedure was to get an order absolute and not a final decree. Three views were taken of the question —

- 2 (1917) 1917 Mad 669 (669)
- (1900) 4 Ind Cas 42 (49) (Mad)
- (1900) 2 Ind Cas 433 (438) (Mad)
- (1925) 1925 Lah 610 (619)
- [Contra (1923) 1923 Sind 14 (14) 17 Sind L R 255]

- 3 (1936) 1936 Nag 152 (153)
- 4 (1929) 1929 All 551 (551)
- 5 (1915) 1915 All 2 1 (265) 37 All 414

Note 11

- 1 (1900) 1900 Mad 105 (107)
- (1905) 1905 Mad 710 (714) Notice sent to some defendants only—Application can be dismissed only as against defendants to whom notice has not been sent
- (1906) 4 Cal L Jour 317 (318)
- (1901) 20 Mad 505 (507)
- (1927) 1927 Nag 175 (177)
- (1894) 9 C P L R 5 (7)
- (1899) 2 Mad 133 (136)
- (1929) 1929 Fa 1 333 (394)
- 2 (1900) 32 Cal 53 (256) (F B)
- (1930) 1930 Mad 716 (717) Application for final decree—Notice to all parties is not compulsory—But if any party

Defendant not appearing—Second notice not necessary—If one is ordered but not served, there is no ground for setting aside the *ex parte* decree]

- 3 (1907) 2 Ind Cas 941 (943) (Cal)
- (1904) 27 Mid 40 (42)

Note 12

- 1 (1916) 1916 Mad 573 (522) 59 Mad 453
- (1933) 1933 Cal 508 (508)
- (1903) 1903 Cal 795 (794)
- 1a (1919) 1919 Mad 709 (710) 42 Mad 52
- (1935) 1935 Rang 23 (210)
- (1918) 1918 All 255 (256)
- (1918) 1918 Nag 3 (64) 10 Nag L R 76
- (1916) 1916 Pat 52 (52) 1 Pat L Jour 364
- (1915) 1915 All 386 (387) 13 All 21
- (1916) 1916 Cal 31 (31 23)
- (1914) 1914 Lam 23 (203) 3 Dom 32
- (1911) 11 Ind Cas 13 (346) 3 Cal 113
- (1911) 1911 Oudh 1 (1)
- (1921) 1921 Pat 501 (50) 1 Pat 435
- (1921) 1921 Mad 15 (16)
- (1911) 1911 Cal 551 (55)
- (1923) 1923 Lam 40 (421)
- (1917) 1917 Oudh 31 (31) 10 Oudh Cas 203
- (1912) 1912 All 23 (21) 14 All 603
- (1911) 1911 Cal 100 (100)
- (1911) 1911 Cal 7 (200) (Mad)
- (1916) 1916 Pat 52 (52) 1 Pat L Jour 364
- (1923) 1923 All 1 (1)
- (1916) 1916 Nag 1 (2) 13 Nag L R 76

^{1a} But see (1923) 1923 Nag 30 (520).
19 Nag L R 121 Notice served—

- (1) An application for an order absolute was an application for execution² and was governed by Art 179 of the Limitation Act of 1877 (now Art 182 of the Limitation Act of 1908)³
- (2) The proceedings for an order absolute under the Transfer of Property Act were proceedings *in suit*⁴ and that Art 178 (now Art 181 of the Limitation Act of 1908) was applicable to them⁵
- (3) Art 178 did not apply to applications for order absolute under the Transfer of Property Act as they were not applications *under the Civil Procedure Code*, within the meaning of that article⁶ and therefore there was no period of limitation applicable to such an application⁷

All these cases are only of academic interest now in view of the fact that it is made quite clear that an application under this Rule is for a final decree and not one for execution.

Where the Court in effect directs the stay of proceedings for a final decree limitation runs from the date of the removal of the bill^a. Where a minor plaintiff's next friend dies after preliminary decree and no new next friend is appointed the suit must be deemed to be *in abeyance* and the limitation for an application under this Rule will start from the date of the plaintiff's attaining majority^b. S 6 of the Limitation Act will not however apply to such a case since the application under this Rule is not one for execution.

Where the preliminary decree directs the mortgagee to pay off a prior mortgage as a condition of his enforcing his own mortgage the time requisite for ascertaining the amount due to the prior mortgagee may be deducted when calculating limitation for an application for final decree⁸. Where, in such a case, no

(1917) 1917 All 119 (119) 39 All 532

(1919) 1919 All 76 (17) 40 All 203

(1916) 1916 Mad 36 (3 C)

[But see (1915) 1915 Cal 230 (7C)
42 Cal 234]

2 (1903) 23 All 212 (213) 214

(1906) 16 Mad L Jour 503 (304)

(1902) 24 All 542 (144)

(1900) 13 All 28 (251) (1 L)

3 (1878) 20 All 302 (304)

(1897) 20 All 357 (358)

(1914) 1914 P C 150 (157) 47 Cal 111 (4)
Ind App 89 (P C)

(1917) 1916 Cal 541 (542)

(1919) 1914 L C 65 (67) 36 All 284 (111)

(1914) 1914 L C 66 (6) 36 All 350 (P C) Re
versus (1910) 33 All 154 7 All I J
1001 1 Ind Cas 196 (F B)

(1916) 1916 Mad 55 (25) 33 Mad 14

(1905) 27 All 625 (62)

(1899) 23 Bom F 14 (750)

(1903) 30 Cal 61 (76)

(1901) 24 Mad 603 (702)

(1908) 31 Mad 68 460 (70)

4 (1907) 23 All 76 (80)

(1903) 4 Nag L R 158 (160)

(1904) 91 Cal 818 (873) 874

[See (1894) 7 C P L R 40 (41)]

[See also (1898) 22 Cal 133 (135)]

(1902) 23 Cal 644 (647) Question re
guarding order absolute for sale is not
regarding execution within S 244]

5 (1902) 24 All 542 (544) 546] In this case it
was held that Art 178 applied

though the application was to be
held to be one for execution

(1903) 36 Mad 760 (754)

(1904) 1 All L J 15 (17)

(1902) 34 All 300 (301) 307]

(1896) 8 All 56 (57)

[See (1907) 10 M d I Jour 93 (504)]

6 (1890) 3 Cal 94 (92)

(1910) 3 Cal 96 (93)

1892] 5 C L R 61 (62)

1899] 11 C L R 141 (142)

[Of (1907) 3 Nag L R 55 (59) Pro
ceedings between decree nisi and
order absolute are neither a con
tinuation of the suit nor proceed
ings in execution]

7 (1910) 17 Cal 36 (803)

(1910) 4 Ind Cas 956 (154) (Rang)

(1894) 16 All 3 (4)

(1903) 5 Bom L R 540 (541)

See (1909) 1 Ind Cas 67 (637) (Cal)

Court to be guided by consideration
whether any delay on mortgagee's
part has not been unreasonable so
as to bring it within the rules ap
plied in such cases by Courts of
equity]

[See also (1903) 16 C P L R 114
(115)]

8a (1922) 1922 Lat 901 (703) 1 Pat 435

7b (1933) 1933 Cal 505 (509)

7c (1933) 1933 Cal 505 (505)

8 (1911) 1921 Cal 381 (382)

[See (1921) 1921 All 56 (55) 43 All

5, time is fixed for payment to the prior mortgagee the plaintiff is not entitled to claim that limitation does not begin to run for his application for final decree until he has paid off the prior mortgage however long he may take to do so, he is only entitled to a deduction of six months from the date of the preliminary decree⁹

Where, on an application for final decree, an extension of time is granted to the mortgagor, and a fresh application is made by the mortgagee subsequently, it is to be deemed a continuation of the previous application¹⁰

Where an appeal is preferred against a preliminary decree, limitation for an application for a final decree runs only from the date of the appellate decree and not from the expiry of the period fixed by the lower Court for payment,¹¹ though the appellate decree is passed three years after the expiry of the period fixed by the lower Court for payment¹² But the dismissal of an appeal for *non-prosecution* does not give rise to a fresh starting point for limitation for an application for final decree¹³ See Note 9 to S 148

There is a conflict of opinion as to whether a plaintiff, who obtained a decree under the Transfer of Property Act, is bound, on the coming into force of the Civil Procedure Code, 1908, to apply for a *final decree* before proceeding to execute his decree. The High Courts of Madras and Patna have held that he is not bound to do so and that the Code will not affect his rights to execute the decree which had vested in him under the old law¹⁴ The High Court of Bombay has, on the other hand, taken a contrary view¹⁵ It is however clear that where the right to apply for an order absolute is barred by limitation even before the Code of 1908 came into force no *fresh right* to apply for a final decree is conferred by the Code¹⁶

There is no limitation for the mortgagor's application for deposit of the mortgage money under the preliminary decree¹⁷ Where an application for a final decree is dismissed a subsequent application is not for a revival of the previous application¹⁸

13 Mortgagor's rights before confirmation of sale

Even before the amendment of 1929 it was held that the right of a mortgagor to redeem under a mortgage decree was not lost till the sale was actually

(But see also (1917) 1917 Oudh J1 (32) 20 O C 205)

12 (1917) 1927 P C 25 (25, 26) 31 Ind App 52 3 Lah 253 (P C)

13 (1922) 1922 Pat 101 (103) 1 Pat 1 5

14 (1919) 1919 Mal 196J (J10)

(1920) 1920 Mal 286 (47)

(1917) 1917 Mad 315 (HC)

(1918) 1918 Pat 41 (15) 4 Pat L Jour 213

15 (1918) 1918 Bom 217 (218, 219) 11 Bom 501

16 (1914) 1914 Mal 15 (11)

17 (1921) 1922 Oudh 33 (34)

18 (1918) 1918 All 120 (286) 13 Ind Cas 515 (119)

(1922) 1922 Mal 100 (11)

[See (1933) 1933 Cal 516 (517) But where an application made in time is adjourned *sine die* and a subsequent application is made though after three years it may be treated as a continuation of the first application]

1 At 21 (P C)

(1927) 1927 P C 25 (25, 26) 31 Ind App 52 3 Lah 253 (P C)

(1924) 1924 Jh 52 (5) 3 Jh 257

(1924) 1924 All 611 (632) 47 All 113

(1921) 1921 Pat 101 (107) 1 Pat 444

(1918) 1918 Oudh 35 (37) 21 Oudh Cas 11

(1919) 1919 Mal 196 (198)

(1914) 1914 All 15 (137) 3 All 21

held and confirmed¹. Thus it was held that the mortgagor could apply to stop a sale under O 21, R 69,² or have the sale set aside under O 21, R 59.³ The amendment of 1929 gives express legislative sanction to the said view, namely, that the mortgagor's right to redeem continues till the confirmation of the sale.⁴

In this connection it may be noted that, under S 89 of the Transfer of Property Act, the defendant's right to redeem and the security become both *extinguished* on the passing of the order absolute.⁵ The words 'as to the extinguishment' have been omitted in the present Rule with the effect that a final decree does not now extinguish the mortgage security or the right to redeem.⁶

Where a period has been fixed for the payment of the mortgage money under the preliminary decree it is not open to the mortgagor to pay the money before the date fixed with costs and interest calculated *up to the date of payment* only and avoid further liability for costs and interest.⁷

See also the undermentioned case⁷

14 Payment into Court

Unlike the provisions of S 89 of the Transfer of Property Act under which the defendant had to pay the mortgage money either to the *plaintiff* or into the

Note 13

- 1 (1923) 1 L.J. All. (1311) 21 All. 606
(1922) 19 L.J. All. 24
(1920) 19 L.J. Oudh 209 (20) 207
(1920) 19 L.J. All. 126 (19) 42 All. 517
(1916) 1916 L.J. at 64 (65) 1 Pat. I Jour. 261
(1911) 9 Ind. Cas. 188 (19) (All.)
(1930) 19 L.J. Pat. 451 (452)
(1922) 1922 Mld. 1191 (1192) Final decree for sale not executed—Mortgagor can bring separate suit for redemption [But see (1924) 1933 Cal. 39 (42, 43) 50 Cal. 1464. Held that prior to Amendment of 1929 right of redemption was extinguished by the sale itself even before confirmation and also that Act 21 of 1929 is not retrospective.]
- 2 (1906) 28 All. 24 ()
(1899) 20 All. 354 (376)
(1897) 19 All. 205 () 34
(1906) 3 Cal. I Jour. 2 (30)
(1901) 1 All. I. 1699 (700)
(1898) 1 Mld. 44 (488)
(1904) 1 Cal. 82 (88) (E.I.)
(1901) 1 Cal. 2 (37)
3 (1906) 1 Cal. W.N. 171 (4)
(1902) 23 Mld. 2 (1902) 23 Mld. 2 (1902)
(1899) 22 Mld. 2 (1902)
(1896) 23 Cal. 12 ()
(1901) 23 Lom. 101 (10)
[But see (1905) 23 Cal. 702 (70) 710]
[See also (1897) 23 Cal. 152 (68) Sale not set aside under Order 21 Rule 53 or R 30—Sale must be confirmed]
- 3a (1934) 1934 Cal. 622 (523) Even though confirmation is duly filed by the judgment debtor himself
- 4 (1933) 1933 Jh. 361 (362)
(1900) 23 Mld. 637 (11 642)
(1924) 1924 Orl. 5 (31)
(1924) 1924 Cal. 854 (888)
(1923) 19 L.J. Cal. 273 (276)
(1920) 19 L.J. P.C. 79 (50) 42 All. 364 47 Ind.

App. 1 (P.C.)

- (1920) 19 L.J. Oudh 203 (204) 29 Oudh Cas. 44
(1914) 1914 Oudh 209 (211) 1 O.C. 347
Forfeiture suit—Right of redemption subsists till final decree—No question of limitation
(1913) 20 Ind. Cas. 59 (70) (All.)
(1918) 1918 P.C. 34 (35) 40 All. 407 45 Ind. App. 120 (P.C.)
(1921) 2 Ind. Cas. 835 (837) (Mld.)
[But see (1905) 23 Mld. 37 (40)]
(1906) 29 All. 718 (780) Person advancing money to mortgagor for paying off mortgage after order absolute but before sale is entitled to subrogation—Last clause in S 89 only refers to matter connected with execution of mortgage decree and does not affect principle of subrogation [See also (1888) 15 Cal. 346 (502)]
(1905) 3 Cal. W.N. 171 [Until sale is confirmed mortgage subsists]
(1907) 1922 L.C. 11 (11) 48 Ind. App. 49 All. 41 (P.C.)
(1918) 1918 Mld. 104 (10)
(1924) 1924 Mld. 645 () 4 Mld. 1
(1922) 192 Cal. 23 (2) 43 Cal. 12
(1924) 1928 Notes (81) 111 Ind. Cas. 738 (All.)
(1922) 192 L.C. 181 (18) 111 at 322 Per on making money for paying off the mortgage after final decree but before sale entitled to subrogation [But see (1925) 12 All. 6 (8)
(1906) 192 Mld. 516 (819) 43 Mld. 31
(1905) 1 Nig. L.R. 106 (10)
(1895) 19 All. 134 (136) Property cannot be sold before the time fixed by the Court]
- 7 (1910) 5 Ind. Cas. 806 (806) (Cal.) Plaintiff dying after date of order for payment—His heir substituted—Heir's order for payment into Court must be taken before sale takes place

5, Court, this Rule provides that it should be paid *into the Court*¹. But suppose the money is paid out of Court to the mortgagee. Then, if such payment is made *after the final decree* or after the order absolute (under the Transfer of Property Act is passed, O 21, R 2 will clearly apply and a payment can be certified to the executing Court, in the absence of such certification within the limitation period the executing Court will not take cognisance of it². Even if the payment is made after the *preliminary* decree and before the *order absolute* or the *final decree* is passed, the Court *executing the final decree* cannot, by virtue of the provisions of O 21, R 2, recognise such a payment unless certified³. On the question whether the Court *dealing with an application for a final decree*, can recognise such a payment, it has been held by the High Courts of Madras⁴ and Lahore⁵ that O 34, R 5 prescribes only one method of payment, namely, *into Court* and that payment *out of Court* cannot be recognised. On the other hand it was held by the High Courts of Allahabad,⁶ Calcutta,⁷ and Rangoon⁸ and by the Judicial Commissioner's Court of Nagpur,⁹ that such a payment could be *certified* to the Court (though it is not the executing Court) under the provisions of O 21, R 2, that therefore a certified payment can be recognised, or a payment can be certified by the Court dealing with the application to pass a final decree but that a payment not so certified within the period of limitation prescribed therefor, cannot be recognised. The High Court of Patna,¹⁰ the Chief Court of Oudh^{10a} and the Judicial Commissioner's Court of Nagpur^{10b} have held that such a payment can be recognised under O 23 R 3 as an adjustment of a *pending* suit, though in a later case¹¹ the Nagpur Court has disagreed with this view on the ground that O 23 R 3 cannot apply to a satisfaction of a decree *already passed*. The High Court of Lahore has also held that O 23 R 3 is inapplicable to such a payment^{11a}.

Even in cases arising under the Transfer of Property Act, there was a conflict of opinion, but of a somewhat different nature. It was held by the Allahabad High Court and the Judicial Commissioner's Court of Oudh, that a proceeding under S 89 of that Act for obtaining an order absolute was a proceeding in execution, and, therefore the Court dealing with an application for an order absolute, being an *executing* Court could not recognise a payment after the

Note 14

- 1 See Note 16 to Rule 2 ante
- 2 (1910) 7 Ind Cas 625 (626) (Cal) After order absolute
- (1910) 7 Ind Cas 255 (256) (Cal)
- (1907) 12 Cal W N 282 (283) After order

Mad 105

(See, however (1932) 1932 Mad 115 (116) 55 Mad 300 Where mortgagor and mortgagee settle out of Court and report to the Court preliminary decree ceases to exist)

- (1915) 1935 Lah 105 (113)
- (1915) 1932 Lah 211 (212)
- (1915) 1932 Lah 105 (113) 1913 Pun Re N 13

- 3) (1912) 1912 Lah 31 (32) Payment out of Court—Not recognisable under O 21,

R 2 or O 23 R 3

- 6 (1917) 1917 All 119 (119) 39 All 533
- (1922) 1922 All 383 (384) 44 All 664
- 7 (1914) 1918 Cal 472 (473)
- 8 [See (1924) 1924 Rang 194 (195) 6 Rang 250]
- 9 (1925) 1925 Nag 49 (49) 20 Nag L R 122
- (1915) 1915 Nag 55 (56) 11 Nag L R 16
- 10 (1917) 1917 Pat 577 (577) 2 Pat L J 333
- (1935) 1935 Pat 135 (330 335) Distinguishing 1930 Pat 731
- 10a (1927) 1927 Oudh 275 (276) Suit for redemption
- (See also (1935) 1935 Oudh 313 (315) If payment is admitted Court can record it under O 23 R 3 but if disputed payment being contrary to the terms of the Rule Court is not bound to embark upon an enquiry]
- 10b (1917) 1917 Nag 73 (81)
- 11 (1925) 1925 Nag 49 (49) 20 Nag L R 122
- 11a (1915) 1915 Lah 31 (33) (1935) 1935 Lah 163 (163)

preliminary decree unless it had been certified within time¹² The High Court of Calcutta, on the other hand, held that a proceeding for an order absolute is not one in execution, and that the Court dealing with such application can recognise such payments especially as § 89 expressly provided that payment may be to the plaintiff or into the Court¹³

Where the decree is not one under R 1, as in the case of a compromise decree R 3 does not apply and the Court can recognise payments made out of Court¹⁴ & also the undermentioned cases¹⁵

15 Return of documents relating to property

Where the preliminary decree does not provide for the payment of damages by the plaintiff to the defendant if the plaintiff fails to deliver all the documents relating to the mortgaged property as directed by the decree the Court cannot grant such relief by way of execution The mortgagor may sue separately for damages¹

16 Dismissal of mortgagee's application for final decree

O 34, R 1 requires only that the plaintiff should apply for a final decree His said application is not any ground for dismissing his application If it is dismissed on this ground it should be set aside and a final decree passed¹ The Court can also entertain a fresh application for final decree in such a case² An application for final decree cannot be dismissed for failure to give list of properties in respect of which the final decree was prayed for or for a wrong calculation of interest

17 Directing that the mortgaged property or a sufficient part thereof be sold

As to the Court's powers to direct the order in which the mortgaged properties are to be sold see Note 10 R 4 and the undermentioned case¹ But the

- 17 (1905) 30 All 218 (20)
(1910) 6 Ind Ca 1000 (1001) 13 Outh (45)

14

[See (1917) 18 Ind Ca 731 (732) 3 All 178]

- 13 (1907) 9 Cal (1) (100)
(1910) 7 Ind Ca 1004 (1005) (Cal)

(1907) 8 Cal W N 102 (104)

- 14 (1902) 1902 All 353 (354) 44 All 668

(1909) 1301 Lat 31 (733) 3 Pat L Jou (72)

- 1 1 0 6 Ind Ca 103 (32) (Cal) Mortgagee in possession as receiver must account for interest and profits before he can get order absolute for sale

(1882) 8 Cal 81 (1) Payment into Court within a certain time ordered—It is sufficient compliance if judgment debtor brings the money into Court within the time fixed and diligently takes the necessary steps for a final payment into the Court

(1895) 1808 All W N 100 (100) Preliminary decree providing that plaintiff should redeem certain prior mortgages Plaintiff paying the money into Court but subsequently withdrawing it—Payment is illusory

Note 15

- 1 (1902) 1902 Mad 200 (200) Quære—Whether the decree in the absence of specification of documents to be delivered was not too indefinite for

execution

Note 16

- 1 (1905) 1905 All 622 (623) 47 All 546
(1934) 1934 Outh 909 (210) If dismissed refusal to re-tore it is failure to exercise jurisdiction vested by law

(1933) 1333 Outh 279 (231) 8 Luck 496

192 192 All 441 (440) 43 All 597

[See also (1931) 1931 Mad 95 (96) (1) Dismissal for not taking steps ordered—Period of three months under O 3 R 1 not given—(Ira v. v. v.)

(1918) 1918 All 98 (96)

[See also (1934) 1934 Outh 909 (210)]

(1934) 1934 All 431 Preliminary decree for sale ordered—Application for final decree dismissed under O 3 R 3—Application on after period of 2½ years under S 151 to set aside dismissal should be entertained and final decree passed

[See also (1933) 1933 Mad 200 (56) Dismissal for non payment of costs—Pro h application allowed under O 3 R 4 and S 141]

- 3 (1907) 1907 All 433 (440) 43 All 592

Note 17

- 1 (1931) 1931 All 601 (603) Order in which properties are to be sold ruled in issue and found against—Not provided for in preliminary decree—Not to be incorporated in final

the sale does not operate on the rights of that mortgagor.

Any enlargement which takes place in the interest of the mortgagor subsequent to the final decree ensures for the benefit of the auction purchaser.³ On the other hand, he is liable to pay the Government revenue accruing due on the property after the purchase.⁴

A mortgagee decree holder purchasing the mortgaged property in execution of his decree is not bound to give credit to the mortgagor for the market value of the property but only for the actual price for which he purchased it.

A mortgagee who himself purchases the mortgaged property in execution of his decree for sale becomes the owner of the property and cannot maintain, as against subsequent purchasers the position that the mortgage still remained an encumbrance.^{5a}

See also the undermentioned cases.^f

20 Execution of final decree for sale

Proceedings for sale under a final decree or under an order absolute are proceedings in execution.¹ Consequently the Court executing the final decree cannot go behind the decree though by consent of parties, accounts not allowed by the decree can be taken in execution.² A mere *preliminary decree* under R 4 is incapable of execution it is only the *final* decree that can be executed.⁴ But where in a case under the Transfer of Property Act a decree was executed without an order absolute having been obtained and the judgment debtor did not raise any objection to such course at the proper time, it was held that he was estopped from raising the contention subsequently that the decree was not executable.⁵ A decree for sale providing in terms that the rights of prior mortgagees should not be prejudiced is not incapable of execution.⁶

No *attach rent* is necessary before sale under a mortgage decree⁷ and, consequently, O 21 R 58 does not apply to claims preferred against the execution of

acts subrogated to plaintiff's rights
[See also (1933) 1933 Cal 33 (12 44)
5) Cal 144]

[See also (1918) 1918 Pat 522 (523)
Mortgage decrees in favour of same
mortgagee under successive mort-
gages—Purchase by him under prior
mortgage decree—Subsequent en-
cumbrance over the property sold is
disallowed]

2 (1911) 12 Ind C.A. 193 (700) (L B)

3 (1891) 18 Cal 114 (176 177) 17 Ind App 201
(P C)

(1894) 18 Mad 412 (405)

4 (1912) 16 Ind C.A. 210 (212) 40 Cal 87 39

5 " " " " " " " " " " " "

6 " " " " " " " " " " " "

for
particular property sold—Subsequent
correction of decree does not affect
validity of sale

(1933) 27 All 62 (66) Judgment debtor
standing by and allowing sale to
take place is estopped from ques-
tioning validity of sale

Note 20

1 (1900) 3 Oudh C.A. 1 (7)

2 (1906) 23 All 193 (195)

(1938) 1 Oudh C.A. 49 (51)

(1918) 1918 Cal 453 (460)

(1930) 1930 All 520 (520) Final decree
passed by Court having jurisdiction
cannot be contested by judgment
debtor who remains absent on notice
being served

(1901) 1901 All W N 23 (25) Decree cannot
be executed against person not
named therein

(1917) 1917 Pat 582 (586) Final decree pro-
viding for interest which was dis-
allowed by the preliminary decree—
Remedy of judgment debtor is by
appeal and not objection in execu-
tion

(1931) 1931 Oudh 121 (122)

3 (1916) 1916 Mad 795 (793)

4 (1905) 8 Oudh C.A. 75 (76)

(1921) 1921 Pat 320 (320)

(1909) 9 Mad L Jour 343 (350) Case before
Code of 1905—Decree not executable
till order absolute

5 (1902) 5 Oudh C.A. 251 (254)

" " " " " " " " " " " "

" " " " " " " " " " " "

" " " " " " " " " " " "

6 " " " " " " " " " " " "

7 (1879 80) 4 Bom 515 (520) (F B)

(1903 04) 2 L B R 135 (137)

(1916) 1916 Mad 785 (788)

[See also (1932) 1932 Mad 716 (718),

5. mortgage decrees.⁸ Under S 20 of the Oudh Laws Act (XVIII of 1876) the restrictions imposed by S 60 of the Code are applicable to mortgage decrees also.⁹

The transferee of the mortgagor's interests after the final decree is not a necessary party to the execution proceedings.¹⁰

A Court can sell under a mortgage decree only the property comprised in the mortgage.¹¹ and the mortgagee cannot, in execution of his mortgage decree, seek any remedy against the other properties of the mortgagor.¹²

Proceedings for execution of a final decree for sale can be stayed under O 11 R 6 of the Code.¹³

O 21 R 83 of the Code does not, under the express terms thereof, apply to mortgage decrees.¹⁴

21 Transfer of final decree

Prior to the addition of Cl (e) to Sub S 1 of S 17 of the Registration Act by Act XXI of 1929 a transfer of a final decree for sale was held not to require registration¹ but now the law is otherwise.

22 Injunction restraining mortgagor from receiving income of mortgaged property

After a final decree for sale has been passed in a mortgage suit, the Court has no power to grant an injunction restraining the mortgagor from receiving the income of the mortgaged property. It can only bring the property to sale.¹

23 Construction of mortgage decree—See the undermentioned cases¹

24 Appeal

An appeal lies from a final decree for sale as from any other decree. Such decree is therefore not open to revision under S 115.¹

An order rejecting an application for a final decree amounts to a dismissal of the suit and as such is appealable as a decree.²

- | | |
|---|--|
| 71J) Rent decree under Estates Land Act which gives first charge is not a mortgage decree so a claim is admissible | (1831) 3 All 239 (213) |
| 8 (100) 150, All W N (2) (63) | (1891) 3 All 216 (719) |
| (100) 1332 Lih 618 (618) | (1878-80) 2 All 345 (349) |
| [See (1334) 1341 Lih 176 (176) Com promise decree in money suit providing that a house may be deemed to be mortgaged for the claim—Decree is not a mortgage decree] | (1878-80) 2 All 342 (344, 345) |
| 9 (1000) 3 Oudh Cas 1 (1) | (1900) 92 All 412 (444) Mortgage decree as per plaint wrongly including non hypothecated properties also—Held intention was only to decrees against hypothecated properties specified in the plaint |
| 10 (19 0) 150 All 507 (509) | (1933) 1933 Oudh 1 (3) Mortgaged property ordinarily means hypotheca—If any part is found invalid it will be excluded from the decree |
| (1901) Cal Ind Cas 144 (144) (All) | |
| 11 (1917) 1917 P C 197 (201) | Note 24 |
| [See also (1000) 2 All 412 (443) Even though mortgage decree erroneously includes non hypothecated properties also] | 1 (1970) Pat L Jour 312 (313) |
| 12 [See (1002) 5 Oudh Cas 108 (108 109)] | (1902) 23 Cal 611 (613 614) |
| 13 (1923) 1923 Lih 552 (552) | (1903) 1 Ind Cas 67 (78 67J) (Cal) Order absolute for sale under S 83 is appealable as a final decree [See (1 00) 2, Mad 214 (53)] |
| 14 See also Note 8 to R 4 of O 31 | (1920) 12 All 61 (67) (F B) Order absolute under S 83 transfer of Property Act being one in execution is appealable under S 214 (now S 47) of the Code |
| [But see (1000) 3 Oudh Cas 42 (46) Substantially correct] | 2 (1913) 1913 Mad 703 (709) 42 Mad 52 |
| Note 21 | (1921) 1921 Cal 501 (5 2) |
| 1 (192) 1925 Oudh 300 (309) 3 Oudh Cas 352 | (1932) 1932 Lih 214 (215) |
| Note 22 | [See (1931) 1931 Pat 25 (2 6) But where Court merely postpones passing of final decree on account of the pendency of an appeal against preliminary decree the order is not a decree—It is however revivable] |
| 1 (1915) 1915 All 77 (75) 37 All 423 | |
| Note 23 | |
| 1 (1900) 19 Mad 443 (444) 23 Ind App 37 (1 C) | |
| (1914) 1914 Mad 137 (136) | |
| (1920) 1920 Lih 46 (44) 44 Bom 381 | |
| (1931) 3 All 55 (500) (F 1) | |

But an order allowing an application under this Rule is not appealable^{1a}. The reason is that the order stands in the place of the judgment and it is only the decree that is drawn up in pursuance thereof that is appealable.

A decision as to the order in which the mortgaged properties should be sold may amount to a decree if it affects the rights of co-defendants *inter se*³.

See S 97, Notes 1 and 2 also, on the question as to whether when, and how far a preliminary decree can be attacked in an appeal from a final decree.

25 Court fee

An appeal from a final decree for sale should be stamped with an *ad valorem* Court fee and not as an appeal from an order¹. Similarly, the Court fee on an appeal against an order rejecting an application for a final decree is *ad valorem* on the amount claimed².

See also Note 7 to S 97 *ante*.

26 Costs not recoverable from mortgagor personally

In the absence of anything to the contrary in the decree itself, the costs awarded against a mortgagor in a mortgage suit form part of the mortgage money and cannot be recovered *personally* from the mortgagor¹. But see the undermentioned cases².

27 Dekkhan Agriculturists Relief Act

A decree for sale upon a mortgage under S 10 (b) of the Dekkhan Agriculturists Relief Act is not a *decree nisi* and no final decree is necessary before it can be enforced¹. But the award of a consolidator under S 44 of the Act was held to be not exempt from the requirements of S 89 of the Transfer of Property Act².

28 Limitation for application for execution of final decree

Article 182 of the Limitation Act applies to an application for the execution of a final decree for sale passed under this Rule¹ and time runs under that article from the *date of the final decree*². But when there has been an appeal time runs

^{1a} (1934) 1934 Mad 198 (199)

³ (1929) 1929 Mal 506 (507)

(1922) 1932 All 33 (89) 33 All 391

Note 25

1 (1920) 1920 Bom 101 (101)

(1918) 21 Ind Cas 498 (1918) 30 All 470

2 (1920) 1920 All 115 (114)

(1906) 12 Cal W N 10 8 (1079)

Note 26

1 (1921) 1921 All 104 (104) 40 All 630

(1924) 1928 Mad 604 (606) Question: one of construction of mortgage decree in each case

(1926) 1926 All 424 (42) 48 All 420

(1916) 1916 Ind L 1 (1) 2 Pat L Jour 51

(1918) 1918 All 866 (367) 40 All 103

(1896) 20 All 573 (26)

(1909) 20 Cal 431 (433)

(1907) 20 Mad 464 (465) (1931) 1931 All 124 (125)

2 (1926) 1926 All 63 (63) Costs subsequent to final decree need not be added to mortgage money

(1933) 1933 Lah 329 (300) Non mortgagor defendant raising false pleas made personally liable for costs

(1932) 1932 Rang 153 (153 154) Unless the decree directs specifically a mortgagee defendant is not personally liable for costs of the suit

(1919) 1919 All 291 (294) 41 All 473

(1931) 1931 Mad 72 (272) Purchaser of equity of redemption—liability of defence in the mortgage suit—Court can make him personally liable for costs of mortgage

Note 27

1 (1916) 1916 Bom 93 (99) 40 Bom 492

(1924) 1924 Bom 163 (160) 48 Bom 172

2 (1901) 23 Bom 614 (610)

Note 28

S 89 Transfer of Property Act—Time runs from order absolute for sale under S 89 as till then there is no executable decree.

{But see (1906) 10 Mad L Jour 503 (504) Decree under S 89 is capable

the order absolute for sale]

5. from the appellate decree.³ Where an appeal to the Privy Council is dismissed for non prosecution the executable decree is that of the lower Court and Art 182 applies.⁴ See also the undermentioned case.⁵

29 Nature of proceedings for final decree

There was a conflict of decisions, before the coming in force of the present Code of Civil Procedure, as to whether proceedings for order absolute under S 89 of the Transfer of Property Act were proceedings in execution of the decree under S 88 or proceedings in the suit itself some cases taking the former view¹ and others taking the latter view.² This conflict is now settled under the new Code which makes it clear that a decree under R 1 is incapable of execution³ and that the proceedings under R 5 are proceedings in the suit itself for a supplemental decree and not proceedings in execution.⁴ Hence the provisions of O 22 apply to proceedings for final decree.⁵ Similarly, the doctrine of *lis pendens* applies to such proceedings.⁶ But O 1 R 10 refers to a stage not concluded by a decree and hence does not apply to proceedings for final decree so as to enable the addition of persons who were not parties to the preliminary decree, as parties to the proceedings for final decree.⁷

30 Joint decree holders

One of several joint decree-holders cannot certify satisfaction of the decree beyond his own interest in the decree so as to bind the other decree-holders.¹

Under the Transfer of Property Act, where a joint decree under S 88 of the Act was passed in favour of several persons some of them could apply for an order absolute in favour of all.²

1 (1903) 26 Mad 11 (12)

1 (1914) 1914 P C (1) (6) 96 All 254 41 Ind 141 p 104 (P C)

5 (1905) 16 Mad L Jour 303 (304)

Note 29

1 (1851) 16 All 270 (213)

(1857) 19 All 520 (521)

(1907) 21 All 542 (544)

(1905) 27 All 625 (627)

(1916) 1916 Mad 957 (957)

2 (1905) 33 Bom 273 (277)

(1904) 6 Bom L R 1043 (1045)

(1906) 33 Cal 567 (570)

(1858) 25 Cal 133 (135)

(1894) 21 Cal 818 (823)

See also the following cases in which it was held that the order absolute for sale, there was no executable decree —

1.
2.
3.

void—May for certain reasons be come voidable

(1935) 1935 Pat 345 (370)

(1916) 1916 Mad 23 (324)

(1927) 1927 Pat 105 (107)

(1919) 1919 Cal 255 (255) 46 Cal 245

Most mortgage security not extinguished by preliminary decree¹

(1921) 1921 Cal 551 (552)

(1926) 1926 Sind 20 (21)

[See also (1931) 1931 All 386 (397, 398) 33 All 253]

5 (1919) 1919 Pat 190 (193) 4 Pat L Jour 240 (17 B)

(1917) 1917 All 423 (427) 33 All 551

(1915) 1915 All 27 (28)

6 (1915) 1915 Nag 28 (28) 12 Nag L R 50
(1903) 3 Ind Cis 791 (792) (Cis)

7 (1916) 1916 Nag 120 (121) 13 Nag L R 69

Note 30

1 (1904) 26 All 185 (183)

(1904) 26 All 318 (320)

(1910) 32 All 164 (166)

2 (1911) 11 Ind Cas 700 (701, 702) 31 All 72

1 (1921) 1921 Cal 551 (552)
(1933) 1933 Cal 798 (799) Final decree based on a valid and operative preliminary decree cannot be held to be

R. 6. [*New Act IV of 1882, S. 90 (1)*] Where the net proceeds of any sale held under the last preceding Rule are found insufficient¹⁰ to pay the amount due¹¹ to the plaintiff, the Court, on application by him may, if the balance is legally recoverable¹² from the defendant⁶ otherwise than out of the property sold,¹³ pass a decree for such balance.³

Recovery of balance due on mortgage in suit for sale

Synopsis

	Note No		Note No
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1 Transfer of Property Act S 90

This Rule corresponds to S 90 of the Transfer of Property Act with the difference that the word found between the words are and insufficient is new

As to the law before the Transfer of Property Act See the undermentioned case¹

2 Amendments after 1908

The Rule was amended by the Transfer of Property (Amendment Supplementary) Act, XXI of 1929, as follows —

Order 34 Rule 6—Note 1

(1120) 1926 Nag 163 (169)

1 (1917) 1917 All 149 (150)

C. P. C. 305 & 306

6.

(1) The words "any sale held under the last preceding Rule" have been substituted for the words "any such sale"

(2) The words "on application by him" (plaintiff) are new.

3 Personal decree for balance against mortgagor

This Rule provides that the mortgagee may, *by way of application*, obtain a decree *personally* against the mortgagor, for the balance still remaining due to him after the mortgaged property is sold¹. The object of the Rule is to enable such a decree to be passed in the mortgage suit itself and to avoid multiplicity of proceedings^{1a}. In fact, a separate suit for enforcing the personal liability would be barred under the provisions of O 2, R 2².

A personal decree under this Rule, will, however, be granted only after the mortgagee has exhausted his remedies against the security, in other words, it will be granted only after the sale has been carried out and the deficiency ascertained, it is a relief which will not be granted to the mortgagee until that stage is reached³. The mere fact, therefore, that the *plaint* does not contain a prayer for such relief⁴ or that the original decree does not reserve a liberty to the plaintiff to apply for a personal decree⁵ will not preclude the mortgagee from applying under this Rule when the deficiency is ascertained. Where a compromise in a mortgage suit provided for payment of the mortgage money in certain instalments and, on default, for execution by sale of the mortgaged properties "in the usual way," but did not reserve any right to the plaintiff to apply for a personal judgment, it was held by their Lordships of the Privy Council that there was nothing to suggest that the plaintiff agreed to forego the benefit of the personal covenant, and that the powers of the Court to give that relief do not depend on O 34, R 6 of the Code nor are they derived from the clause in the decree reserving leave to the plaintiff to apply for a personal judgment⁶.

Note 3

- 1 (1926) 1926 All 343 (344)
- (1927) 1927 Lah 445 (446, 447) 8 Lah 721
- (1911) 11 Ind Cas 987 (989) 30 Bom 452
- 1a (1906) 28 All 365 (372)
- (1892) 14 All 513 (516)
- (1889) 11 All 486 (488)
- (1920) 1920 Bom 95 (96)
- (1902) 25 Mad 244 (236) (F B)
- 2 (1920) 1920 Oudh 251 (252) 23 Oudh Cas 145
- (1902) 20 Mad 244 (237)
- (1922) 1922 Pat 450 (458) 1 Pat 506
- (1922) 1922 Pat 450 (458) 1 Pat 506
- (1904) 14 Mad L Jour 490 (491)
- [See (1911) 10 Ind Cas 336 (337) (All)]
- 3 (1932) 62 Mad L Jour 170 (173, 174) 1931 Notes 23 (a) (P C)
- (1934) 1934 Cal 426 (427) Before order is passed under O 34 R 6 property ordered to be sold must be sold first and balance legally recoverable must be left unpaid
- (1930) 1930 All 69 (71) 52 All 363
- [See also O 21, R 30, Note 4 Foot note (1)]
- [But this Rule is not applicable to charge decrees.]
- (1935) 1935 All 411 (415) Charge created by operation of law—Charge holder is not disentitled from pursuing personal remedy

[See also (1935) 1935 Oudh 260 (262)]

[See (1933) 1933 Mad 33 (33) Maintenance decrees making whole family property liable and creating charge on specific items—Charged items need not be proceeded against and exhausted before execution against other properties—Analogy of mortgage decrees not applicable]

- 4 (1899) 1899 All W N 72 (72)
- (1909) 4 Ind Cas 206 (257) (Bom)
- (1933) 1933 Oudh 520 (521)

[But see (1924) 1924 Lah 132 (130, 136)]

- 5 (1932) 62 Mad L Jour 170 (173, 174) 1931 Notes 23 (a) (P C) Confirming 1929 Cal 397 (384)

(1935) 1935 All 411 (413, 414) Plaintiff claiming personal decree in plaint—Defendant not denying it nor Court mentioning anything about it in decree—Subsequent application under O 34 R 6 is not barred by *res judicata*

- (1933) 1933 Oudh 520 (521)
- (1909) 4 Ind Cas 250 (257) (Bom)
- (1889) 16 Cal 423 (425)
- (1892) 14 All 513 (517)
- (1927) 1927 Mad 779 (780)

- 6 (1932) 62 Mad L Jour 170 (173, 174) 1931 Notes 23 (a) (P C) Confirming 1929 Cal 397 (389)

It follows from what has been said above that the Rule contemplates a *separate* decree being passed for the balance, & Court will be acting irregularly, therefore, in providing, in the decree for sale itself, that the mortgagee may proceed personally against the mortgagor for the balance.⁷ On the other hand the preliminary decree should not direct that properties not mortgaged should not be proceeded against—the question must be left for decision at the proper time.⁸ But where, at the time of the original decree a *decision* has been given as to the *personal liability* of the defendant, the question cannot be raised again on general principles of *res judicata*.⁹ A decree for sale, providing for execution thereof personally against the mortgagor in case of deficiency, though contrary to the provisions of R 6 is not void on that ground. No fresh supplementary decree under R 6 can be passed¹⁰ or is necessary in such a case,¹¹ before enforcing the

- 7 (1904) 31 Cal 792 (1904)
(1885) 1885 All W N 141 (1904).
(1907) 30 Mad 44 (1907)
(1907) 31 Bom 244 (1907)
(1923) 1923 Bom 32 (1923)
(1912) 15 Ind Cal 111 (1912) Cal
(1918) 1918 Mad 1987 (1918) 40 Mad 980
(1911) 11 Ind Cal 117 (1911) 35 Ind L R 71
[But this does not apply to land where the lien for property tax is not in force
[See however (1933) 1933 Oudh 352 (303) J Luck 31 Suit on mortgage executed by guardian—Relief of personal decree prayed for among other reliefs—Guardian allowing decree to be passed without contest—Preliminary decree continuing decree over is proper]
8 (1914) 1914 Cal 214 (215)
J (1916) 1916 Nag 1 (3) 13 Nag L R 76
(1931) 1931 Cal 764 (764) Decree for sale and personal decree without application for latter relief though improper is valid
(1933) 1933 Lih 329 (330)
(1935) 1935 Oudh 11 (12) Preliminary decree containing provision that if sale proceeds are insufficient plaintiff would be at liberty to apply for personal decree—Decree for sale Sale proceeds insufficient to pay decretal amount—Application under O 31 R 6 for personal decree cannot be barred by limitation
(1933) 1933 Oudh 466 (468) J Luck 30 Composite decree combining decree for sale and personal decree operates at future date when mortgage debts are not satisfied by sale
(1938) 1938 Oudh 229 (531) 9 Luck 167 (Do)
(1904) 32 Mad 334 (535 530)
(1906) 28 All 307 (369)
(1930) 1930 Oudh 378 (381) *Smastara J* dissenting
(1923) 1923 Notes 33 (a) 124 I C 609 (Oudh)
(1930) 1930 Oudh 10 (17)
[But see (1925) 1925 Oudh 462 (464)]
[See also (1918) 1918 Pat 315 (316)]

- Where the original decree does not reserve such liberty the defendant is not estopped from disputing his liability]
[See also (1933) 1933 Oudh 352 (304) 9 Luck 51 S 97 of the Code precludes the agitation of such a question]
10 (1912) 17 Ind Cal 263 (265) (Cal) A personal decree cannot be passed under R 6 where the mortgage decree itself has granted personal remedy
[See also (1932) 1932 Cal 710 (778) Solenunth—Composite decree thereon incorporating personal decree on deficiency—Not invalid]
[But see (1931) 1931 Pat 49 (51) 6 Pat L Jour 106 Application for personal decree under R 6 need not be dismissed]
11 (1920) 1920 Mad 479 (480) 43 Mad 421
(1894) 21 Cal 26 (26)
(1890) 1890 All W N 142 (143)
(1915) 1915 Mad 443 (401)
(1903) 7 Cal W N 744 (743)
(1900) 15 Mad L Jour 6 (7) Construction of decree—Dee rev providing that person of judgment debtor should not be proceeded against—Other properties liable
(1893) 15 All 334 (337)
(1891) 13 All 60 (60)
(1891) 13 All 356 (356)
(1887) J All 484 (433)
(1904) 29 All 12 (13)
(1906) 28 All 129 (129)
(1911) 1911 Mad 111 (112) 112a 43 Ind Cal 9 (576 885)
(1918) 1918 Mad 604 (605)
(1894) 21 Cal 213 (221)
(1918) 1918 P C 150 (160) 47 Cal 370 (P C)
(1900) 1920 Mad 4 J (480) 43 Mad 421
(1911) 1911 Cal 432 (443) Held on construction of decree that it was not a composite decree granting personal relief as well as relief against mortgaged property
(1928) 1928 Lih 603 (603)
(1928) 1928 Mad 33 (39)
(1923) 1923 Sind 44 (45) Rights under a valid mortgage decree directing recovery of balance personally from

personal liability though execution cannot be issued until the mortgage property has been sold and the proceeds found insufficient to satisfy the mortgage¹²

Similarly the mortgagee is not entitled to proceed against the non-hypothecated properties under the original decree for sale without a personal decree under this Rule¹³. But where execution is allowed against the non mortgaged properties of the mortgagor, without such a personal decree having been obtained and the mortgagor fails to object to such procedure, he will be estopped subsequently from objecting to the execution on the ground of the want of a personal decree¹⁴

A personal decree under R 6 can only be based on a decree for sale under which the mortgaged property has been sold. Thus where a person holds two mortgages over the same property and obtains two decrees upon them but sells the mortgaged property under one of them he cannot apply for a decree under R 6 if the balance of the sale proceeds after satisfying the decree under which the sale is held is not sufficient to satisfy the other mortgage¹⁵. Similarly where a puisne mortgagee who has obtained a decree on his mortgage is joined as a party to a suit on a prior mortgage and the property is sold in execution of the decree on the prior mortgage but the balance of sale proceeds after satisfying the prior mortgage is not sufficient to satisfy the puisne mortgage, the puisne mortgagee cannot obtain a decree under R 6 for his amount¹⁶. See also Note 10, *Infra*

The present Rule makes it clear that the plaintiff must apply for a decree under this Rule and that the Court cannot pass the decrees *suo motu*. The law was the same even before the amendment of the Rule in this respect by Act XXI of 1929¹⁷. But the application need not be in writing nor need it be signed¹⁷

A decree under R 6 can be made only against the defendants in the original suit¹⁸

A personal decree under this Rule can be executed either against the person of the mortgagor or by attachment and sale of his other properties¹⁹. A

judgment debtor cannot be deemed as abandoned by presenting an application under O 34 R 6

(1911) 10 Ind Cas 915 (916) 4 Sind LR 244

(1911) 12 Ind Cas 184 (185) (Mad)

(1911) 12 Ind Cas 629 (630) (Mad)

(1912) 15 Ind Cas 23 (24) (Cal) Personal decree for costs

(1914) 1914 Mad 140 (170)

(1915) 1915 Mad 452 (453) 33 Mad 877

(1915) 1915 Mad 414 (414)

(1914) 1914 Oudh 215 (215) 17 Oudh Crs 153

(1916) 1916 Lah 349 (349)

(1914) 1914 Oudh 333 (334) 18 Oudh Crs 55

(1924) 1924 Pat 262 (263) 2 Pat 706

[See 1937 Cal 775 (778) The necessity of separate decree under this Rule in such cases depends on the terms of decree already passed]

(1913) 21 Ind Cas 283 (781) 16 Oudh Cas 238

(70)

9]

356

17 (1924) 1924 All 804 (803)

18 (1927) 1927 All 691 (692)

19 (1889) 16 Cal 423 (425)

(1925) 1925 All 352 (352) Decree against Hindu widow—Other properties can be attached

[See (1901) 73 Cal 12 (16) 17] Suit

decree under this Rule should not, therefore, direct the realisation of the amount from any specific property²⁰

Although a decree merely declares the amount due to be a charge on the mortgaged property it should be construed as a mortgage decree for sale to which R 6 is applicable²¹

Although a mortgage is invalid a personal decree may be passed in the same suit against the mortgagor on the basis of the personal covenant in the mortgage deed²² A personal decree obtained without informing the Court of a previous refusal by it to grant such a decree, cannot be set aside as fraudulent²³

4 Personal liability of purchaser from mortgagor

The word defendant in R 6 means the defendant mortgagor and a personal decree cannot be passed under the Rule against a purchaser of the equity of redemption¹ This is so even if the purchaser has contracted with the mortgagor to pay off the mortgage and has acted with himself a portion of the consideration for the purpose The reason is that there is no privity of contract between himself and the mortgagor

5 Personal liability is a question of construction of the instrument

A personal liability to pay the mortgage amount is, in each case a question of the construction of the mortgage deed¹ But every simple mortgage² and every English mortgage³ involves *prima facie*, a personal obligation to pay Similarly, *prima facie* there is no personal obligation to pay in a usufructuary mortgage or a mortgage by conditional sale⁴ (See S 58 of the Transfer of Property Act) Where the time for payment fixed under the decree *nisi* was enlarged on condition

on mortgage is brought not only upon the lien but also upon the personal covenant]
[See also O 21 R 90 and Note 4, Foot note (1) thereto]

(1916) 1916 All 232 (233) 38 All 209
(1923) 1923 P C 54 (54) (P C)

Note 5

20 (1899) 19 All W N 125 (126)

21 (1916) 1916 Mad 756 (758)
[See also (1919) 1932 Cal 775 (781) Solenwith—Decree creating charge and incorporating personal liability in case of deficiency—Even as charge holder is entitled to benefit of this rule]

22 1 (1) 1931 Mad 124 (125)
(1 (1) 1915 Pat 365 (366)
(1 (1) 1915 Bom 102 (104) 39 Bom 353

23. (1915) 1915 All 397 (400)

Note 4

1 (1909) 3 Ind C 33 (33) (All)
(1913) 18 Ind C 747 (749) (Cal)
(1916) 1916 Mad 763 (764) 30 Ind C 155 (155 156)
[See (1924) 1924 All 877 (878) Right to personal decree is different from the right given by covenant in deed to recover money by sale]
[See also (1933) 1933 Lah 329 (330) Sale of right of redemption and successful pre-emption suit—Pre-emptors defendants are not personally liable in absence of contract to that effect]

2. (1912) 13 Ind C 804 (304) 34 All 63 39 Ind App 7 (P C)
(1909) 31 All 352 (358)

1 (1909) 1 Ind C 442 (443) (Cal)

(1859) 16 Cal 540 (544)

(1852) 4 All J (5)

(1918) 1918 Mad 330 (330)

(1922) 1922 Cal 52 (52 53)

(1916) 1916 Mad 13 (14)

(1932) 1932 Lah 164 (166 167) 13 Lah 259

In all mortgages personal covenant is presumed unless negated by the nature and terms thereof—In certain classes much more clearly implied covenant is required than in others

2 (1900) 29 Mad 491 (493)

(1934) 1934 Pat 433 (433) Additional sum paid by mortgagee to save property from sale—Mortgagee has right to decree under O 34 R 6

(1906) 4 Cal L Jour 246 (248 and 253)

(1907) 5 Cal L Jour 257 (259)

(1908) 30 All 383 (390)

(1922) 1922 Nag 38 (39) 18 Nag L R 145

3 [But see (1891) 7 Cal 394 (400)]

4 (1900) 22 All 149 (150) 27 Ind App 53 (P C)
[See also (1932) 1932 Lah 164 (166, 167) 13 Lah 259 In usufructuary mortgages in the absence of express covenant a much more clearly implied covenant is required than in other forms of mortgage—On the terms of a bond assumed to be a usufructuary mortgage, *vid.*, personal covenant was clearly implied]

5, of the mortgagor paying interest not provided for in the decree it was held that the mortgagor was personally liable for the payment of such interest "

6 Personal decree against person not the mortgagor

The word defendant in the Rule means as has been seen in Note 4 above the mortgagor defendant¹ Where a mortgage bond was executed by the Court of Wards on behalf of a ward a decree may be passed against the ward under this Rule for the balance of mortgage money due after the sale of the mortgaged property and appropriation of the sale proceeds " A personal decree against the managing member of a Hindu joint family binds the junior members of the family though they were not parties to the suit³

7 Personal decree against the heirs of the mortgagor

Where mortgaged property is found to be insufficient to satisfy a mortgage decree obtained against the heirs of a mortgagor a decree may be passed against them under this Rule to the extent of the assets of the deceased in their hands¹ Where a decree under this Rule exempts the person and property of the sons of the mortgagor who is the manager of a joint Hindu family but a decree is passed against them to the extent of the assets of the mortgagor in their hands the assets received by the sons by survivorship on the death of the father are liable under the decree² But when the son's share is exempted from the mortgage decree against the father it is also exempt from a decree under the present Rule³

8 Personal remedy under compromise decree

The fact that the original decree was a compromise decree is no bar to a personal decree being passed under this Rule¹ According to the High Courts of Bombay² and Calcutta³ a compromise decree in a mortgage suit may be executed against the mortgagor personally without any decree being passed under R 6

5 (1892) 12 C P L R 78 (82)

Note 6

- 1 (1904) 26 All 507 (508)
(1910) 7 Ind Cas 84 (78) (Cal)
(1916) 1916 Mad 763 (64) 30 Ind Cas 188
(188 189)
[See also (1931) 1931 All 631 (632) 58
All 695 Persons not interested in

to assets received

[See (1901) 1121 Pat 35 Personal
decree against son's share and mort-
gage decree against father—Decree
under R 6 is necessary to proceed
against father's other properties—
Decree as it stands could be executed
against son's share]

2 (1910) 5 Ind Cas 146 (147) (Cal)

3 (1903) 23 All W N 41 (42)

Note 8

1 (1932) 62 Mad L Jour 170 (173 174) 1931
Notes 23 (a) (1 C) Confirming 1929
Cal 387 (389)

(1933) 1933 Oudh 214 (215) Application for
personal decree is not barred unless
excluded by compromise

(1933) 1933 Oudh 520 (520) 9 Luck 211

(1909) 3 Ind Cas 443 (444) (Cal)

(1926) 1926 Oudh 27 (28)

[See (1931) 1331 Oudh 422 (423 424)
Compromise not contemplating per-
sonal liability—Decree embodying a
clause for personal liability—Decree
annulled by deleting the clause]

2 (1930) 1930 Bom 208 (209) 54 Bom 352
[But see (1920) 1120 Bom 35 (36) In
this case it was held that the com-
promise decree could not be executed
against the mortgagor personally]

3 (1923) 1923 Cal 668 (669)
[See also (1932) 1932 Cal 414 (415
416)]

can be passed against him in the
suit—Suit dismissed

2 (1922) 1922 Nag 98 (100 101) 18 Nag L R
145

3 (1901) 22 All 403 (403 410)

Note 7

1 (1912) 14 Ind Cas 55 (55) (All)

(1915) 1915 Lah 314 (314)

(1931) 1931 All 368 (369) In this case it was
held that the property in question
was not such assets

(1909) 1 Ind Cas 442 (443) (Cal) Hindu joint
family—Mortgage by the father—
Personal liability of sons confined

1 See above
decree is competent against persons

although it does not expressly provide for personal relief. But the Patna High Court has held that a decree under this Rule is necessary in such a case⁴. Where the compromise decree itself expressly provides for personal relief a fresh decree under this Rule is not necessary⁵.

9 Right of mortgagee to attach other properties of mortgagor before date fixed for payment of mortgage money

After the preliminary decree in a mortgage suit and before the date fixed for the payment of the mortgage money if there is a reasonable probability of the mortgaged property not being sufficient to satisfy the mortgage debt the Court can order the attachment of the other properties of the mortgagor if it is satisfied as to the existence of the conditions laid down in O 38 R 5. The fact that under O 34 R 6 no personal decree can be obtained until the mortgaged properties are sold does not affect the plaintiff's rights under O 38 R 5¹.

10 Where net proceeds of any such sale are found insufficient

The opening words of the Rule make it clear that a decree under the Rule can only be passed after the mortgaged property has been sold and it is found that the sale proceeds are not sufficient to satisfy the mortgage debt¹. But if a personal decree is actually passed before the sale and the mortgagor does not object, he is estopped from questioning the validity of such personal decree later on². If the mortgaged property though no fault of the mortgagee has been destroyed by fire or otherwise ceased to exist or to be available for sale the plaintiff is not bound to go through the farce of bringing the property to sale before applying for a decree under the Rule³. Thus where the mortgagee is unable to sell a portion of

4 (1916) 1918 Pat 962 (263) 3 Pat L Jour 649

5 (1923) 1923 Oudh 490 (490) 3 Luck 411

Note 9

1 (1919) 1919 Cal 258 (250) 46 Cal 240

(1931) 1931 Bom 329 (329)

[See (1919) 1919 Lah 402 (403) Mortgage decree for sale allowing decree holder to proceed against judgment debtor personally if proceeds insufficient—Court can attach his other property under O 38 R 5 even before sale]

Note 10

1

2 (1924) 1924 All 225 (297) 46 All 37

(1933) 1933 Lah 831 (832) Suit to enforce mortgage referred to arbitration—Award and decree thereon giving decree holder choice of realising amount from mortgaged property or any other immovable property of judgment debtor—Decree holder can validly proceed against property other than mortgaged or e

3 (1915) 1915 Mad 452 (452) 39 Mad 677

(1935) 1935 Lah 536 (536) Mortgaged property held to be not saleable as being ancestral property

(1934) 1934 Lah 174 (175) 15 Lah 607

Mortgaged property not available owing to claim of third party—Personal decree can be passed

(1933) 1933 Lah 92 (793) Mortgaged properties sold under a decree on a prior mortgage—Sale proceeds not sufficient even to pay first mortgage—Puisne mortgagee can apply under this Rule without bringing the properties to sale

(1935) 1935 Oudh 260 (262)

(1911) 12 Ind Cas 439 (440) (Mad) Mortgagor having no saleable interest in the mortgaged property

(1921) 1921 Pat 49 (51) 6 Pat L Jour 106 Mortgagee not allowed to sell a portion of the property

(1929) 1929 Cal 121 (173)

(1924) 1924 Cal 209 (210) 50 Cal 718 Portion of property sold for arrears of rent through no fault of the mortgagee

(1928) 1928 Bom 323 (323) Property destroyed by fire

(1978) 1978 All 71 (273) 50 All 321

(1919) 1919 Cal 951 (956) 45 Cal 702

(1919) 1919 Oudh 201 (201) 93 Oudh Cas 145

(1906) 33 Cal 800 (891 832)

(1909) 1929 Cal 121 (123)

(1911) 9 Ind Cas 403 (406) 14 Oudh Cas 217 No bidder forthcoming because

6, the mortgaged properties by reason of their being situated in a Native State which will not execute the decree of a British Indian Court and the sale proceeds of the remaining portion of the properties are not sufficient to satisfy the mortgage, the decree-holder is entitled to a personal decree against the judgment-debtor ⁴. Similarly, where a mortgage of joint family property by the father of a Hindu joint family is found to be not for legal necessity, it has been held by the Madras High Court that a conditional decree may be passed against the father personally and the sons share in the joint family property for the recovery of the balance that may remain due to the mortgagee after the sale of the *father's share of the mortgaged property* (without the son's shares being put to sale) ⁵. Where a sale in execution of a decree on a mortgage is set aside on the ground that the mortgagor has no saleable interest in the mortgaged property, a personal decree may be passed against the mortgagor, because the mortgagee, having been compelled to refund the entire purchase money, the net sale proceeds are nil and therefore insufficient to satisfy the mortgage debt ⁶.

A personal decree should not be passed against the mortgagor till the *entire* mortgaged property ordered to be sold has been sold and the proceeds are found insufficient to satisfy the mortgage debt ⁷. But it is open to the mortgagee in the plaint to give up his claim against any portion of the mortgaged property and obtain a decree for sale in respect of the rest. If in such a case, the sale proceeds of the portion ordered to be sold are not sufficient to satisfy the mortgage debt, the plaintiff may obtain a personal decree against the mortgagor ⁸.

saleable interest in the property
(1904) 20 All 25 (27) Third person establishing his right to a portion of the mortgaged property—Sale of the remaining not sufficient to pay off the mortgage—Decree may be passed
" *loc. cit.*

have no saleable interest—Yet sale must precede application for personal decree

[See also (1913) 20 Ind Cas 370 (321) (All)] Where the mortgagee negligently allows a third person to come in and sell a portion of the mortgaged property, he cannot afterwards come in under O 31 R 6]

[See also (1934) 1934 Mad 82 (82) Decree for sale of four items—Three sold and personal decree asked—Subsequent to mortgage fourth item sold to stranger representing to be unencumbered—Purchaser not party to mortgage suit—Mortgagee held entitled to personal decree]

* (1931) 1931 Pat 49 (51) 6 Pat L Jour 106
o (1920) 1920 Mad 479 (480 481) 55 Ind Cas 320 (321) 43 Mad 421

[See also (1933) 1933 Lah 768 (770) Mortgage of family property by father not for family necessity—Mortgagee can obtain personal decree against father and in execution bring entire family estate to sale unless debt is illegal or immoral]

o (1927) 1927 All 395 (396) 43 All 506 But

this rule is not applicable where there is no sale at all in consequence of the mortgage decree itself becoming inoperative at the instance of a successful claimant to the mortgaged property

[See (1932) 1932 All 475 (476) Mortgagee getting final decree but no steps for sale since mortgagor's title was negatived in a subsequent suit by third party]

(1932) 1932 All 358 (360) (Do)

7 (1900) 22 All 404 (404)

(1906) 33 Cal 890 (892)

[But see (1907) 29 All 369 (371) Mortgagee decree holder may give up in execution, his claim against a portion of the mortgaged property and apply for personal decree if sale of rest of property leaves a deficit]

8 (1903) 20 All 79 (82)

(1905) 2 All LJ 413 (414) 28 All 19 Sale of property ordered to be sold under S 83 T P Act constitutes the only condition precedent for order under S 90 whether the order under S 83 was passed rightly or wrongly
(1917) 1917 Pat 515 (555) 42 Ind Cas 56 (56 57) 2 Pat L Jour 538

[See (1906) 28 All 19 (20) Decree for sale—Mortgagee relinquishing claim to portion of mortgaged property at the time of order absolute for sale—Sale of property directed to be sold insufficient—Mortgagee may obtain personal decree]

[Contra (1920) 1920 Mad 221 (222) 51 Ind Cas 84 (85)]

The sale of the mortgaged property need not be necessarily a *judicial sale*. The Rule covers also a private sale.⁹ Where the mortgagee himself purchases the mortgaged property in execution of his mortgage decree with the leave of the Court, the leave to bid puts him in the same position as any other purchaser and he is bound to give credit only for the amount bid by him and may apply for a personal decree for the balance of the mortgage money remaining due after deducting such amount.¹⁰

Where a portion of the mortgaged property was acquired by the Government under the Land Acquisition Act it was held by the Allahabad High Court that the mortgagee's remedy was to bring to sale the rest of the property and then, if there is a balance due, to apply for a personal decree.¹¹ But the Calcutta High Court has held that where the mortgaged property is compulsorily acquired by the Government the mortgage lien is transferred to the compensation money standing to the credit of the mortgagor in the collectorate and the mortgagee is entitled, in execution of a decree for the sale of the mortgaged property, to take out such money without obtaining a further decree under the present Rule.¹²

See also Note 3 *supra*.

11 Amount due

The amount due is the amount for the recovery of which a decree for sale has been previously passed.¹ Costs awarded to the mortgagee form an integral part of the amount due.² A puisne mortgagee paying off a prior encumbrance is entitled to a personal decree for the deficit due to him having paid off the prior mortgage.³

12 Legally recoverable

A personal decree cannot be passed in every suit for sale upon a mortgage, but only where the defendant by his contract or otherwise is under a *personal*

[Compare (1906) 28 All 674 (G-5) Decree passed against wrong property—Such property sold—Personal decree may be passed]

9 (1906) 2 All L J 353 (355)

(1906) 28 All 660 (664)

[But see (1914) 1914 Mad 251 (252) 23 Ind Cas 544 (545) Mortgage decree against A and B—Private sale by A alone—B can insist on judicial sale being held before personal decree is passed against him]

10 (1884) 16 Cal 132 (136)

(1890) 18 All 31 (33)

(1854) 16 Cal 652 (692) 16 Ind App 107 (P C)

(1897) 15 Cal 4 (7)

(1904) 1 All L J 466 (487) Decree holder's failure to give the full decretal amount according to his undertaking to the Court was held to be an abuse of the process of the Court though he was not thereby disabled from applying for personal decree [See also (1932) 1932 All 704 (706 707) 54 All 448 Decree holder to coming one of the heirs of one of the

Note 11

1 (1929) 1929 All 15 (16)

2 (1908) 11 Oudh Cas 377 (378)

(1908) 35 Cal 431 (433)

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(1930) 1930 Oudh 398 (322)

(1916) 1916 Pat 1 (1) 2 Pat L Jour 51

[But see (1857) 14 Cal 155 (157, 158)

Costs may be recovered personally

and (1937) 1937 Mad 155 (156 157)

53 Mad 332 Notwithstanding amalgamation into the mortgage money as

one lump sum or heap costs can be

personally recovered if remaining due

after sale of properties mortgaged,

and (1931) 1931 Rang 153 (156)

J Rang 186 Costs may be personally

received though personal remedy for

mortgage money and interest is

time barred]

[See also (1919) 1919 All 297 (298)

41 All 479 Costs of unsuccessful ap

peal by mortgagor may at mort

gagee's option be added to mortgage

money or be recovered personally

from mortgagor]

(1910) 5 Ind Cas 32 (33) (All)

(1914) 1914 All 444 (445)

3 (1903) 26 All 93 (94)

- 6, obligation to pay the mortgage debt¹ and the plaintiff's right to enforce the personal obligation is *not barred by limitation* at the date of the suit for sale²

For further information see Note 17, below.

13 Legally recoverable otherwise than out of the property sold

These words mean by way of illustration that the balance must be a balance which the mortgagee is not precluded by the terms of the mortgage from realising otherwise than out of the property sold or a balance the recovery of which is not barred by limitation¹

14 Prior and puisne mortgagees

A puisne mortgagee is not a defendant against whom a *personal* decree may be passed there being no privity of contract between him and the plaintiff¹

15 Costs against puisne mortgagees

A prior mortgagee is not entitled to a personal decree for costs against a *puisne* mortgagee¹ As seen in Note 6 above the word defendant in this Rule means only the *mortgagor* defendant and not necessarily those claiming title under him

16 Insolvency of mortgagor

Where pending a suit by a mortgagee on his mortgage, the mortgagor is declared insolvent the plaintiff can still proceed against the mortgaged property¹ If the mortgaged property is not sufficient to pay the debt and the mortgagor is personally liable under the mortgage the mortgagee may prove for the balance in the insolvency proceedings along with the other creditors of the mortgagor if the personal liability was not time barred at the date of the institution of the suit on the mortgage² But can the mortgagee obtain a personal decree under this Rule in such a case? No according to the Allahabad High Court³ Yes according to the Lahore High Court⁴ and the Oudh Chief Court⁵

17 Limitation

We have seen (Note 12) that a balance is not legally recoverable if the personal remedy is *barred by limitation* at the date of the suit for sale Article 132

Note 12

- 1 (1304) 28 Bom 690 (634)
2 (1885) 7 All 502 (505) 12 Ind App 12 (P C)
(1892) 14 All 513 (518)
(1893) 15 All 331 (332)
(1886) 12 Cal 399 (395 396)
(1910) 34 Bom 540 (545)
(1922) 1922 Bom 237 (236) 45 Bom 848

Note 13

- 1 (1892) 14 All 513 (518)

Note 14

- 1 (1930) 1930 Lah 791 (792)
(1912) 17 Ind Cas 927 (930) (Cal)

Note 15

- 1 (1904) 20 All 507 (508 509)
(1901) 23 All 439 (440)
[See also (1932) 1932 Cal 775 (781)
59 Cal 1314 No personal liability
against puisne mortgagee as such]
[See however (1931) 1931 Rang 153
(159) 9 Rang 186 Prior mortgagee's
priority raised and found against—

—Defences found against—Costs on
contested sale against subsequent
mortgagee and *ex parte* sale against
mortgagor—Personal decree under
this Rule passed against mortgagor—
Subsequent mortgagee is liable per-
sonally for difference of costs between
contested and *ex parte* sales since
no personal decree can be passed
against him]
[See (1933) 1933 Lah 329 (330) In
this case personal decree for costs was
passed against a non mortgagor de-
fendant for having raised false de-
fences to the suit]

Note 16

- 1 [See (1911) 12 Ind Cas 587 (588) 34 All 106]
2 (1911) 12 Ind Cas 587 (588) 34 All 106
(1925) 1925 Pat 438 (440) 4 Pat 128
(1930) 1930 Oudh 20 (26)
3 (1911) [See 12 Ind Cas 587 (588) 34 All 106]
[But see (1932) 1932 All 336 (337)
54 All 428 Sale and right to per-
sonal decree arising after discharge
in the I P—Decree holder entitled
to personal decree]
4 (1921) 1921 Lah 240 (240) 2 Lah 95
5 (1930) 1930 Oudh 20 (26)

—Subsequent mortgagee contesting

of the Limitation Act is confined to suits to recover the mortgage money from the mortgaged property and does not apply to the personal remedy under a mortgage¹. The personal remedy is governed by the six years period of limitation in the case of registered instruments² and by the three years period in the case of unregistered instruments³ and time runs from the date on which the mortgage amount becomes due⁴. If the right to a personal decree is not barred at the date of the institution of the suit the plaintiff is entitled to such a decree in the case of a deficiency though the application for the personal decree is made at a time when a suit for the personal remedy would be barred⁵. If a decree is barred under this Rule it is barred in its entirety and a personal decree cannot be passed for costs alone where the right is barred as regards principal and interest⁶. But though the mortgagee's personal remedy may be barred as regards the principal he is entitled to a personal decree for interest accrued within six years from the suit for sale because so long as the mortgage debt is not time barred the personal liability for the payment of interest continues. An acknowledgment by one co-mortgagor alone is not sufficient to keep alive a mortgage debt as against all the co-mortgagors⁸.

The plaintiff's application for a personal decree has to be made under Art 181 of the Limitation Act within three years from the date on which the right to apply for a personal decree accrues⁹. S 6 of the Limitation Act does not

Note 17

- 1 (1855) 12 Cl & Fin 353 (353-354)
(1876) 126 I C 56 (353) 354 Pat 575 53 Ind App 134 (P C)
- 2 (1919) 131 J All 24 (29) 41 All 581
(1933) 1933 Cal 268 (269) Application is governed by Art 111 and not by Art 66 of the Limitation Act
(1933) 1933 Lah 323 (30)
- 3 (1930) 1380 All 69 (71-72) 52 All 363
(1923) 1928 Notes 73(c) 114 I C 812 (Oudh)
(1933) 1933 Cal 268 (269) 36 Cal W N 117
- 3 See *Lit stat on Act Art 115*
- 4 (1896) 18 All 341 (342)
(1934) 1934 All 334 (400-401) 56 All 954
Mortgage amount to be paid in eight years.—In default of one year's interest mortgagee having power to recover interest or to recover principal and interest without regard to stipulated period Default in paying interest committed—Suit decreed—Application under O 34 R 6—For personal decree filed—Limitation held begun after stipulated period and not after expiry of one year
(1933) 1933 Lah 329 (330)
(1921) 1921 Bom 43 (438-439) 45 Bom 1206 Time for suit on personal covenant in mortgage runs from expiry of mortgage term—But where mortgagee enjoys the usufruct in lieu of interest time runs from last year when he enjoys such usufruct
(1926) 1926 Oudh 436 (336) Two mortgages in respect of the same property in favour of the same person at different times—Amount of the second mortgage to be paid along with money due on the earlier mortgage—Limitation for claim under second mortgage runs from date when first

- mortgage amount becomes payable
(1895) 5 Mad L Jour 234 (235-236)
(1903) 6 Oudh Cas 30 (33)
(1906) 1906 All W N 133 (133)
(1893) 20 All 386 (384)
(1893) 20 All 512 (514)
(1908) 30 All 368 (383)
(1924) 1927 Oudh 567 (68)
(1929) 1929 Oudh 53 (60) 4 Luck 237
(1916) 1916 Mad 13 (14)
(1916) 1916 Nag 1 (8) 13 Nag L R 76
(1904) 34 Cal 672 (675)
(1885) 7 All 502 (503) 12 Ind App 12 (P C)
(1892) 14 All 513 (518)
(1898) 15 All 331 (332)
(1885) 12 Cal 359 (395-396)
6 (1914) 1914 All 444 (445)
7 (1928) 1928 Lah 633 (634)
(1930) 1930 Lah 737 (37)
8 (1915) 1915 Cal 652 (653)
(1933) 1933 Cal 268 (269)
9 (1918) 1918 All 105 (106) 40 All 551
(1933) 1933 Cal 251 (252) 60 Cal 13 In the case of a Court sale time begins to run from the date of the order under O 21 R 92
(1935) 1935 Mad 640 (642-643) Appeal from order dismissing application to set aside sale—Time for application for personal decree runs only from date of appellate order and not from date of confirmation of sale by lower court
mortgage decree set aside—Time for ap

- 6 apply to such an application, inasmuch as it is not an application for execution within that Section.¹¹

Where a mortgage decree provides for the sale of the mortgaged property and for realisation of any deficiency from the other properties of the mortgagor, the 12 years period under S 48 of the Code for enforcing the personal liability runs from the date of the decree and not from the date of the sale of the mortgaged property.¹¹ A contrary view was taken in the following cases.¹²

The limitation for the execution of a personal decree runs from the date of the *drawing up of a formal decree* and not from the making of an order for personal decree.¹³

18 Succession certificate

A personal decree cannot be passed in favour of the heirs of a mortgagee in the absence of a succession certificate produced by them.¹ But a person who has succeeded to the estate of a deceased mortgagee by the right of *survivorship* need not produce a succession certificate before he can obtain a personal decree against the mortgagor.²

19 Notice

Where a decree holder applies for a personal decree against the judgment-debtor under this Rule the proper procedure for the Court is to issue notice to the judgment debtor calling upon him to show cause why the application should not be granted and to hear his objection if any.¹ But in the absence of fraud, a suit does not lie to set aside an *ex parte* personal decree under the Rule, on the ground of failure to serve notice on the judgment debtor.² An order directing execution to issue against the judgment debtor personally without a supplemental decree under this Rule should not be passed without notice to the judgment-debtor.³

20 Execution of personal decree

An executing Court cannot entertain any question as to the validity of a personal decree which has become final.¹ (*See Notes to S 38, ante*) A mortgage-decree until it reaches the stage shown by Transfer of Property Act, S 90 (O 34,

- (1302) 1902 All W N 50 (51) Under the peculiar circumstances of this case time was held to run from the date on which after the sale the decree for sale was amended.
- (1923) 1923 All 203 (204) Private sale of mortgaged property—Delay in execution of sale deed—Nevertheless time for application for personal decree for balance does not begin to run till the deed of sale is executed. [But see contra (1915) 1915 Cal 725 (726) 42 Cal 294 Neither Article 181 nor any period of limitation applies

- 12 (1918) 1918 Mad 607 (608)
(1918) 1918 M L 1187 (1190) 40 Mad 989
[See (1903) 25 All 511 (513) Combined decree under Ss 80 and 90 T P Act cannot be treated as a decree for money within S 250 (now S 48) of the Code of 1882]
- 13 (1906) 3 Cal L Jour 291 (297)

Note 18

- 1 (1908) 35 Cal 767 (772)
(1908) 12 Cal W N 145 (147, 148)
(1904) 28 Bom 630 (634)
2 (1922) 1922 Pat 523 (531) 1 Pat 387

Note 19

Note 20

- 1 (1917) 1917 Pat 330 (330)

R 6) does not become a money decree to which S 209 of the Code of 1882 (now S 34) relates²

21 Appeal

An order refusing an application for a personal decree under the Rule is a decree and appealable as such¹ *Plaintiff's* Court fee is payable on an appeal from such an order as well as on an appeal from a decree under the Rule. An application for a personal decree is not a plaint and an order returning it for presentation to the proper Court is therefore not appealable under O 43 R 1³. Where the original mortgage suit was valued at less than Rs 5000 an appeal from a personal decree in the suit lies under S 21 of the Bengal N W P (now Agri) and Assam Civil Courts Act (U P Act XII of 1887) to the District Judge and not to the High Court though the personal decree be for a sum exceeding Rs 5000⁴.

See Notes to S 96

22 Nature of proceedings under R 6

Proceedings for a personal decree under this Rule are not proceedings in execution but proceedings in suit and the provisions of O 9 are therefore applicable thereto¹

23 Miscellaneous

(1) An application for a personal decree should be made to the Court which passed the decree for sale and not to the Court to which it was sent for execution¹

(2) A decree directing realisation from the other properties of the mortgagor if the mortgaged properties which are to be proceeded against first are not sufficient is not a money decree for purposes of registration²

(3) A simple mortgagee whose rights under the personal covenant have not been barred is a creditor of the mortgagor within S 53 of the Transfer of Property Act and can sue to set aside an alienation of the other properties³

(4) Order 20, R 11 empowering the Court to allow payment by instalments applies to an application for a personal decree under this Rule⁴

(5) A proceeding under this Rule is not governed by S 52 of the Transfer of Property Act because it is not a proceeding in which any

2 (1900) 2 Bom L R 225 (226-227)

suit

Note 21

1 (1918) 1918 All 97 (97) 40 All 553
(1933) 1933 All 429 (431) Application under this Rule held not maintainable order is decree

[See also (1932) 1932 All 356 (337) 34 All 428 Appeal lies and no revision is competent]

2 (1915) 1918 All 97 (97) 40 All 553

(1924) 1924 All 292 (293)

(1913) 19 Ind Cas 371 (373) (Cal)

(1915) 1915 Oudh 122 (123) 18 Oudh Cas 191

(1916) 1916 All 357 (358)

(1931) 1931 All 192 (193)

(1919) 1919 All 218 (219) 41 All 384

Note 22

1 (1930) 1930 All 841 (843) 52 All 989

(1932) 1932 All 466 (466) Application under this Rule is a proceeding in the

[See (1908) 35 Cal 10 (12) *Ex parte* decree under R 6 can be set aside under inherent power of Court]
[See also (1921) 1921 Pat 491 (433) *Ex parte* decree passed by oversight under R 6 can be set aside]

Note 23

1 (1918) 1918 Mad 669 (670) 47 Ind Cas 903 (954 955)

[See (1931) 1931 All 197 (197-193)]

2 (1909) 2 Ind Cas 511 (511) (Bom) For regis

right to immovable property is directly and specifically in question⁵

(6) An assignment of the mortgage decree includes the supplemental decree under this Rule⁶

R. 7. [*New Act IV of 1882, S 92*] (1) In a suit for redemption, if the plaintiff¹⁶ succeeds, the Court shall pass a preliminary decree³—

(a) ordering that an account be taken⁴ of what was due to the defendant at the date of such decree for—

(i) principal and interest⁵ on the mortgage,

(ii) the costs⁶ of suit, if any, awarded to him, and

(iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage security together with interest thereon, or

(b) declaring the amount so due at that date, and

(c) directing—

(i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months⁹ from the date on which the Court confirms and countersigns the account taken under clause (a) or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses⁷ as provided in Rule 10 together with subsequent interest on such sums respectively as provided in Rule 11,⁸ the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents¹⁰ in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff¹¹ at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property, and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made¹² on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interests, the defendant shall be entitled to apply for a final decree—

(a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale that the mortgaged property be sold, or

(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarr'd from all right to redeem the property

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure or sale as the case may be, extend the time fixed for the payment¹³ of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest

[See Rr 2 and 4, *ante* and R 9, below]

Synopsis

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Other Topics

Co mortgagor's redemption—Inapplicability of Sub mortgage See Note 4 Pt (c)
the Rule See Note 3 Pt (b)

1 Legislative changes

This Rule corresponds to S 93 of the Transfer of Property Act

2 Amendments after 1908

The Rule has been amended by Act XXI of 1929. The general changes thus introduced are on the same lines as in the case of Rr 2 and 4 see Notes under Rr 2 and 4. Further in case of default by the mortgagor in payment of the mortgage money within the prescribed time the old Rule provided for foreclosure except where the mortgage was simple or usufructuary and for sale except where the mortgage was one by conditional sale. The present Rule has been amended to suit the changes in S 67 of the Transfer of Property Act as amended by Act XX of 1929 see Notes under R 2 *ante*

3 Scope of the Rule

As this Rule corresponds to Rr 2 and 4 *ante* in most particulars the Notes under Rr 2 and 4 may be consulted under this Rule also. The decree under this Rule is *preliminary* and incapable of execution without a final decree being passed¹

Order 34 Rule 7—Note 3

- 1 (1920) 1920 U.P. Bur 43 (44) 3 U.B.R. 183
(1838) 22 Bom 771 (173)
(1922) 1922 Bom 127 (125) 46 Bom 348

- (1914) 1914 Nag 8 (13) 10 Nag L.R. 150
Every preliminary decree in a mort-
gage suit must be followed by a
final decree

The proceedings after a preliminary decree are proceedings in suit to which the provisions of O 22 will apply.² O 34 contemplates only one preliminary decree being passed. Hence it is unnecessary to first pass a decree for accounts and then again another preliminary decree for redemption. Such a decree for accounts if passed will only have the effect of an interlocutory order for accounts.³ Where it is found that the money due to the mortgagee has already been paid, a final decree may be at once passed without any preliminary decree.⁴ (See R 9, *infra* which expressly provides for this). A decree for possession on condition of the plaintiff's paying a certain sum within a certain time is not a preliminary decree within this Rule.⁵

The Rule applies only to a suit for redemption against a mortgagee and not by one co-mortgagor against another who has redeemed the entire mortgage, for redemption of plaintiff's share of the mortgaged property.⁶ A compromise decree in a redemption suit, which is itself capable of execution does not require a final decree.⁷ No application for a final decree can be made under this Rule and R 8 where a decree had been passed under S 92 of the Transfer of Property Act.⁸

Ordinarily a suit for an account on a mortgage cannot be asked for, unless the mortgagor asks for redemption also.⁹ The burden, in suits for redemption, is on the mortgagor of proving the existence of a mortgage¹⁰ and the mere fact that the defendant denies the mortgage is no ground for decreeing possession without any payment by the mortgagor.¹¹ A conditional decree for redemption on payment of the amount due may be passed even though the Court finds that the mortgage has not been satisfied out of the mortgaged property as alleged in the plaint.¹²

A mortgagor cannot redeem by application but only can do so by way of suit.¹³

4 Mode of taking accounts Sub Rule 1 Cl (a)

We have seen under R 2 *ante* that the object of the Legislature is that complete accounts of all amounts due by either party to the other in respect of the mortgage transaction should be taken in a mortgage suit, so as to avoid unnecessary litigation. A mortgagee in possession is bound to account for the rents and profits of the property (see Transfer of Property Act S 76), and the mortgagor is entitled to deduct from the mortgage money all sums thus owed by the mortgagee.¹ Where the mortgagee has been in possession of the mortgaged pro-

2 (1915) 1915 All 88 (85) 37 All 226
(1927) 1927 Oudh 156 (151) 2 Luck 464
O 22 does not apply after a decree
has been passed though it may be

3

for a later stage in execution]

4 (1922) 1922 All 473 (479)

(1926) 1926 Mad 305 (306)

5 (1913) 19 Ind Cis 850 (857) (Lah)

(1924) 1924 Lah 635 (636) Decree is cap
able of execution as it is

6 (1923) 1923 Lah 129 (131)

(1926) 1926 Mad 614 (614)

8 (1914) 1914 Mad 392 (392)

9 (1850) 81) 5 Bom 614 (616)

(1880) 81) 5 Bom 604 (607)

10 (1931) 1931 Oudh 378 (379)

(1903) 27 Bom 271 (276)

(1905) 2 All L J 62 (61)

[See also (1874) Bom P J 304 (305)
Plaintiff need establish only a *prima facie* case—Then onus is shifted to
defendant (5 Bom H C R 159 (161))
And (1856) 1856 Bom P J 217 (Do)]

11 (1860) 6 Bom H C R A C J 9 (12)

12 (1875) 78) 1 All 524 (525)

(1901) 24 Mad 408 (411) A mortgagor may
plead in the alternative that the
mortgage money has been paid or
that he is prepared to pay any sum
that may still be found due

13 (1875) 12 Bom H C R 160 (162)

(1875) 12 Bom H C R 163 (164)

Note 4

1 (1866) 1 Agr HCR 132 (133) Mortgagee not
to be charged interest on income from

party, the burden is on him to prove that the mortgage has not been satisfied out of the usufruct of the property.² In a suit to redeem a puisne mortgagee who has redeemed a prior mortgage, the mortgagor is liable to pay the amounts of both the mortgages.³

Where a prior mortgagee sues on his mortgage without imploding the puisne mortgagee and purchases the property in execution of his decree the puisne mortgagee subsequently suing for redemption is bound to pay not the sum for which the property was sold but the amount due on the mortgage up to the date on which the prior mortgagee obtained possession after the purchase.⁴ A Court can in estimate accounts with a view to seeing whether the mortgagee has been satisfied out of the usufruct even though in doing so it has to deal with questions relating to properties lying outside its jurisdiction.⁵ In a suit for the redemption of two distinct mortgages the accounts should be taken separately in respect of each mortgage.⁶ A mortgagee who refused a valid tender of the mortgage money does not thereby cease to be a mortgagee and the subsequent accounts between him and the mortgagor should be included in the suit for redemption. In a suit for redemption of a mortgage to which the sub mortgagee also is joined as a party the decree should direct accounts to be taken of the mortgage as well as of the sub mortgage and should provide that out of the mortgage money, the sub mortgagee shall be paid the amount due to him and the balance if any should be paid to the mortgagee.⁷

In suits for redemption the accounts should be taken up to the date of actual redemption or sale as the case may be.⁸

(1881) 20 Cal 1 (7) 25 Ind App 241 (P C)
Mortgagee entitled to deduct from income sums spent properly for interest etc

(1890) 14 Moo Ind App 443 (1st) (P C)
Interest in property to be first deducted from interest due to mortgagor

(1891) 15 W P H C R 207 (208-209)
Said W R 21 (276)

(1891) 15 W R 6 (6) Surplus of income after deducting interest should be deducted from principal

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(1914) 1914 Mad 661 (661-662) 21 Ind Cas 701 (702) Mortgagee is bound to give credit to the mortgagor for all sums agreed to be paid by him but which he did not pay

[See (1902) 26 Bom 383 (382) Judge has to decide on the accuracy of the accounts presented by the parties]

(1915) 1915 Mad 567 (568) Mortgagee in possession liable to account for rents and profits even after preliminary decree

(1910) 13 Ind Cas 414 (440) 13 Oudh Cas 37 Accounts should be settled though not claimed by plaintiff

C P C 307 & 308

(1927) 1927 Nag 302 (302)

[See also (1921) 1927 Oudh 703 (208) Mortgagee to take part of usufruct for interest and pay the balance to mortgagor under the terms of the deed—Such balance can be claimed in the redemption suit]

[See also (1937) 1932 Oudh 255 (260) Mortgagee getting possession of a property exempt from mortgage—Obtaining decrees for payments against mortgagor as tenant—Mortgagee liable to account therefor in suit for redemption. But a separate suit for mesne profits accruing after date fixed for payment and before delivery of possession is not barred]

[See S 11 Note 40 Pt (J) R 9 Note 3 Pts (2) and (3) below and also the following cases: (1926) 1926 Oudh 113 (118) And (1910) 6 Ind Cas 336 (338) (C 11)]

2 (1883) 1883 All W N 90 (91)

3 (1900) 27 All 305 (310)

4 (1902) 24 All 185 (187)

(1914) 1914 All 42 (42) 26 All 123

5 (1875 78) 1 All 431 (432-433)

6 (1890) 14 Bom 13 (24)

7 (1901) 34 Cal 923 (27-29)

8 (1901) 15 Bom 692 (693)

(1917) 1917 Oudh 141 (143) 42 Ind Cas 66 (67)

(1906) 28 All 633 (641)

9 (1908) 30 All 36 (38)

(1918) 1918 Mad 567 (568)

5 Interest

In a suit for redemption, the mortgagee's right to interest is not limited to that accruing during the six years preceding the suit¹. Where a mortgagee who is entitled to possession obtains a decree for possession, he is not entitled to any interest between the date of the decree and the date of the delivery of possession².

6 Costs

In a suit for redemption, the mortgagee defendant is entitled to all costs unless he has refused a valid tender of the mortgage money or has otherwise been guilty of misconduct¹. Such costs are part of the mortgage money and in the absence of any express provision in the decree to the contrary are not personally recoverable from the mortgagor². Where the plaintiff mortgagor has been awarded costs in such a suit he is entitled to set off the amount of his costs against the mortgage money payable by him³.

7 Subsequent costs charges and expenses

The amendments introduced by the Transfer of Property Act (Amendment) Supplementary Act XXI of 1929 have made clear that the mortgagee is entitled to charges and expenses properly incurred by him in respect of the mortgage security even *subsequent* to the preliminary decree. Although the Rules were not so explicit before the above amendment as they are now on this point the law was recognised to be the same even under the old Rules¹.

8 Subsequent interest as provided in R 11

R 7 Sub R (1) Cl (c) (i) provides for the payment by the mortgagor of interest subsequent to the date fixed for payment under the preliminary decree up to the date of the actual realisation of the mortgage money. This point was not conceded under the old Rules¹.

9 Pays into Court on a day within six months

A decree under this Rule should state a period within which the mortgage money should be paid¹. This period may be less than six months². In computing the period so fixed the date of the decree should be excluded³.

If the decree for redemption fixes no period for payment it must be taken as an ordinary decree to which Art 182 of the Limitation Act would apply^{3a}.

le and not mortgage—
used costs

Act provides for account only up to date of suit—Thereafter this Rule applies]

(1935) 1335 Bom 97 (98) (Do)

Note 5

1 (1914) 1914 Lah 344 (345)

(1930) 14 Bom 113 (115)

2 (1889) 1889 All W N 177 (177)

Note 6

3 (1920) 1920 All 492 (494)

(1920) 1920 All 492 (494)

3 (1874) 4 Cal 747 (744) Notwithstanding any claim that the defendant's attorney might have against the defendant in respect of the defendant's costs of the suit

(1893) 17 Bom 33 (34)

Note 7

1 (1918) 1918 Cal 1039 (1040) 44 Cal 443

Note 8

1 (1926) 1926 Oudh 306 (307)

Note 9

1 (1909) 1 Ind Cas 71 (72) (Cal)

(1913) 18 I C 48 (49) 1313 Pun Re No 63

[See also (1874) 1874 Bom P J 7 (7)]

2 (1927) 1927 I C 17 (17) (P C)

3 (1885) 1885 All W N 80 (81)

3a (1913) 19 Ind Cas 49 (43) 1913 Pun Re No 63

(1926) 1926 Mad 405 (406) Costs of mortgage in redemption suit are discretionary where he raises questions denying mortgagor's right to redeem

(1924) 1924 Bom 172 (173) Mortgagee can't bring suit on the ground of transac

But where in a suit for sale by a puisne mortgagee, the preliminary decree directed the plaintiff to pay off the prior mortgage before bringing the mortgaged property to sale, but fixed no period within which the prior mortgage was to be paid off, it was held that, in this respect the decree was a decree for redemption and the period allowable for payment of the prior mortgage amount could not exceed six months.⁴ The Rule requires the payment to be made *into the Court*. As to whether a payment made out of Court can be recognised by the Court, see Note 14 to Rule and O 23, R 3.

10 Shall deliver up to the plaintiff the documents¹

On payment of the mortgage money, the mortgagor is entitled to the return of the mortgage bond¹ and other documents relating to the title to the land. But where the mortgagee defendant has lost the title deeds, the *executing Court* cannot, in the absence of any express provision in the decree to that effect compel him to give security for the value of the property.²

11 Shall re-transfer the property to the plaintiff

The mortgagor has a right of redemption to re-transfer the property to the mortgagor free from the mortgage and from all encumbrances created by him. Thus if he has sold the property to another the lease is not binding on the mortgagor who can therefore eject the lessee as a trespasser.¹ The property must be re-transferred along with the *accruals* if any, to the property. Thus, where the mortgagee taking advantage of his position as such, has taken a mortgage of the holding of a tenant the mortgagor is entitled on redemption to the possession of the holding provided he pays the amount due on its mortgage.² The Rule requires that a mortgagee with possession should on redemption, put back the mortgagor in possession.³

12 Procedure on default of payment

The Rule provides that on default by the mortgagor in the payment of the mortgage money within the time allowed by the Court, the mortgagee is entitled to apply for a final decree for sale or foreclosure.¹ The present Rule provides for a *decree for sale* in the case of any mortgage other than a usufructuary mortgage, a mortgage by conditional sale or an anomalous mortgage which provides only for foreclosure. It provides for a *decree for foreclosure* in the case of a mortgage by conditional sale or an anomalous mortgage which provides only for foreclosure. Under the Rule as it was before Act XVI of 1929 a decree for sale was provided for in the case of any mortgage other than one by conditional sale. And a decree for foreclosure was provided for in the case of any mortgage other than a simple or usufructuary one. These changes are in conformity with the changes in S 67 of the Transfer of Property Act made by Act XX of 1929. See Notes under R 3

(Cil) Mortgagor entitled to possession on payment as per decree—Subsequent possession by mortgagee renders him liable for mesne profits in subsequent suit by mortgagor.

Note 12

1 [See (1901) 25 Bom 101 (103) Omission to draw up proper decree under S 92 of the Transfer of Property Act did not

Redemptory decree—No time fixed—
Payment within 3 years permitted

4 (1921) 1321 All 76 (57) 49 All 320

Note 10

1 (1920) 1326 All 741 (743)

2 (1901) 12 Mad 1 Jour 63 (61)

Note 11

1 (1906) 3 All LJ 517 (513)

2 (1909) 3 Ind Civ 355 (356) (Cil)

3 (1910) 29 Mad 71 (73)

[See also (1910) 6 Ind Civ 220 (225)]

be minor at time of execution of

7. *ante* for further information. The undermentioned cases decided under the old Rule are now only of academic interest—

13 Extension of time fixed for payment

The amendments in this Rule and in R 8 made by Act XXI of 1929 make it clear that the Court can extend the time fixed for payment from time to time and that till a decree for foreclosure is actually passed or till the sale is *confirmed*, the mortgagor can redeem the property. The undermentioned cases¹ decided under the old rules have only an academic interest now. Time for payment may be extended though the period originally fixed may have expired². The use of the expression 'extend the time' in the new Rule instead of the expression "postpone the day" which occurred in the proviso to old R 8 makes this clear³. Extension of time may be granted irrespective of the *nature of the mortgage* in question⁴. Even though a decree for redemption may have been passed by the appellate Court an application for extension of time should be made to the Court of *first instance* and not to the appellate Court⁵. Where, in a partition suit, the alienation of a certain property belonging to the joint family was found to be binding only to a limited extent and a decree was passed for possession thereof on condition of a certain amount being paid to the alienee within a fixed date, it was held that this was in effect a decree for redemption and that the Court could extend the time fixed for payment⁶. Time fixed by a compromise decree cannot be extended by the Court⁷. S 148 of the Code does not apply to the extension of time fixed by a decree for redemption⁸. The limitation for an application for a

(1891) 15 Bom 644 (416)

2 (1902) 21 All 479 (481)

(1933) 1933 All 157 (158)

(1933) 1933 Mad 762 (763 764) 57 Mad 395

Amount not so paid—Mortgage is entitled to apply under O 34 R 7 for sale of properties¹

[See also (1874) 1874 Bom P J 7 (7) Procedure on default—To be provided for in the decree. And (1931) 1931 Mad 597 (599) 54 Mad 705 Subsequent mortgagee's redemption suit—Prior mortgagee defendant is a decree holder and his transferee of the decree can apply for final decree on default of payment]

Suit for declaration of mortgage is invalid and for possession—Portion of mortgage found to be valid and decree for possession conditional on payment of certain amount within certain period which was made charge on property—Decree is re-empt on decree and Court has power under O 34 R 7 to extend the time for payment

(1906) 2 Nag L R 137 (143 144)

(1909) 2 Ind Cis 467 (466) (411)

(1902) 26 Bom 121 (126)

(1915) 1915 All 302 (307)

(1927) 1927 Bom 175 (176)

3 (1853) 7 Bom 532 (534) The contrary view taken in this case is not tenable under the present Rule

4 (1925) 1928 All 450 (451) 50 All 832 Mort-
gage is conditional rule

5 (1909) 2 Ind Cis 220 (221) 91 All 325

(1914) 1917 All 279 (273) 33 All 306

(1916) 1916 Mad 694 (695) 31 Ind Cis 210
(210) 37 Mad 876

(1901) 23 All 58 (83)

6 (1920) 1920 Mad 99 (101) 43 Mad 357

[But compare (1915) 1915 Oudh 226 (227) 18 Oudh Cis 58 Power to enlarge time can be exercised only in cases to which Rule strictly applies]
[See also (1933) 1933 Mad 762 (763) 57 Mad 394]

7 (1926) 1926 Nag 2-0 (751)

8 (1912) 14 Ind Cis 240 (241) 34 All 353

2. (1899) 2 Oudh Cis 196 (198)

(1897 1901) 2 U B R 514

(1915) 1915 L B 100 (101)

(1902) 26 Bom 121 (127)

(1923) 1923 Lih 355 (357)

Note 13

1. (1891 1901) 2 U B R 512

(1893 1900) 1893 1900 L B R 171

(1902) 5 Oudh Cis 82 (86 97)

(1899) 1888 All W N 119 (119)

(1884) 1884 All W N 320 (330)

(1904) 1 All L J 300

(1893) 16 Mad 214 (219)

(1899) 13 Com 106 (105 107)

(1900) 13 Mad 267 (263 269)

(1896) 19 Mad 10 (57) (F L)

final decree for redemption runs from the date of payment although the Court may have extended the period for payment originally fixed⁹. Where a preliminary decree is *simply confirmed* in appeal, the period fixed runs only from the decree of the Court of first instance unless the appellate Court extends the period¹⁰. See Note 9 to S 148.

14 Form of decree

For the form of a preliminary decree under this Rule see Appendix D, Forms 7, 7 A 7 B and 7 C. The decree ought not to contain unnecessary declarations¹. It should not direct that the defendant should not be evicted till he has cut the crops sown by him².

15 Second suit for redemption See Note 40 to S 11

16 Who can redeem See S 91 of the Transfer of Property Act

If a party whose title is to some extent imperfect at the date of the institution of the suit seeks to redeem and is able to prove a perfect title at the hearing of the case he should have a decree for redemption. Thus if a purchaser in execution sale of the equity of redemption sues for redemption before he has obtained a certificate of sale but obtains such certificate before the hearing, he should have a decree for redemption¹. In a suit by a purchaser of the equity of redemption for redemption the mortgagee cannot question the adequacy of the consideration for the sale².

17 Trespass by mortgagor before redemption

Where a redemption decree was made but the mortgagor, without having made any payment, unlawfully trespasses upon the property and dispossesses the mortgagee in possession the latter can sue to recover back possession¹.

18 Court fee

See S 7 Cl (ix) of the Court fees Act. No Court fee is payable on surplus profits decreed in favour of a mortgagor in a redemption suit¹.

19 Jurisdiction

In suits for redemption, the value of the suit for purposes of jurisdiction is the amount of the *principal money* secured by the mortgage and not the value of the *property* mortgaged¹.

20 Appeal See Notes under Rr 2 to 6 *supra* and also under S 97. See also the under mentioned case¹

9 (1977) 131 L.R. 37 (4) 50 Bom 730

10 (1897) 13 Mad 10 (13)

(1906) 13 G. 104 (1905)

(1896) 18 All 43 (4)

(1896) 18 All 223 (1904 22)

[Lut. sec. (1883) 11 Bom 172 (1)]

Note 14

1 (1891 97) 9 Ind App 21 (26) (PC). As to form and content of a redemption decree
[See (1902) 1 L.B.R. 186 (187 to 189)]

2 (1886) 8 All 502 (1885 500)

Note 16

1 (1881 12) 6 Bom 133 (142 143)

[See also (1903) 132 J. 100 (1903)]

Court can take note of events happening subsequent to suit and of

moulding decree accordingly.]

2 (1868) 3 Agr. H.C. R 30 (31)

(1888) 18 S. 100 (191 91)

Note 17

1 (1905) 192 Oudh 200 (250 256) 28 Oudh C.A. 46

Note 18

1 (1900) 1909 Nag 1 (7) 71 Nag L.R. 197

Note 19

1 (1906) 1906 Oudh 346 (347)

Note 20

1 (1934) 1934 Pat 97 (99). Directions by Court with regard to the mode in which account is to be taken is not preliminary decree and the order is not appealable as such.

R. 8. [*Neu*, Act IV of 1882 S 93] (1) *Where* before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this Rule, the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of Rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the defendant to deliver up the documents referred to in the preliminary decree

and, if necessary,—

(b) ordering him to re-transfer at the cost of the plaintiff the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this Rule the Court shall not pass an order under sub-rule (1) of this Rule unless the plaintiff in addition to the amount mentioned in sub-rule (1) deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase money paid into Court by the purchaser

Where such deposit has been made, the purchaser shall be entitled to an order for re-payment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent thereof

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the defendant in this behalf,—

(a) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is hereinbefore referred to in R 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property ; or

(b) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same

[See R 3, 5 & 7 See also O 21, R 89]

Synopsis

	Note No		Note No
I Legislative changes	1	V Final decree for foreclosure or	
II Amendments after 1908	2	sale—Sub R (3)	6
III Scope of the Rule	3	VI Power to enlarge time	7
IV Decree for redemption	4	VII Limitation	8
(i) Redemption after due date	5	VIII Appeal	9

Other Topics

Court to which application to be made	See Note 6 (i) Note 1 (s) and (j)	Redemption by person interested in part	See R 1 Note 6 F N (20 a)
Final decree for sale at instance of mortgagor himself	See Note 6 (i) (f)	Redemption—Partial	See R 1 Note 6 Pt (0 a)
Period of decree in redemption suit	See R 4 below	Subsequent suit for redemption	See R 7 Note 10 and S 11 Note 40

1 Legislative changes

The Rule came into force by S 93 of the Transfer of Property Act

2 Amendments after 1908

The Rule was amended by the Transfer of Property Act (Amendment) Supplementary Act XXI of 1929 on the same lines as R 3 and 5 *ante*. The provision as to extension of time has been transferred to R 7. *vide* Notes under R 3 and 7 *ante*. Under the old Rule a decree for sale could not be passed only in the case of a mortgage by *conditional sale*. Under the present Rule no decree for sale can be passed even in the case of *usufructuary* mortgages.

3 Scope of the Rule

The decree under R 7 is only a preliminary decree and a final decree under the present Rule is necessary to terminate a suit for redemption¹. As has been seen already in Note 4 to R 7 in a redemption suit there should be a complete settlement of all accounts between the parties in relation to the mortgage². (*See also* R 9 and 10 *infra* which show that accounts should be taken right up to the date of actual payment of mortgage money and re transfer of possession.)

4 Decree for redemption

On payment of the mortgage money before a final decree for sale or foreclosure is passed the mortgagor is entitled to a final decree for redemption. A mortgagor can however exercise the right of redemption in the case of a decree for sale at any time before the sale is confirmed though the final decree for sale may have been passed in the meanwhile. If the redemption is *after the final decree for sale* the mortgagor will get an *order* for the delivery of the title deeds etc. as indicated in Sub R (1). If the mortgagor seeks to redeem the property *after the sale* and before it is confirmed he must deposit for payment to the auction purchaser 5 per cent of the purchase money in addition to the mortgage money. Under Sub R (1) all rights acquired by the mortgagee under the mortgage must on redemption be re transferred to the mortgagor¹. The mortgagor in possession need not vacate possession till he has received the full mortgage money².

A mortgagor is not disentitled to a decree for redemption simply because he has attached under his decree for costs against the mortgagee the mortgage money.
withdrawn

3, a portion of it³

The mortgagee is not entitled to notice of payment into the Court of the mortgage money under the preliminary decree⁴. Nor is the mortgagor required to make an application to the Court before paying in the money⁵. The refusal of the Treasury Officer to accept the mortgage money though paid within the proper time does not amount to default by the judgment debtor⁶. Where the mortgagor has paid into the Court the sum ascertained by the first Court pending an appeal by the mortgagee as to the amount due, the mortgagor is entitled to credit for the amount paid though it *lapsed* to the Government through the failure of the mortgagee to take the money out of Court⁷. Payment to an unauthorised person does not discharge a mortgage⁸.

5 Redemption after due date

The present Rule makes it clear that though a mortgagor was failed to redeem the mortgaged property within the time allowed by the Court he is entitled to do so at any time before a final decree for foreclosure is passed or a sale of the mortgaged property under a final decree for sale is confirmed. See Note 8 *infra*.

6 Final decree for foreclosure or sale—Sub Rule (3)

The provision as to the passing of a final decree for foreclosure under the circumstances indicated in the Rule is imperative¹. A final decree for foreclosure or sale can only be passed on application by the mortgagee. A final decree for *foreclosure* cannot be passed in the case of a *simple mortgage*². The absence of any provision in the preliminary decree for the passing of a final decree for sale or foreclosure is no bar to the passing of such a decree³. An application for final decree should be made to the Court of first instance though the preliminary decree was modified in appeal⁴. In the undermentioned case it was held that the mortgagor himself was entitled to apply for a final decree for sale, if he was not able to pay the mortgage money⁵.

7 Power to enlarge time

The provision as to the enlargement of time contained in the proviso to the old R 8 has now been transferred to the present R 7 by Act XVI of 1929. A payment of the amount due within the time fixed entitles the mortgagor to a final decree for redemption¹. But the time can be extended by the Court for making such payment under this Rule. The principles discussed in Note 13 of R 2 and in Note 9 to S 148 apply in general to an extension of time under this Rule. Thus the time can be extended even though the time originally fixed has expired². But no extension can be granted unless good cause is shown therefor³.

3 (1901) 27 All 992 (394, 395)

4 (1924) 1974 Ml 102 (102)

5 (1925) 1975 Oudh 255 (256) 93 Oudh C 15 46

6 (1929) 1329 All 881 (882)

7 (1912) 16 Ind C 830 (831) (P C)

8 (1921) 1974 Lah 733 (710)

Note 6

1 (192) 1927 All 300 (301)

2 (1913) 19 Ind C 15 8 5 (801) (Lah)

3 (1913) 1915 L B 100 (101) 27 Ind C 15 706 (106)

4 (1901) 1901 Bom 101 (103)

(1911) 1911 All 427 (428) Subsequent mortgage suit for redemption—Prior mortgagee defendant can get final decree for sale though preliminary

decree does not provide ther for

5 (1900) 23 Mld 221 (222, 593)

6 (1911) 12 Ind C 8 497 (498) 36 Mld 32

No. 7

(1927) 1927 Oudh 596 (597) Fact that mortgagee nothing by extension is good cause

(1903) 19 Mld J Jour 266 (266) I in file mortgage is good cause

Nor is the mortgagor entitled to an extension as a matter of right.⁴

The power to extend time applies to all kinds of mortgages. Ordinarily a mortgagor who seeks to pay the money after the time fixed, must apply for extension.⁵ The application need not however, be in any prescribed form and even an application to pay the money may itself be treated as an application for extension. But the application must be made to the Court of *first instance*⁶ even though the decree may have been confirmed on appeal.⁷

It was held in the undermentioned cases⁸ that the power to enlarge time under this Rule applies to what are strictly suits for redemption. But where in a partition suit, it was found that in alienation of joint family property was partially binding on the plaintiff and a decree was passed for possession against the donee conditional on the payment of a certain sum of money to him within a certain time, it was held by the High Court of Madras that the decree was *in effect* one for redemption, and that the time fixed by it could be extended under this Rule.¹¹

Even if the time is not extended, the mortgagor, as has been made clear by this Rule, can redeem the property at any time before a final decree for foreclosure is passed, or a sale of the property is confirmed by the Court. And this was the practice followed even before the amendment under Act XXI of 1929 was made.¹² As to the decrees passed before the Transfer of Property Act see the undermentioned case.¹³

It has been held by the Chief Court of Oudh that even in the case of a *compromise decree* for redemption, the Court, is entitled under this Rule to extend the time in proper cases.¹⁴

8 Limitation

Article 181 of the Limitation Act applies to an application by the mortgagor for a final decree under this Rule and time runs from the expiry of the period fixed for payment by the mortgagor.¹ But a mortgagor being entitled to pay the mortgage money at any time before the final decree for foreclosure is passed or

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| (1912) 14 Ind Cas 240 (241) 34 All 385 (Do) | (1900) 27 Cal 703 (705) |
| (1912) 18 Ind Cas 14 (15) (All) | (1927) 1927 Bom 32 (34) 56 Ponn 730 |
| (1914) 1319 Oudh 351 (352) Mortgages losing nothing by extension is good cause | (1925) 1925 Oudh 644 (650) 28 Oudh Cas 261 |
| 4 (1910) 7 Ind Cas 96 (98) (All) | (1911) 3 Ind Cas 337 (338) 14 Oudh Cas 10 |
| (1914) 1916 Mad 882 (882) 39 Mad 82 | (1913) 1315 All 302 (307) |
| 5 (1925) 1923 All 480 (481) 50 All 562 Time can be extended even in case of mortgage by conditional sale | (1916) 1916 Oudh 135 (135) 19 Oudh Cas 30 |
| 6 (1920) 1920 U L J 3 (45) | (1904) 1 All L J 900 (301) |
| 7 (1920) 1920 U L J 43 (45) | (1923) 1923 Oudh 736 (237) 25 Oudh Cas 706 Property can be redeemed even after final decree |
| 8 (1907) 2 Ind Cas 220 (221) 31 All 325 | (1894) 13 All 205 (205) Sale could be avoided by payment under S 231 of Code of 1882 (now O 21 R 6) |
| (1916) 1916 Mad 694 (695) 31 Ind Cas 540 (240) 33 Mad 576 | (1887) 10 All 1 (4) |
| 9 (1917) 1917 All 233 (239) 23 All 206 | (1905) 31 Mad 351 (355) Sale could be avoided by deposit under S 310 A of Code of 1882 (now Order 21, Rule 8) |
| 10 | [but see (1900) 13 Mad 267 (267) 269] Decree for redemption — Payment cannot be made after the period fixed] |
| 11 | 13 (1896) 20 Lom 273 (280) |
| 12 (1892) 14 All 950 (374) | 14 (1927) 1927 Oudh 556 (556) |
| (1903) 1 Ind Cas 750 (752) 26 Cal 122 | |
| (1893) 1900 L B R 174 | |
| (1903) 23 All 231 (233) | |
| (1888) 20 All 446 (447) | |
| (1907) 5 Oudh Cas 32 (38) | |
| (1904) 2 Ind Cas 616 (616) (Mad) | |
| (1906) 3 Cal L J 513 (536) | |

Note 8

- 1 (1925) 1925 Oudh 253 (256) 28 Oudh Cas 40

before the sale of the mortgaged property is confirmed by the Court there is no period of limitation applicable to a payment by him of the mortgage money. It has even been held that there is no period of limitation applicable to an application by the mortgagor for a final decree for redemption it being the duty of the Court to pass such a decree¹. But under the amendments of the Rule made by Act XXI of 1929 even a mortgagor has to apply for a final decree for redemption. Hence the view taken in the above decision requires reconsideration. Where there has been an appeal against the preliminary decree the period of limitation for an application for final decree commences not from the expiry of the time fixed for payment but from the date of the appellate decree². An application for extension of time by a decree holder is a step in aid of execution within the meaning of Limitation Act Art 182 in respect of a subsequent application for sale by him³.

9 Appeal

An order refusing to extend time is appealable under O 13 R 1 (d)¹. But no appeal lies against an order granting an extension of time². It is doubtful whether an order merely refusing to pass a final decree but leaving it open to the mortgagor to apply again for such a decree is appealable as a decree³.

R. 8 A. [New] Where the net proceeds of any sale held under the last preceding Rule are found insufficient to pay the amount due to the defendant, the Court, on application by him, may, if the balance is legally recoverable from the plaintiff otherwise than out of the property sold, pass a decree for such balance.

Recovery of balance
due on mortgage in
suit for redemption

[Cf R 6 above]

Synopsis

Scope of the Rule Note No 1

1 Scope of the Rule

This Rule is new and was inserted by the Transfer of Property (Amendment Supplementary) Act XXI of 1929. The Rule provides for a personal decree being passed in a suit for redemption against the mortgagor where the proceeds of a sale held on the default of the mortgagor to pay the mortgage money in time under a decree for redemption are not sufficient to satisfy the mortgage debt. The Rule corresponds to R 6 ante which provides for a personal decree being passed in a suit for sale by the mortgagee.

The words the last preceding Rule refer to R 8 as amended by Act XXI of 1929 under which no decree for sale could be passed in the case of a usufructuary mortgage as was possible under the old Rule. Where therefore a decree for sale was passed in respect of a usufructuary mortgage under the old Rule and a sale is held in pursuance thereof it was held that such a sale could not be said to have been held under the last preceding Rule within the meaning of this Rule and that consequently no personal decree for the balance remaining due could be passed under this Rule¹.

¹ (1925) 1925 Oudh GJ (600) 29 Oudh Cas

Note 9

- 1 (1924) 1924 Bom 93 (98) 4 Bom 906
2 (1916) 1916 Mad 694 (695) 33 Mad 86
3 (1928) 1928 Lah 350 (306)

Order 34 Rule 8 A—Note 1

- 1 (1933) 1933 Oudh 40 (41).

R. 9. [New] *Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in Rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required, to re-transfer the property and to pay to the plaintiff the amount which may be found due to him: and the plaintiff shall, if necessary, be put in possession of the mortgaged property.*

Synopsis

Scope of the Rule	Note No	Claim for over payments—Suit for if	Note No
Deduction of costs payable to mort	1	lies	3
gagor	2		

Other Topics

Discharge of mortgage—No need for preliminary and final decree See Note 1 Pt (3)	Limitation See Note 1 Pt (6) Previous Law and Practice See Note 1, Pts (1) and (2)
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1 Scope of the Rule

This Rule is new and gives effect to the practice followed in cases arising under the Transfer of Property Act¹ and in cases arising even previous thereto²

If the Court finds that the mortgage has been discharged, a decree for redemption can be passed at once without the formality of a preliminary and final decree³. A mortgagee who continues in possession of the mortgaged property after the mortgage has been satisfied is liable for all the receipts from the property with interest from the time when the debt was fully paid off⁴. Extra Court-fee in addition to the Court-fee paid on the principal sum due need not be paid on the surplus profits that may be decreed to a mortgagor in a redemption suit⁵. A claim by a mortgagor for recovery of over-payment received by the mortgagee is a relief included in a suit for redemption to which Art 148 of the Limitation Act applies⁶

2 Deduction of costs payable to mortgagor

The mortgagor is entitled to set off the costs awarded to him against the mortgage money¹ in preference to the claim of the defendant mortgagee's attorney for his costs of the suit²

3 Claim for overpayments—Suit for if lies

The intention of the legislature being that a suit for redemption should include the entire accounts between the parties in relation to the mortgage, a separate suit for overpayments is barred under S 11 and O 2, R 2¹ (See Note 40

Order 34 Rule 9—Note 1

4 (1920) 1929 Bom 337 (339)
[See also (166.) 1 N W P H C R 111
(113 114) Mortgagor entitled to excess
profits with interest at the rate pro-
vided for mortgage money]

5 (1931) 1931 Mad 479 (479)
(1923) 1923 All 261 (262) 45 All 151
6 (1922) 1922 Cal 149 (190 151)

Note 2

1 (1893) 17 Bom 32 (34)
2 (1879) 4 Cal 742 (743, 744)

Note 3

1 (1903) 20 All 86 (87)
(1901) 25 Bom 115 (119)

Re No 3,

- page 8]
2 (1881) 6 Cal 377 (379)
(1872) 13 South W R 63 (66)
3. (1922) 1922 All 479 (479)

to S 11) But mesne profits accruing *after* the date fixed for payment under the preliminary decree or after the date of payment under the decree⁴ have been held to be recoverable by a separate suit. No such suit can however be brought for the profits accruing *before* such date⁴.

R. 10. [New Act IV of 1882, S 94] In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure sale or redemption the Court shall unless in the case of costs of the suit the conduct of the mortgagee has been such as to disentitle him thereto add to the mortgage-money such costs of the suit and other costs charges and expenses as have been properly incurred by him since the date of the preliminary decree for foreclosure sale or redemption up to the time of actual payment

[See R. 2 to 8-A and S 35]

Synopsis

	Note No		Note No
I Legislative changes	1	(b) Costs of appeal	5
II Amendments after 1908	2	(c) Other costs charges and expenses	6
III Mortgagee is ordinarily entitled to his costs	3	IV Power of executing Court to add costs	7
(i) Such costs of suit as have been properly incurred	4	V Costs awarded by decree mode of realisation	8

Other Topics

Mortgagee's conduct disentitling him to costs. See Note 3 I t (1)
Subsequent suits for sums or account payable in mortgage suits. See R J Note 3, also see S 11 Note 40 and R J Note 4, F N (1)

1 Legislative changes

The Rule corresponds to S 94 of the Transfer of Property Act

2 Amendments after 1908

The Rule was amended by Act XXI of 1929. The provision as to the payment of other costs charges and expenses is new.

3 Mortgagee is ordinarily entitled to his costs

In a suit for sale foreclosure or redemption the mortgagee is ordinarily entitled to his costs unless his conduct has been such as to disentitle him thereto¹. For the scale on which costs are awarded see the under

- (1901) 91 Bom 577 (533-534)
(1889) 16 Cal 657 (797) 16 Ind App 107 (P C)
(1904) 34 Cal 273 (703)
(1900) 1070 Mal 531 (532)
(1905) 90 All 225 (721)
(1865) 6 Bom H C R (A C) 97 (99)
[See also (1907) 6 Bom Cal (66) Separate suit for mesne profits by mortgagee held barred]
(1910) 6 Ind C 330 (537) (C 1)
(1904) 15 O Lat 106 (107) 5 Pat L Jour 95
(1906) 126 Oudh 113 (114) Mesne profits accruing due after the date of pay-
ment can be the subject of a separate suit
(1930) 133s All 36 (J) Quest of whether mesne profits is out of the scope of the redemption suit—O R 2 is also not a bar to the suit. It is held on a distinct case of action
(1918) 1318 Mid 254 (34)
(1907) 8 Oudh C 102 (303)
Order 34 Rule 10—Note 3
(1932) 1302 Outh 13 (134) Costs his who acted in this case
(1909) 2 Ind C 1657 (66) (C 1)
(1871) 1 Ind Jur (N S) 50

mentioned cases :

4 Such costs of suit as have been properly incurred

The mortgagor's liability in a mortgage suit cannot be enhanced by a final decree beyond the point indicated in the preliminary decree except in so far as is provided for by the present Rule¹. It has been held by the Allahabad High Court that the Rule refers only to costs incurred between the preliminary decree and the final decree and not to the costs incurred *subsequent to the final decree* in execution proceedings². The Chief Court of Oudh on the other hand has expressed a different view and held that the Rule applies to all costs incurred in connection with the suit up to the time of *actual payment* whether before or after the final decree³. It is submitted that the Oudh view accords more with the language of the Rule than the Allahabad view.

5 Costs of appeal

There is a conflict of decisions as to whether the costs of an unsuccessful appeal by the mortgagor from the preliminary decree in a mortgage suit can be added to the mortgage money or should be recovered from the mortgagor personally. In some cases, it has been held that such costs can be added to the mortgage money,¹ while in other cases that the Rule refers primarily to costs incurred in the Court which prepares the final decree and that therefore the costs of appeal cannot be added to the mortgage money but should be recovered personally from the mortgagor². According to the unmentioned cases³ however the question is one of *construction* of the appellate decree dismissing the appeal.

6 Other costs charges and expenses

This expression has been newly inserted by Act XXI of 1929 and gives effect to the practice followed before the Act, of adding such costs charges and expenses, incurred after the preliminary decree, to the mortgage money¹.

(1901) 71 Mad 347 (386) 28 Ind App 46 (P C)	Note 4
(1913) 19 Ind Cas 474 (474) (Mad)	1 (189) 19 All 186 (188)
(1910) 30 Mad 44 (46) Improper defence to a redemption suit is a ground for refusing costs	2 (1926) 1326 All 68 (67)
[See also (1925) 1925 Mad 778 (773) Redemption suit—Decreed—Costs claimed in second appeal by mortgagor on ground of want of misconduct—Not ruled in lower appellate Court—Costs in trial Court alone allowed]	(1926) 1926 All 722 (722) 48 All 652
(1926) 1926 Mad 400 (400) Redemption suit—Unsubstantiated defences such as denial of right to redeem or claim for excess in improvement etc.—Costs in Court at discretion	3 (1900) 1300 Oudh 928 (378)
(1878) 31 Ind 202 (203) Where the bargain is void the Court would decline to award it	Note 5
2 (1910) 37 Cal 907 (913) Costs on scale No 2 against mortgagor who does not appear	1 (1919) 1919 All 297 (298) 41 All 473
(1877) 11 L Jur (N S) 222 Mortgage deed providing for costs as between mortgagor and client—Such costs were awarded	1 (1918) 1918 Oudh 445 (445)
(1881) 5 Cal L Rep 437 (438) Ordinarily costs between party and party awarded	(1924) 1924 All 104 (104) 45 All 630
	(1926) 1926 All 343 (343) Though the final decree had been passed before the dismissal of the appeal
	2 (1914) 22 Ind Cas 42 (44) (All) (1913) 13 Ind Cas 384 (384) (All) (1914) 1914 All 190 (191) Especially where the final decree had been passed before the dismissal of the appeal
	3 (1913) 13 Ind Cas 384 (384) (All) (1914) 1914 All 89 (92) Appeal by some defendants only—Costs granted to mortgagor—Only appealing defendants are personally liable for such costs
	(1913) 19 Ind Cas 729 (730) (All)
	(1925) 1925 All 437 (438)
	Note 6
	1 (1914) 1919 L B 136 (138) Arrears of Government revenue paid by the mortgagor after preliminary decree to prevent sale of mortgaged property

10. 7 Power of executing Court to add costs

Costs which should have been but have not been excluded in a final decree cannot be claimed in execution¹

8 Costs awarded by decree made of realisation

Prima facie the costs awarded in a mortgage suit against the mortgagor, should be added to the mortgage money and the mortgagor is not personally liable for them except when a decree can be passed against him under R 6 *ante*¹. But under S 3, of the Code the Court has the power to make the mortgagor personally liable for the costs even in the first instance in which case the mortgagor would be personally liable for the costs.

R. 11. [Nen] In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable the Court may order payment of interest to the mortgagee as follows, namely —

(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage—

(i) on the principal amount found or declared due on the mortgage—at the rate payable on the principal, or where no such rate is fixed at such rate as the Court deems reasonable,

(ii) on the amount of the costs of the suit awarded to the mortgagee—at such rate as the Court deems reasonable from the date of the preliminary decree and

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage money—at the rate agreed between the parties, or, failing such rate at the same rate as is payable on the principal, or failing both such rates, at nine per cent, per annum; and

(b) subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable—

<p>erty can be added to mortgage money</p> <p>(1915) 1313 Cal 369 (370) Let it made by mortgagee to et vide execution sale amount can be added to mortgage money</p> <p>(1918) 1313 Cal 1039 (1040) 44 Cal 148</p> <p>(1891) 15 Bom 675 (683) Ordinarily there is no personal liability for such costs and charges</p> <p>Note 7</p> <p>1 (1922) 1922 All 97 (28) 44 All 0</p> <p>Note 8</p> <p>1 (1904) 10 Mad 464 (465, 466)</p> <p>(1914) 1314 All 443 (445)</p>	<p>(1918) 1313 All 366 (367) 43 Ind Cas 557 (559) 40 All 109</p> <p>(1908) 35 Cal 431 (433)</p> <p>(1908) 20 All 523 (524)</p> <p>(1899) 2 Oudh Cas 103 (109)</p> <p>(1899) 2 C P L R 34 (90 JS) Upon final decree for foreclosure mortgagor's liability for costs also ceases</p> <p>2 (1887) 14 Cal 183 (185)</p> <p>(1907) 3 Nag L R 34 (100 101)</p> <p>(1958) 10 All 173 (181)</p> <p>(1898) 10 All 127 (133)</p> <p>(1913) 19 Ind Cas 773 (730) (All) Held on construction of decree that the costs were recoverable personally</p>
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(i) on the aggregate of the principal sums specified in clause (a) and of the interest thereon as calculated in accordance with that clause; and

(ii) on the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under Rule 10.

[Sec S. 34]

Synopsis

Note No 1
2 | Rule of damdupet

Note No 3

Amendments after 1908
Interest in mortgage suits

1 Amendments after 1908

The present Rule is new. It was substituted for the old R 11 which was repealed by Act XXI of 1929 and re-enacted as S 94 of the Transfer of Property Act. Prior to Act, XXI of 1929 there was no special statutory provision regarding interest in mortgage suits corresponding to the present Rule.

2 Interest in mortgage suits

This Rule which was inserted in the Code by Act XXI of 1929 gives effect to the previous case-law bearing on the subject. This case-law may be summarised as follows—

Interest prior to the suit—Interest could not be claimed in every case as a matter of course. No interest was recoverable unless there was an express or implied agreement to pay interest¹ or unless it was recoverable under mercantile usage or under some statutory provision, such as the Interest Act 1839 (See Notes under S 34). Where there was an agreement to pay interest, the Court should decree it at the agreed rate, however high it might be,² unless it was

Order 34, Rule 11—Note 2

- 1 (1913) 40 Cal 514 (116) (1912) 16 Ind Cas 360 (561) (31d) Held on construction that *rent* and *not* interest was agreed to be paid.
(1921) 1221 All 319 (320) 43 All 39 Interest payable on default in paying stipulated instalments—Waiver.
(1921) 1921 P C 100 (102) 23 Oudh Cas 150 (P C) Held on construction that interest became payable only after the period fixed for redemption.
(1957) 1565 Pun Re No 64 Right to interest—Waiver may be proved by non payment.
(1905) 7 Bom LR 772 (790) Bond providing for simple interest only and no rest—Only simple interest can be awarded.
(1901) 8 Cal WN 216 (218) Mortgagee not entitled to interest for the day on which the money was advanced as also for the day on which the money was repaid.
(1864) 1864 W R Gp No 157 (157) In absence of express provision for interest, interest need not be paid.
(1913) 35 All 302 (306) Liability of Hindu son.
[See (1901) 4 Oudh Cas 93 (35)]

Liability of Hindu son under decree on mortgage against father)

- (1913) 1913 Lah 123 (126) 1913 Pun Re No 64 Decree for redemption did not to become limited—Interest suit for redemption—Interest should be decreed.
(1922) 1922 Cal 659 (690) 31 Cal 722
(1933) 1933 Lah 652 (644)
(1936) 20 Bom 744 (745)
(1890) 14 Bom 113 (114)
(1853) 3 Cal 303 (314)
(1836) 18 Cal 164 (150) 17 Ind App 201 (P C)
(1893) 20 Cal 360 (364)
(1893) 20 Cal 360 (364)
(1894) 21 Cal 366 (374) 21 Ind App 1 (P C)
(1891) 24 Cal 699 (703) (F B)
(1904) 31 Cal 233 (240)
(1904) 31 Cal 332 (338); 31 Ind App 57 (P C)
(1831) 3 Cal 125 (126)
(1910) 5 Ind Cas 916 (916) (Mid)
(1882) 1882 Pun Re No 40, page 118.

penal,³ or the rate of interest was excessive and the transaction was substantially unfair see (Usurious Loans Act, 1918), in either of which cases, the Court might decree what it considered a reasonable rate of interest.³ A stipulation for the payment of compound interest was held to be not necessarily penal.⁴ Nor did the mere fact that the rate of interest was excessive give rise to a presumption of undue influence where it was not proved that the lender was in a position to dominate the will of the debtor.⁵ The interest decreed was a charge on the mortgaged property.⁶

Where the mortgagee was in possession of the mortgaged property, the income from the property should be applied in discharge of the interest payable to him.⁷ But a mortgagee who was entitled to possession in lieu of interest could not claim any interest for the period for which he failed to obtain possession on account of his own laches.⁸

The present Rule and S 72 of the Transfer of Property Act make it clear that interest is payable on the costs and charges and expenses properly incurred by the mortgagee in respect of the mortgage security.⁹

Post diem interest or interest after the date fixed in the mortgage deed for the payment of the mortgage money—There was a conflict of decisions as to the power of the Court to decree interest after the due date for payment under the mortgage deed. In some cases it was held that, in the absence of any specific

- (1949) 1839 Pun Re No 135 page 46r
(1908) 1903 Pun Re No 110 page 503
(1110) 1910 Cal 796 (799) 42 Cal 602 (661 666)
(101) 28 Bon 371 (37)
(See also 2 Hiv 644 and (1909) 2 Ind Cas 27 (24 25) 5 Nag L R 37 Contract rate to be given even though interest is payable only on default of payment of instalments)
2 (1915) 1915 Cal 796 (792) 42 Cal 612
(See also (1910) 5 Ind Cas 660 (665) 32 All 448 Stipulation for higher rate of interest with a provision for lower rate in case of punctual payments—Not penal)
3 (See (1912) 13 Ind Cas 5 (5) 34 All 126) (1933) 1933 All 140 (184) Contract at 24 per cent compound interest with six monthly rest—Security ample—Interest reduced to 15 per cent simple
(1933)
was allowed
(1912) 13 Ind Cas 401 (402) (Lah) Mortgage by Hindu father of joint family property—Necessity of borrowing at excessive rate of interest not proved—Interest may be reduced
220) compound interest
Piv (See (1931) 3 All 610 (623) (F P))
5 (1921) 1921 P C 60 (62) 51 Ind App 101
3 Pat 279 (P C)
(1927) 1927 All 538 (535)
6 (1921) 1921 Pat 403 (400) But interest as damages is not a charge on the pro
40 Cal 514
(1914) 1914 Lah 350 (305) 22 Ind Cas 837 (839) 1914 Pun Re No 91 Interest is not a charge on the property unless it is specifically made so
7 (1902) 24 All 521 (531) 23 Ind App 148
8 (1907) 2 Ind Cas 221 (222) 31 All 320
(1926) 1926 All 665 (666 667) Mortgagee to discharge debt due on possessory mortgage in Jeth—Not taking any steps—Is not entitled to interest after suit for redemption
(1875) 7 N W P H C R 57 (55)
(1900) 9 Oudh Cas 144 (145)
(See also (1889) 1889 All W N 17, (177) Mortgagee not executing his decree for possession—Not entitled to interest in subsequent suit for redemption)
(1933) 1933 All 70 (73) 54 All 1041
8 (1893) 1893 Pun Re No 67 page 297 In Punjab where the Transfer of Property Act does not apply a different view was taken

stipulation for the payment of such interest, it could not be decreed.⁹ But in a great many cases it was held that an intention to pay interest subsequent to the period fixed for redemption at the same rate as before might be implied in the absence of any agreement to the contrary.¹⁰ Even if there was no intention to pay such interest, the Court could award it by way of damages for the breach of the contract to pay the mortgage money at the stipulated time.¹¹ The contract rate of interest was ordinarily taken as the measure of damages,¹² though the Court could vary it if it considered it necessary.¹³

Post diem interest at a reasonable rate might also be decreed under the

- J (1913) 21 Ind Cas 253 (251) 35 All 534
 10 (1914) 20 All 171 (180) 25 Ind App 9
 (P C)
 (1933) 1933 Mad 171 (171) But compound interest cannot be awarded unless specially agreed to
 (1935) 1935 Oudh 213 (216)
 (1937) 19 All 39 (13, 50) 23 Ind App 138
 (P C)
 (1935) 22 Bom 107 (110)
 (1935) 25 Cal 246 (249 250)
 (1939) 22 Mad 333 (340)
 (1937) 20 Mad 149 (151)
 (1937) 20 Mad 371 (375)
 (1900) 23 Mad 534 (535)
 (1912) 16 Ind Cas 216 (217) (All)
 (1914) 1914 Oudh 137 (133) 23 Ind Cas 871 (872)
 (1914) 1914 All 171 (172)
 (1915) 1915 Mad 398 (398) 26 Ind Cas 124
 (1915) *Post diem* compound interest not recoverable unless expressly provided for
 (1915) 1915 Mad 1161 (1162)
 (1916) 1916 Lah 359 (359) 32 Ind Cas 521
 (822) 1916 Pun Re No 5
 (1916) 1916 Oudh 313 (314) 19 Oudh Cas 165
 (1916) 1916 Oudh 193 (202)
 (1916) 1918 Lah 89 (89) 1918 Pun Re No 31
 (1921) 1919 Lah 351 (352)
 (1915) 1915 Mad 1161 (1162)
 (1919) 1919 Mad 186 (186) 52 Ind Cas 313
 (313) Even intention to pay *post diem* compound interest may be implied
 (1919) 1919 Lah 279 (279) 1 Lah L Jour 116 (120)
 (1917) 1917 Cal 537 (541)
 (1932) 1932 Pun Re No 23 page 113 *Post diem* interest is charge on property
 (1934) 4 Mad L Jour 260 (263) (Do)
 (1932) 1932 Oudh 122 (122) 25 Oudh Cas 36
 (1933) 15 All 393 (393) 20 Ind App 116
 C. P. C. 309 & 310
 (P C) Express agreement to pay *post diem* interest
 [See also (1932) 1932 Nag 39 (40 41)
 25 Nag L R 1 Terms of deed providing interest and payment by instalments—No provision nor indications as to interest after whole amount becomes payable—Presumption is payment at reasonable rate]
 11 (1935) 17 All 511 (517) 23 Ind App 190
 (P C)
 (1938) 1938 Mad 171 (171)
 (1888) 10 All 85 (90)
 (1883) 11 All 416 (419)
 (1886) 8 All 486 (490) Principles of compensation for breach of contract and not implied contract to pay *post diem* interest
 (1880) 2 All 617 (619)
 (1876 77) 2 Cal 41 (44)
 (1876) 25 Suth W R 189 (190)
 (1895) 18 Mad 331 (334)
 (1923) 1923 Lah 632 (633, 634) 4 Lah 406
 [See (1915) 1915 Lah 302 (303) 27 Ind Cas 616 (617)]
 (1917) 1917 Pat 510 (511)
 (1922) 1922 Lah 254 (257) 3 Lah 200 (FB)
 (1866) 1866 Pun Re No 93 page 145
 (1872 1892) L B R 570
 12 (1886) 8 All 486 (489)
 (1933) 1933 Mad 171 (171)
 (1875 78) 1 All 603 (607)
 (1878 80) 2 All 617 (619)
 (1922) 1922 Lah 254 (257) 3 Lah 200
 13 (1895) 17 All 511 (517) 22 Ind App 199
 (P C)
 (1886) 8 All 486 (489 490)
 (1878 79) 3 Bom 131 (133)
 (1878 80) 2 All 617 (619)
 (1876 77) 2 Cal 41 (43 44)
 (1876) 25 Suth W R 189 (190)
 (1835) 18 Mad 248 (250)
 (1929) 1929 Lah 355 (355)
 (1863) 11 Suth W R 68 (63)
 (1875) 14 Suth W R 450 (450)
 (1871) 15 Suth W R 234 (235)
 (1876) 25 Suth W R 318 (318)
 (1872) 1872 Pun Re No 42 page 57
 (1937) 1937 Pun Re No 73 page 265
 (1838) 6 C P L R 11 (12)
 (1902) 1902 Pun L R No 95 page 365

1. Interest Act of 1839 though there might be no agreement to pay such interest ¹⁴ Such interest awarded either as damages, ¹⁵ or under the Interest Act, ¹⁶ was held not to constitute a charge on the mortgaged property though a contrary view also was held in the undermentioned cases ¹⁷ It was also held that *post diem* interest claimed as damages for breach of contract could be recovered only for the period prescribed by the Limitation Act for a suit for compensation for such breach, ¹⁸ and that a claim for such damages would fail unless the mortgage suit was brought within the period of limitation for a suit for damages for breach of the contract ¹⁹ But the Privy Council observed in the undermentioned case that the claim was a recurring one and so long as the principal itself was not barred *post diem* interest could be recovered for the six years (or three years, as the case may be), preceding the suit on the mortgage ²⁰

Interest from institution of suit to the date fixed under the preliminary decree for the payment of the mortgage money—The same rules which guided the Court with reference to interest accruing prior to the suit applied also till the date fixed under the decree for the payment of the mortgage money Hence, where there was a stipulated rate of interest, the Court was held bound to decree interest at that rate till the date fixed for payment of the decretal amount, however high it might be, unless it was *penal* or was excessive and the transaction was substantially unfair ²¹ Where the period originally fixed for payment was *extended* by the

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| 14 (1894) 21 Cal 274 (278) | (1910) 5 Ind Cas 654 (656) (Cal) |
| (1897) 24 Cal 699 (703) (F B) | (1909) 4 Ind Cas 56 (57) (Cal) |
| (1895) 18 Mad 389n (338n) | (1920) 1920 Cal 888 (888) 61 Ind Cas 241 (241 242) Any other arrangements inadmissible under S 93 of the Evidence Act |
| (1891) 18 All 330 (336) | (1906) 29 Mad 65 (67) |
| (1892) 19 Cal 19 (24) | (1897) 21 Mad 364 (365) |
| (1895) 18 Mad 257 (261) | (1911) 12 Ind Cas 18 (20) (Rang) |
| (1894) 1894 Pun Re No 114 page 437 | (1928) 1928 Lah 96 (97) |
| (1893) 6 C P L R 22 (23) | (1928) 1928 Lah 192 (192) |
| 16 (1895) 17 All 581 (588 589) (F B) | (1927) 1927 Lah 445 (447) 8 Lah 721 |
| 17 (1894) 21 Cal 274 (278) <i>Post diem</i> interest awarded under Interest Act | |
| (1895) 18 Mad 248 (250) | |
| (1902) 1902 Pun Re No 95 page 427 | |
| [See also (1895) 17 All 511 (517) 22 Ind App 199 (P C) Where the <i>post diem</i> interest awarded as damages was directed to be added to the principal in taking the accounts] | |

¹
19 Halsbury p 101, *Marshfield v Hutchings*

(1903) 1903 Pun L R No 33 There is no limitation to a mortgagee's claim for interest in a suit for redemption

21 (1927) 1927 P C 1 (2) 54 Ind App 1, 54

reduced as being penal—Reduced in

appellate Court or otherwise, the contract rate of interest was payable till the extended period²² Though the mortgagor paid into the Court the decretal amount before the date fixed in the decree for payment he was bound to pay interest for the entire period fixed²³

The words "principal amount found due or declared due on the mortgage" mean only the principal amount due under the mortgage without interest till date of suit Therefore, a mortgagee is entitled to interest from the date of suit to the date fixed for payment at the contract rate only on the principal amount due under the mortgage and not on the total amount due on the date of suit²⁴

Interest from date fixed in the decree for payment till realisation—The Court could decree interest even for the period subsequent to the date fixed for payment in the decree till realisation²⁵ The following cases which held to the contrary^{26a} were obsolete even prior to the enactment of the present Rule The

gagae s misconduct]

[See also (1913) 18 Ind Cas 709 (911)
37 Bom 326, 40 Ind App 68 (P C)
Interest after suit not provided for
in decree must be deemed to have
been refused]

[See also (1900) 1900 Pun Re No 3

22 (1930) 1930 Pat 380 (332)
(1922) 1922 Oudh 268 (269)
(1915) 1915 All 318 (314)
(1937) 1937 P C 1 (2) 54 Ind App 1 54

Interest on costs can be awarded only
from date of preliminary decree]
[But see (1935) 1935 Pat 98 (98)
Interest on principal amount from
date of suit to date of decree is in
the discretion of the Court—The
word used in this Rule is 'may']

since he did not ask for more
(1922) 65 Ind Cas 703 (710) (Cal) During
proceedings to set aside *ex parte* de
cree suit pending and interest at
contract rate allowable
(1931) 1931 Nag 161 (163 to 165) 27 Nag
L R 312 Such interest is bound by
the law of dampudat and S 31 is
inapplicable

23

(1925) 1925 P C 280 (287) 52 Ind App 418
5 Pat 135 (P C) Trial Court grant
ing interest after suit on amount
of personal decree and not on mort
gage amount and directing taking of
accounts—Successor has no power to
award interest on mortgage amount
after suit

*The following cases holding that such
interest was not payable till date fixed for
payment must be regarded as obsolete*—
(1925) 1925 Lom 362 (362)

(1909) 10 Cal L Jour 203 (207) 3 Ind Cas
289

(1886) 12 Cal 569 (579) (F B)

(1873 4) 12 Beng L R 451 (468 482)

[See also (1899) 12 O P L R 78 (82)
Court granting extension of time on
condition of mortgagor paying inter
est on decretal amount—Such inter
est does not form part of the mort
gage money]

(1921) 1921 P C 100 (102) Where the Privy
Council disallowed interest from de
cree of trial Court till the Privy
Council judgment, in view of the
mortgagee's persistence in ascertain
ing an unwarrantable claim
[See (1935) 1935 Oudh 263 (263)]

decree to be included in valuation
under S 110, C P Code].

[But see (1881) 7 Cal L Rep 206 (214)]
(1881) 7 Cal L Rep 267 (208) These cases
were decided prior to the Transfer of
Property Act and hence are obsolete

23a (1933) 1933 Oudh 128 (129) 8 Luck 315
(1935) 1935 Oudh 263 (263)

24 (1906) 23 All 223 (224) (P C)

(1901) 23 All 181 (193) 28 Ind App 35 (P C)

(1899) 21 All 361 (373) (P B)

(1897) 24 Cal 766 (773)

- 1 scheme of the Code being that after the date fixed in the decree for payment the relationship between the parties passed from the domain of *contract* into that of *judgment* the Court was not bound to award interest after such date at the contract rate but might award such interest at any rate that it considers *reasonable*²⁵ The undermentioned cases²⁵ which held that the Court was bound to award the contract rate till payment are not good law

Future interest after the date fixed for payment is to be paid on the aggregate of the principal interest and costs awarded by the decree²⁶ The present Rule makes it clear that such future interest forms part of the mortgage money and is not a simple money claim²⁷ The proper stage for decreeing future interest is at the time of passing the final decree²⁸ Subsequent interest not mentioned in the final decree must be taken as refused²⁹ But an agreement between the parties for the payment of future interest may be given effect to though the final decree does not provide for it³⁰ When future interest is decreed it must be paid till the confirmation of the sale³¹

3 Rule of Damdupet —See Note 16 to S 34

- | | |
|--|---|
| <p>refused in certain circumstances</p> <p>(1933) 1933 Oudh 128 (129) 8 Luck 315 With regard to future interest Court has a discretion—Discretion exercised by trial Court will not be interfered with unless there are sufficient grounds</p> <p>(1935) 1935 Pat 98 (98) 14 Pat 400</p> <p>(1904) 31 Cal 138 (141)</p> <p>(1900) 23 Mad 637 (642)</p> <p>(1906) 29 Mad 170 (171)</p> <p>(1909) 3 Ind Cas 289 (290) (Cal)</p> <p>(1911) 10 Ind Cas 695 (696 697) 7 Nag L R 14 Despite a provision to the contrary in the mortgage bond</p> <p>(1913) 18 Ind Cas 362 (363) (Mad)</p> <p>(1915) 1915 Cal 679 (679)</p> <p>(1918) 1918 Cal 151 (153)</p> <p>(1919) 1919 Mad 231 (232) 42 Mad 465</p> <p>(1922) 1922 Pat 386 (387) 6 Pat L Jour 676</p> <p>(1925) 1925 Pat 455 (459)</p> <p>(1900) 2 Bom L R 225 (227)</p> <p>(1902) 6 Cal W N 769 (771)</p> <p>(1915) 1915 Oudh 31 (42 43)</p> <p>(1904) 34 Cal 150 (161) 34 Ind App 9 (P C)</p> <p>(1886) 12 Mad 485 (486)</p> <p>(1915) 1915 Loh 113 (114 115) 1915 Pun Re No 22</p> <p>(1900) 3 Oudh Cas 130 (155)</p> <p>(1901) 6 Cal W N 653 (654)</p> <p>(1918) 1918 Oudh 274 (224)</p> <p>(1913) 18 Ind Cas 535 (542) (Cal) Future interest may even be refused</p> <p>(1932) 1932 Cal 689 (690 691) 59 Cal 722 (Do)</p> <p>(1914) 1914 Oudh 289 (290)</p> <p>[See (1907) 34 Cal 150 (161) 34 Ind App 9 (P C) Date of realisation means date fixed by the decree for payment]</p> <p>[See also (1935) 1935 Oudh 263 (265)]</p> | <p>Interest subsequent to date fixed for payment is ordinarily calculated at 6 per cent]</p> <p>25 (1901) 11 Mad L Jour 7 (9)</p> <p>(1911) 10 Ind Cas 846 (847) (Lah)</p> <p>(1903) 30 Cal 953 (960)</p> <p>[See (1910) 5 Ind Cas 61 (62) (Cal)]</p> <p>26 (1909) 3 Ind Cas 291 (300) (Cal)</p> <p>(1909) 3 Ind Cas 289 (290) (Cal)</p> <p>(1926) 1926 All 119 (120)</p> <p>(1923) 1923 Oudh 241 (241) 26 Oudh Cas 59</p> <p>(1921) 1921 U B 5 (9) 4 U B R 1 Interest at 9 per cent allowed</p> <p>(1912) 16 Ind Cas 374 (375) (Cal) If there was a valid tender of the mortgage money interest thereon would cease though the appellate decree afterwards enhanced the amount found due</p> <p>[See however (1932) 1932 Oudh 255 (263) Trial Court a discretion to award future interest on the principal sum alone not interfered with in appeal]</p> <p>27 The contrary view in (1891) 16 All 269 (270) is no longer good law</p> <p>28 (1921) 1921 Pat 352 (352) 5 Pat L Jour 598</p> <p>(1918) 1918 Cal 151 (153)</p> <p>(1921) 1921 Pat 352 (352) 5 Pat L Jour 593</p> <p>(1917) 1917 Pat 582 (583 584) Final decree awarding future interest cannot be questioned in execution</p> <p>29 (1921) 1921 Pat 352 (352) 5 Pat L Jour 593</p> <p>[But see (1891) 16 All 2 0 (273)]</p> <p>(1931) 1931 Oudh 47 (48) Preliminary decree providing for future interest—Mortgagee is entitled to such interest though final decree does not provide for it</p> <p>30 (1912) 17 Ind Cas 936 (940) (Cal)</p> <p>(1901) 23 Bom 333 (337)</p> <p>31 (1906) 33 Cal 846 (848)</p> <p>(1919) 1919 All 253 (254) 41 All 526 (528)</p> |
|--|---|

R. 12. [New; Act IV of 1882, S 96] *Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.*

[See S 73 Sub-S (1) Cl (b)]

Synopsis.

	Notes	Notes
Transfer of Property Act S 96	1	Sale free from prior mortgage 3
Scope of the Rule	1a	Where a prior mortgage is a usufructuary one 4
Sale of property subject to the prior mortgage	2	Sale by the Court subject to a charge 5

Other Topics

Sale without express reservation of prior mortgagee's rights—Effect See Note 3 Pt (1a)

1 Transfer of Property Act S 96

The present Rule corresponds to the old S 96 of the Transfer of Property Act of 1882 which was repealed in 1908 Under the Transfer of Property (Amendment) Act XX of 1929 a new S 96 has been inserted in the Transfer of Property Act which deals with a different subject

1a Scope of the Rule

This Rule confers upon the Court the power of directing a sale free from the prior mortgage subject to two conditions namely, that the property must be one of which the sale is directed under this Order and there must be consent of the prior mortgagee When these conditions are satisfied, the Court has full power in its discretion to direct the sale free from the prior mortgage¹ The Rule does not require the consent of the plaintiff or of anybody else besides that of the prior mortgagee² The right to apply under this Rule is not confined to the plaintiff decree holder The Court can exercise the power under this Rule on the application of anybody or even of its own motion³

2 Sale of property subject to prior mortgage

The explanation to O 34 R 1 makes it clear that the prior mortgagee is not a necessary party to a suit for a sale on puisne mortgage Hence a puisne mortgagee can bring the mortgaged property to sale under his own decree subject to a prior mortgage⁴ The contrary view, taken in the undermentioned cases

Order 34 Rule 12—Note 1a

- 1 (1935) 133o Mad 453 (454)
 - 2 (1935) 133o Mad 453 (454)
 - 3 (1935) 1335 Mad 453 (454)
- [See however (1935) 1935 Mad 660 (663) Decree holder alone has the right to apply]

Note 2

- 1 (1895) 22 Cal 33 (46)
- (1934) 1934 All 73 (75) Prior mortgagee not impleading subsequent mortgagee—Sale in execution—Purchaser made party to subsequent mort

gagee's suit — He can claim under O 34 R 12 to sell property free from incumbrance and that he should be paid in first instance or may redeem subsequent mortgage

(1896) 23 Cal 795 (795)

(1901) 22 All 205 (206)

[See also (1935) 1935 Lah 218 (221) Defendant having prior and subsequent mortgage rights impleaded in suit in the capacity of subsequent mortgagee—He can claim the benefit of this Rule in execution on the basis of his prior mortgage]

2, decided under the Transfer of Property Act, is obsolete ²

As to whether a person having two mortgages on the same property can sue on his puisne mortgage, reserving his rights under the first mortgage *see* Note 40 to S 11. He cannot, however, in any case, *sell* the property twice under his two mortgages ³. But if the prior mortgage is a *usufructuary* one and the mortgagee is therefore unable to bring the property to sale under that mortgage, there is nothing to prevent his bringing the property to sale under his later simple mortgage subject to the prior usufructuary mortgage ⁴.

3 Sale free from prior mortgage.

The Rule clearly implies that without the prior mortgagee's consent property cannot be sold free of his mortgage in execution of a decree for sale on a subsequent mortgage ¹. In the absence of such consent the sale under a decree on a puisne mortgage can only be subject to the prior mortgage though there may be no express reservation of the prior mortgagee's rights ^{1a}. Although the prior mortgagee may be joined as a party to the suit on the puisne mortgage, it is not incumbent on him to assert and prove his priority where his mortgage or his priority is not impugned (*See* Note 40 to S 11). The priority therefore cannot be lost merely because the prior mortgagee does not establish it in such a case ². *See also* the undermentioned case ³.

4 Where prior mortgage is a usufructuary one

(a) *Sale free of prior mortgage*—A usufructuary mortgagee as such, cannot sue for sale on his mortgage. There is therefore a conflict of opinion as to whether a prior usufructuary mortgagee with whose consent the property is sold under this Rule in execution of a decree on a puisne mortgage is entitled to share in the sale proceeds. The High Court of Madras has held that he can, on the ground that this Rule applies to all mortgages whether simple or usufructuary or whether the mortgages are in favour of the *same person* or different persons ¹. The High Court of Allahabad, on the other hand has held that he cannot do so ². It has, however, held that, where a puisne mortgagee redeems a prior usufructuary mortgagee he can bring the mortgaged property to sale for the amounts due under both the mortgages ³.

(b) *Sale subject to prior mortgage*—As to sale of mortgaged property *subject* to a prior usufructuary mortgage *see* Note 2 *supra*.

5 Sale by the Court subject to a charge

A statement in a certificate of sale that the sale is subject to a charge is not conclusive against the purchaser when it is sought to enforce the charge by a suit ¹.

2 (1891) 13 All 432 (439 453)

(1900) 22 All 212 (214)

3 (1898) 20 All 322 (324 325)

4 (1908) 31 Mad 530 (530 531)

(1910) 1916 Lat 113 (114) 2 Pat L Jour

118

Note 3

1 (1920) 1920 P C 81 (89) 47 Cal 662 47

1a (1906) 29 Mad 84 (86)

2 (1920) 1920 P C 81 (83) 47 Cal 662 47 Ind

App 11 (P C)

(1900) 1930 Lah 1063 (1060) Prior mort

gages & assignce

(1915) 1916 Cal 570 (571)

[*See* (1908) 31 Mad 425 (429) No implication that puisne mortgagee not required to redeem when prior mortgagee is a party]

(1929) 1929 Oudh 463 (466) 4 Luck 250 But if the priority is attacked the prior mortgagee who has been made a party must establish it

3 (1892) 14 All 509 (511 512) Prior mortgagee appropriating portion of sale proceeds is estopped from alleging want of consent

Note 4

1 (1907) 30 Mad 408 (410)

2 (1904) 26 All 14 (17 18)

3 (1904) 26 All 14 (17 18)

Note 5

1 (1893) 16 Mad 207 (213)

A person who sells property subject to an encumbrance which has been recognized by the Court cannot claim a re-sale on the ground that the encumbrance has been found to be void² Mortgages noted in the proclamation of sale as claimed upon the property sold should not necessarily be entered in the certificate of sale or be computed as part of the purchase-money, unless the existence of the mortgage has been either admitted by the parties or established by a decree or declared under O. 21, R 62³ When a sale is subject to encumbrances, the vendor is no longer liable for their satisfaction nor is he entitled to any benefit that the vendee might obtain therefrom⁴

R. 13. [New; Act IV of 1882, S 97] (1) *Such proceeds shall be brought into Court and applied as follows :—*

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

secondly, in payment of whatever is due to the prior mortgage on account of the prior mortgage, and of costs, properly incurred in connection therewith;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

fourthly, in payment of the principal money due on account of that mortgage; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) *Nothing in this Rule or in R. 12 shall be deemed to affect the powers conferred by S. 57 of the Transfer of Property Act. 1882.*

[Cf. S 73, sub-s. (1), Cl. (c).]

Synopsis

	Note No	Note No.
Transfer of Property Act S 97	1	3
Application of proceeds	2	
" Whatever is due to the prior mort		4

Other Topics

Prior mortgage being usufructuary	See	Pt (1)
R 12, Note 4		Scope and applicability
Rights of persons having two or more mortgages	See Note 4, Pt (4)	See Note 2
Subsequent mortgagees		time barred rights
Sale subject to prior mortgage	See Note 2,	not enforceable
		See Note 4, Pt. (3)

1 Transfer of Property Act, S 97.

The present Rule corresponds to S 97 of the Transfer of Property Act.

2 (1899) 23 Bom 759 (760, 761) *Semble* — He may sue for declaration
3 (1894) 18 Bom 175 (176, 177)
4 (1909) 3 Ind Cas 793 (794) . 36 Ind App 203 . 31 All 583 (P C)

3. 2 Application of proceeds

Compare S 73, *ante* R 13 in terms applies only when the sale is ordered under R 12, *et seq.*, when the sale is free of the prior mortgage. But the principle of the Rule applies to other cases also. Hence, even in sales *subject* to a prior mortgage, the proceeds should first be applied towards the interest and costs of the mortgage under which the sale is held and then only towards the principal.¹ This Rule is intended to regulate the position as between the mortgagor and the mortgagee. It does not apply to a case of suretyship.^{1a}

Where a sale is held in enforcement of a prior mortgage, a puisne mortgagee receiving an amount from out of the surplus sale proceeds *by virtue of his security* is bound to apply them only in satisfaction of his mortgage debt though the mortgagor may have paid the money towards other debts.²

3 Whatever is due to the prior mortgagee "

Each of the prior encumbrancers is entitled to interest at the contract rate up to the date of the confirmation of the sale, that being the earliest date when the money really becomes available for distribution.¹

4 ' Person proving himself to be interested in the property sold '

This expression includes a subsequent encumbrancer,¹ but not if the existence or validity of the subsequent encumbrance is challenged by the mortgagor.² A subsequent mortgagee who has obtained a decree on his mortgage but has allowed it to become time barred is not a person interested in the property sold.³ It was held in the case cited below⁴ that the holder of two successive mortgages on the same property, who failed to include the second mortgage in his suit on the first mortgage, could claim the surplus sale proceeds under this Rule as a puisne encumbrancer. That position, will, it is conceived, be different in cases governed by S 67 A of the Transfer of Property Act which has been newly introduced by Act XX of 1929. A mere unsecured creditor is not a person "interested in the property sold." But after the subsequent encumbrances are satisfied, he can proceed against the balance, if any, payable to the mortgagor.⁵

4 R. 14. [New; Act IV of 1882, S. 99¹] (1) *Where a mortgagee⁵ has obtained a decree¹⁵ for the payment of money in satisfaction of a claim arising under the mortgage,⁶ he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit¹¹ for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, R. 2.¹³*

Order 34 Rule 13—Note 2

- 1 (1913) 21 Ind Cas 691 (693) (Mad)
 (1931) 1931 Rang 153 (157, 158) 9 Rang 186
 (1932) 1932 Mad 155 (156 157) 55 Mad 332
 (1935) 1935 Lah 334 (335) Contract by surety for payment of interest—Rule does not apply as claim for interest due by surety is claim apart from claim upon mortgage and is so parate cause of action. Sale proceeds cannot therefore be deemed to have

- been appropriated towards interest.
 2 (1903) 30 Cal 953 (958, 959)

Note 3

- 1 (1910) 8 Ind Cas 4 (6) (Cal)

Note 4

- 1 (1926) 1926 Mad 101 (105)
 (1894) 18 Bom 684 (688)

(2) *Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended.*²

Synopsis

	Note No		Note No
I Transfer of Property Act S 99	1	(b) Attachment of the property is not prohibited	9
II Scope and object of the Rule	2	(c) Transferee of money decree from mortgagee if bound by the restrictions against the mortgagee	10
III Applicability of the Rule to the enforcement of a charge	3	VIII Otherwise than by instituting a suit	11
IV Applicability of the Rule to the enforcement of security bonds	4	IX Sale of mortgaged property for claim unconnected with the mortgage	12
V Mortgagee meaning of under this Rule	5	X Order 2 Rule 2	13
VI Decree for the payment of money in satisfaction of a claim arising under the mortgage	6	XI Consent decree	14
VII Effect of sale in contravention of the Rule	7	XII Decree	15
(a) Position of purchaser at such sale See Note 7 <i>supra</i>	8		

Other Topics

Applicability only if mortgage is valid and enforceable See Note 6 Pt (3)	Rule—Effect See Note 7 Pts (8) and (9)
Applicability to Revenue Courts See Note 2 Pt (6)	Purchase in a sale in enforcement of money decrees of third persons See Note 12, Pts (3) and (4)
Inapplicability to a mortgage created by the decree itself and not existing prior thereto See Note 6 Pt (2)	Sale under Public Demands Recovery Act—What passes See Note 11 F N (1)
Inapplicability to judicial sales before Transfer of Property Act See Note 7 Pt (b)	Sales prior to Transfer of Property Act—What interest passed See Note 7, Pt (12)
Mortgagee himself purchasing contrary to this	Sub R (2) See Note 2 Pts (4) and (5)

I Transfer of Property Act S 99

This Rule corresponds to S 99 of the Transfer of Property Act with this difference viz.—that while S 99 applied even to cases in which the mortgagee had obtained a money decree on a claim *unconnected* with the mortgage, R 14 is expressly confined to cases where a money decree has been obtained on a claim *arising under the mortgage* See Note 11 below

2 Scope and object of the Rule

As has been seen in Note 19 to R 5, *ante* a sale in execution of a decree on a mortgage passes the interests of both the mortgagor and the mortgagee, while a sale in execution of a money decree conveys only the interest of the mortgagor, namely the equity of redemption. The object of the present Rule is to prevent the mortgagee from bringing to sale the bare equity of redemption in execution of a money decree which he may obtain in respect of a *claim arising under the mortgage*. Thus where a mortgagee obtained a simple money decree for the interest that has accrued due on the mortgage or obtains a money decree for the mortgage debt under S 68 of the Transfer of Property Act, he cannot attach and sell the *mortgaged properties* in execution of the said decree though he can proceed against the person or other properties of the mortgagor. If he wants to proceed against the mortgaged properties he is bound to bring a suit for sale again, and such a suit will not be barred by the provisions of O 2 R 2

The reason of the Rule is the avoidance of several evils which are likely to result if a mortgagee is allowed to bring the mortgaged properties to sale in

14, execution of a money decree which he has obtained on a claim arising under the mortgage¹ Such a sale would deprive the mortgagor summarily of the right of redemption without giving him any of the facilities which an ordinary suit for sale ensures Being subject to the unascertained claim of the mortgagee, the property would not fetch a fair value at the sale and the mortgagee would be enabled to purchase it at an unduly low price If a stranger purchased it at the sale without notice of the mortgage he would be subjected to great hardship unless the mortgagee could be held to be estopped from asserting his rights under the mortgage against such a purchaser²

The Rule is retrospective in effect being a rule of procedure and applies to decrees passed even prior to its coming into force³

The Rule does not apply to the Punjab, the Transfer of Property Act not having been extended thereto⁴ See Sub R 2 See also the undermentioned cases⁵

Under S 99 of the Transfer of Property Act, it was held that it applied to Civil Courts and Revenue Courts⁶ It was also held that the Section applied to mortgages created before the Transfer of Property Act,⁷ but not to judicial sales held and perfected before the date of the Act⁸

The Rule prevents only a sale of the mortgaged property under a money decree in respect of a claim arising under the mortgage It does not prevent the attachment of the mortgaged property under such a decree See Note 8, *infra*

See also the undermentioned case⁹

3 Applicability of the Rule to enforcement of a charge

By force of R 15 *infra*, this Rule applies to charges as well as to mortgages¹ It applies however only to a charge which exists *prior* to the decree for money and not one which is created for the first time *by* the decree as in the latter case the decree cannot be said to be obtained in satisfaction of a claim arising under the mortgage (See Note 6 *infra*) In such a case, therefore, the charge can be

(1929) 1929 Pat 439 (440) Rule does not apply to Sontbal Pargannas as the extended

2 (1911) 9 Ind Cas 1034 (1036 1037) (Cal)

3

4

ing sale of mortgaged property does not militate against R 14
Regis direct

Note 3

- 1 (1899) 12 C P L R 26 (27)
- (1905) 1 Nag L R 117 (119)
- (1895) 22 Cal 859 (863)
- (1920) 1920 Mad 183 (186) 43 Mad 786
- (1920) 1920 Pat 521 (522) 5 Pat L Jour 248 Mortgage a charge on mortgaged property for Government revenue paid by him
- (1918) 1918 Cal 705 (706 707)
- [See (1915) 1915 All 3 (4) Flag of Pragwals at confluence of Ganges and Jumna can be subject of a charge for the payment of an annuity out of the contributions of pilgrims]

(1919) 1919 Lah 439 (439) 1918 Pun Re No 88 In view of Sub R (1) even the principle of R 14 does not apply in Punjab
(See also (1931) 1931 Lah 834 (485) 13 Lah 143 Decree for sale not a necessary preliminary to sale of equity of redemption]

5 (1911) 11 Ind Cas 192 (195) 5 Sind L R 71 Prior to extension of Transfer of Property Act to Sind in 1915 R 14 did not apply to Sind

enforced in execution without any fresh suit for sale being filed ²

Thus where in a suit for maintenance by a Hindu widow the maintenance decreed is made a charge on certain property the widow can enforce the charge by applying for sale of the property in execution and cannot be compelled to file a suit for sale ³

4 Applicability of the Rule to the enforcement of security bonds

Under S 145 of the Code the liability of a surety for a judgment debtor can be enforced summarily in execution proceedings in so far as the surety has made himself personally liable. But, suppose besides making himself personally liable he mortgages some property as security, can the property be sold in execution without a suit for sale? On this question there is a conflict of decisions. It has been held by the High Courts of Allahabad,¹ Bombay² Madras³ and Patna⁴ that this Rule does not apply to such a case as there is no *decree for money* against the surety within the meaning of the Rule. But the High Court of Calcutta⁵ has held that the Rule applies and is an absolute bar to the sale of the mortgaged property without a regular suit for sale.

Where the security bond is given to the Court and not to any named person, there is no mortgage, the Court not being a juridical person and the proper procedure to enforce the security is by a summary order for the sale of the property covered by the bond, unless the surety pays the amount of security within a

2 (1919) 1919 Bom 56 (57-59) 43 Bom 631	(1901) 24 Mad 689 (694)
(1934) 1934 All 524 (524)	(1892) 19 Cal 139 (146) (F B)
(1934) 1934 Bom 241 (242)	(1926) 1926 Pat 31 (31-32) 4 Pat 693
(1934) 1934 Cal 327 (327) 60 Cal 1467	[But see (1895) 22 Cal 903 (909)]
Money decree creating charge —	(1907) 17 Mad L Jour 217 Cases decided
Separate suit to enforce charge is not	under Transfer of Property Act S 99
maintainable in view of S 47—This	[See also (1899) 26 Cal 441 (448) To
	avoid difficulty in executing decree
	for maintenance the better course
	would be to appoint a Receiver with
	power to sell in case of default by the
	judgment debtor]
	Note 4
Charge created on certain properties	1 (1895) 17 All 99 (101-102)
—Decree can be executed by sale of	(1878-80) 2 All 604 (607)
charged properties without suit under	(1916) 1916 All 57 (59-60) 38 All 327
S 67	2 (1888) 12 Bom 411 (414)
(1933) 1933 Pat 306 (401) Decree creating	[See also (1926) 1926 Bom 219 (280)
charge for future maintenance can be	50 Bom 339 Where decree holder
	gives up the mortgage he can enforce
	the personal liability by attaching
	and selling the property]
	3 (1890) 13 Mad 1 (3-4)
	(1906) 1926 Mad 194 (196-197)
	4 (1917) 1917 Pat 596 (596) 2 Pat L Jour 197
	[See (1917) 1917 Pat 489 (493)]
	[See however (1916) 1916 Pat 61
	(62) 37 Ind Cas 397 (398-399) Com
	promise in money suit—Referring to
	mortgage already executed — Pro
	perty cannot be sold otherwise than
	by suit for sale]
this question	5 (1905) 31 Cal 494 (496)
(1925) 1925 Mad 1101 (1103)	(1915) 1915 Cal 533 (533)
(1925) 1925 Lah 209 (212)	(1895) 22 Cal 90 (28)
(1927) 1927 All 439 (440) Compromise charg	(1888) 15 Cal 497 (507)
ing property for payment — Sub	[But see (1913) 13 Ind Cas 900 (904)
sequent decree on compromise —	(Cal) Case under S 99 Transfer of
Charge held to be prior to decree—	Property Act—In view of its peculiar
Omiter	facts held S 99 did not apply]
3 (1922) 1922 Cal 35 (37)	
(1916) 1916 Pat 252 (254) 2 Pat L Jour 55	
(1916) 1916 Mad 669 (669)	
(1919) 1919 Mad 894 (896)	

4, specified date⁶

5 Mortgagee meaning of, under this Rule

Mortgagee includes the holder of a charge See Note 3, supra

6 Decree for the payment of money in satisfaction of a claim arising under the mortgage

S 99 of the Transfer of Property Act applied though the claim on which the money decree was obtained was totally *unconnected* with the mortgage. The present Rule applies only to cases in which a money decree is obtained on a claim *arising under the mortgage*¹ (For further information on this aspect of the subject see Note 11, *infra*)

It follows from the language of the Rule that the mortgage should be one *existing* prior to the decree and not one created by the decree itself (*See Note 3, supra*)² The Rule also pre-supposes that the mortgage is *valid and enforceable* at the time of the passing of the money decree. If the mortgage is invalid or has become unenforceable through the efflux of time or any other reason, the Rule does not apply and is no bar to the sale of the property under the money decree³

7 Effect of sale in contravention of the Rule

A sale in contravention of the Rule can be prevented by objection being taken at any time before the sale takes place¹ But if it does actually take place, it is not void but is only voidable at the instance of the mortgagor or of any other person having an interest in the equity of redemption² The contrary view held

6 (1919) 1919 PC 55 (59) 22 Oudh Cas 212 42
All 158 46 Ind App 228 (PC)

(1899) 17 All 99 (101)

(1903) 30 Cal 1060 (1063 1063)

(1926) 1926 Cal 889 (892)

[See (1839) 26 Cal 246 (249) Security bond given to Registrar was held to constitute mortgage and require the formalities of a mortgage]

Note 6

1 (1916) 1916 Pat 252 (253) 2 Pat L Jour 55

2 (1929) 1929 Pat 439 (440)

(1934) 1934 All 524 (524) As per decree the defendant executing security bond for due payment by instalments—On failure decree holder applying for sale in execution—Rule does not apply

(1934) 1934 Bom 241 (242)

(1935) 1935 Nag 123 (130) Charge created in decree on specified properties for payment of decretal amount—Decree can be executed and charged property can be sold—No separate suit is necessary

(1926) 1926 Mld 191 (196 197)

(1916) 1916 Pat 252 (253) 2 Pat L Jour 55

(1922) 1922 Cal 35 (37)

(1909) 4 Ind Cas 606 (605) 3 Sind L R 120 Even under S 99 Transfer of Property Act same was the rule

3 (1921) 1921 Mld 477 (478)

(1935) 1935 All 507 (503) Suit on mortgage of joint family property executed by father—Mortgage found to be invalid to certain extent and simple money decree for such amount issued against father—Cre

ditor can attach and sell mortgaged property in execution of simple money decree

(1920) 1920 All 165 (165) 42 All 560

(1917) 1917 All 470 (473) 39 All 36

(1929) 1929 All 550 (581)

(1921) 1921 All 131 (133) 43 All 67

(1929) 1929 Note 12 (d) 115 Ind Cas 829

(Mld) In this case the principle was applied to a case where the mort up

80)

not

not

the

pre

cedent had not been fulfilled

(1930) 1930 Mld 138 (141) 53 Mld 610

[Suit on mortgage—Finding that the mortgagor had no title to the property at the time of the mortgage—Money decree passed—Judgment debtor subsequently acquiring interest in the property by inheritance—Held that the decree holder could sell the property]

Note 7

1 (1906) 8 Bom L R 576 (577)

(1907) 4 All L J 767 (769)

(1905) 2 All L J 356 (357)

(1916) 1916 Cal 705 (706) 41 I C 73 (16)
45 Cal 530

2 (1917) 1917 Pat 608 (609 611) 2 Pat L Jour 587

(1920) 1920 Cal 363 (366) 47 Cal 317

(1905) 8 Oudh Cas 327 (331)

(1910) 6 Ind Cas 47 (49) (Cal)

in the undermentioned cases³ cannot be considered to be good law. The proper remedy to set aside a sale held in contravention of the Rule is by an application under S 47 of the Code and not by a separate suit⁴. The application should be made before the confirmation of the sale. After the sale has been confirmed it cannot be set aside unless owing to fraud or other reasons the mortgagor was kept in ignorance of the sale proceedings prior to the sale⁵. Where the sale is held after due notice to the judgment debtor he cannot subsequently question its validity⁶.

Once the sale is confirmed the purchaser gets a good title to the property and is not liable to be redeemed subsequently by the mortgagor.⁷ The fact that the mortgagee himself has purchased the property with the leave of the Court makes no difference.⁸ In the undermentioned cases, however, it was held that if the mortgagee himself is the purchaser the mortgagor's right of redemption is not affected.⁹ It is submitted that the latter view is not correct for two reasons —

- (1) S 60 of the Transfer of Property Act recognises the possibility of the extinguishment of the equity of redemption by its becoming vested in the mortgagee and
- (2) a decree holder who buys with the leave of the Court is in the same position as any other purchaser

(See cases cited in Footnote 8 *supra* and also O 21, R 72)

S 47 and O 21 R 93 do not apply to persons who are not parties to the sale proceedings and therefore such persons can object to the sale by a separate suit even subsequent to its confirmation.¹⁰

A sale of the mortgaged property in execution of a money decree is subject

(1907) 30 Mad 313 (315)
(1907) 30 Mad 362 (365)
(1899) 22 Mad 347 (348)
(1905) 32 Cal 61 (66) (F B)
(1905) 32 Cal 236 (316) 32 Ind App 23 (PC)

1097) (Mad)

74

(411)

3 (1899) 12 Mad 32, (328)
(1899) 22 Mad 211 (215)
(1831) 14 Mad 74 (6)
(1893) 16 Mad 436 (43)
(1906) 33 Cal 113 (115)
(1906) 33 Cal 283 (236)
(1903) 30 Cal 413 (465 466)
(1839) 26 Cal 164 (166)
(1919) 1919 Cal 1008 (1009)

4 (190) 30 Mad 313 (315) Though the pro
perty may have been bought by a

5

802

96,

8 (1916) 1916 Lah 196, (198) 1916 Lun Re
No 18
(1923) 1923 Cal 121 (126)
(1926) 1926 Lah 490 (491 492)
(1907) 30 Mad 362 (366)
(1905) 1905 All W N 48 (48) Purchase by
assignee of mortgagee
(1889) 16 Cal 683 (692) 16 Ind App 107
(P C)
(1892) 19 Cal 4 (7)

to the encumbrances covering the property at the time inasmuch as only the mortgagor's interest passes at such a sale¹¹ (Compare the under mentioned cases¹² decided prior to the Transfer of Property Act in which it was held that the mortgagee's interest also passed at such a sale)

But a mortgagee decree holder who while bringing the mortgaged property to sale under a money decree fails to disclose his mortgage is estopped from asserting his rights under the mortgage against an innocent auction purchaser¹³

An application for sale made in contravention of R 14 is not one in accordance with the law within the meaning of Art 182 of the Limitation Act¹⁴

8 Position of purchaser at such sale—See Note 7 *supra*

9 Attachment of the property is not prohibited

The Rule prohibits only the sale of the mortgaged property under a money decree for the mortgage debt. The Rule does not preclude the mere attachment of the property in execution of such a decree¹

10 Transferee of money decree from mortgagee if bound by the restrictions against the mortgagee

Under S 49 of the Code a transferee of a decree in respect of a claim arising under the mortgage holds it subject to the equities which the judgment debtor might have enforced against the decree holder. Hence the transferee of a money decree obtained by the mortgagee is bound by the restrictions imposed by this Rule against the mortgagee¹

The transferee of a money decree *not in respect of the mortgage* obtained by the mortgagee against his mortgagor is not barred, under this Rule from selling the judgment debtor's equity of redemption² See Note 11, *infra*

11 Otherwise than by instituting a suit

As has been seen in Note 2 *ante* the effect of this Rule is that where a mortgagee has obtained a simple money decree on his mortgage he cannot bring the mortgaged property to sale in execution of such decree but must file a separate suit for sale in enforcement of the mortgage and such a suit would not be barred despite the provisions of O 2 R 2¹. A decree in a suit on the mortgage bond which does not provide for the sale of the mortgaged property is only a simple money decree though it may declare the existence of a lien on the property covered

- 11 (1901) 11 C P L R 17 (90)
 (1862) 4 Mad 1 (37 38)
 (1875 78) 1 All 240 (242 243)
 12 (1879 80) 4 Bom 57 (63)
 (1881) 7 Cal 677 (680 681)
 (1876 78) 1 Cal 333 (353)
 (1875) 23 Suth W R 167 (192)
 (1878 80) 2 Mad 108 (112)
 13 (1906) 2 Nag L R 106 (109)
 14 (1890) 12 All 61 (66)

(1905) 37 Cal 494 (497)
 [See (1895) 22 Cal 813 (816)]

2 (1904) 27 All 450 (451 452)

Note 11

- 1 (1931) 1931 All 65 (68) 52 All 964
 (1930) 1935 Lah 672 (675) 16 Lah 60
 (1897) 1 Cal W N 80 (81) Landlord taking

(1887) 10 Mad 129 (130 131) Decree for arrears of interest—Mortgaged property cannot be sold without suit for sale]

(1898) 1 Cal W N 320 (321)

(1902) 29 Cal 537 (542) *Senble*—Attachment and sale under Bengal Public Demands Recovery Act (3 of 1913) does not confer on the purchaser the mortgagee interest of the Gov

by the bond² On the other hand, a decree on a mortgage bond which, though not drawn up in the form prescribed for a decree for sale, yet provides for the sale of the property in case of default by the mortgagor is not a simple money decree and R 14 is no bar to the sale of the mortgaged property in execution thereof³

The Rule applies also to usufructuary mortgages When the mortgagee has obtained a money decree for the mortgage amount in such a case, he cannot bring the mortgaged property to sale in execution of the decree He must bring a suit for sale for that purpose He can bring such a suit though, if he had not obtained a money decree for the mortgage amount, he could not have done so on account of the mortgage being a usufructuary one⁴

Where a mortgagee has given up all his rights under the mortgage, the Rule is no bar to the sale of the mortgaged property in execution of a money decree for the mortgage debt⁵ (See Note 6, *supra*, foot note 3)

It has been held by the Calcutta High Court that the Rule does not apply to a suit for contribution brought by a co mortgagor who has redeemed the entire mortgage and claims a charge on the shares of the other co sharers for the proportionate amounts due by them The reason given is that such a suit is not mere suit for money but a development of the suit on the mortgage⁶

Under O 33 R 13 and S 47 the charge which the Government has on the subject matter of the suit for the Court fee payable in cases where the plaintiff has been allowed to sue as a pauper is enforceable by proceedings in execution and not by separate suit⁷

12 Sale of mortgaged property for claim unconnected with the mortgage

S 99 of the Transfer of Property Act, prohibited a sale of the mortgaged property in execution of a money decree obtained by the mortgagee although the decree was upon a claim unconnected with the mortgage¹ The present Rule applies only if the decree for money is in satisfaction of a claim arising under the

ernment Such interest can pass only to a purchaser of sale under a decree under S 67 of the Transfer of Property Act
{See (18J2) 2 Mad L Jour 188 (190)
Holder of two mortgages on same property—Rule is no bar to sale of property in execution of decree on second mortgage subject to the first mortgage

[See also (1931) 1931 All 350 (351)]

(1812)

Rang 792 Mortgagee's rights are not extinguished even though in a suit give up

N . 12

page indicate that in their opinion the principle of S 99 need not be

4. mortgage and not to a decree on a claim *unconnected* with the mortgage² *A fortiori* there is no bar to the sale of the mortgaged property in execution of a money decree obtained by a third person or to the mortgagee purchasing the property at such a sale³ Even S 99 of the Transfer of Property Act was no bar to such a sale or purchase⁴

The following are cases showing what are and what are not "claims arising under the mortgage" :—

- (1) Where a usufructuary mortgagee grants a lease of the property to the mortgagor, a claim for rent accruing under the lease is not a claim arising under the mortgage,⁵ unless the lease formed part of the mortgage transaction⁶
- (2) Where a mortgagee holds two distinct mortgages on two different properties of the same mortgagor, he can bring to sale one of the properties in execution of a money decree which he has obtained on the mortgage of the *other* property⁷
- (3) A claim for costs awarded to a usufructuary mortgagee in a suit for possession against the mortgagor is not a claim arising *under the mortgage* but one arising by virtue of the decree made by the Court in the suit for possession⁸
- (4) Subsequent to a usufructuary mortgage of the right to receive certain offerings at a temple, the parties agreed between themselves that the mortgagor should pay to the mortgagee a certain sum of money annually in lieu of the offerings a decree was then obtained by the mortgagee, on the basis of this agreement, for the arrears of the annual payments, and it was held that the annual payments formed an essential part of the mortgage money and that hence the decree came within the mischief of R 14⁹
- (5) A mortgagee who has obtained a mortgage decree, as well as a money decree on an independent claim, can sell the property for the consolidated sum and realise, from the sale proceeds, the amount of a decree he has for the mortgage debt¹⁰

applied to claims unconnected with the mortgage

- (1894) 16 All 415 (416, 417)
 2 (1913) 20 Ind Cas 523 (525) 7 Sind L R 11
 (1915) 1915 Cal 427 (427) 42 Cal 780
 (1916) 1916 Lah 196 (198) 1916 Pun Re No 18

41
 All 399 As the claim cannot be said to be unconnected with the mortgage the claim arises under the

- (1905) 7 Bom L R 816 (818) Transferee of money bond from mortgagee was not subject to the restrictions imposed by S 99

- (1925) 1925 Mad 127 (128)
 (1927) 1927 Cal 884 (885) 53 Cal 104
 7 (1925) 1925 Bom 239 (210) 49 Bom 208
 [See however (1909) 4 Ind Cas 1126 (1126) (Mad) S 99, T P Act, applies to cases where there is more than

in
 can
 purchase equity of redemption by agreements subsequent to and independent of, the original mortgage 1

13 Order 2, Rule 2

This Rule expressly provides that O 2 R 2 shall not be a bar to a second suit for sale on a mortgage when the mortgagee has merely obtained a money decree on his mortgage, under which he cannot bring the mortgaged property to sale by virtue of this Rule¹. There was a conflict of decisions on this question prior to the Transfer of Property Act. See the undermentioned cases².

Even after the execution of the decree for money has become time barred the mortgagee can sue for sale under this Rule³.

If however the prior decree was a decree providing for sale of the mortgaged property though not strictly drawn up in the form prescribed for a decree for sale, this Rule does not apply and a second suit for sale is barred by *res judicata*⁴. (See Note 11, *supra* foot notes 2 and 3). Similarly if the mortgagee sues for sale but is content to take only a simple money decree he cannot subsequently sue again for sale. Such a suit will also be barred by *res judicata*. The exemption in this Rule is only from O 2, R 2 and not from S 11⁵.

Further, this Rule relieves the mortgagee only from the restrictions imposed by O 2 R 2 on the splitting of remedies. The restriction as to splitting of claims is not affected by it⁶. Thus a suit for interest alone brought at a time when the principal has become due is a bar to a subsequent suit for the principal⁷.

14 Consent decree

This Rule does not apply to cases in which a decree for money is passed against the mortgagor by consent. The reason is that the benefit under the Rule is intended only for the mortgagee and so he can waive it by consenting to a money decree being passed for the mortgage amount¹.

15 Decree

An order directing a surety for a judgment debtor to pay the amount secured is not a decree for the payment of money within the meaning of this Rule, and hence the Rule does not preclude the sale of the property covered by the

(1901) 1 Ind Cas 162 (163) 31 All 114

(1922) 1922 Bom 237 (237) 46 Fom 848

Note 13

- 1 (1904) 7 Oudh Cas 314 (317)
- (1934) 1934 Cal 73 (76) 60 Cal 111
- (1890) 3 C P L R 170 (172)
- (1911) 1921 M L 133 (191) 44 Ind 301

- 2 (1909) 31 All 19 (20)
- (1906) 33 Cal 843 (842)
- (1913) 133 Rang 153 (159 160) Plaintiff can have the same properties attached and sold in execution—This Rule is no bar as there is no existing mortgage on account of the fact that the relief as to sale is refused in the first suit

- 6 (1901) 23 Bom 161 (168)

- 7 (1909) 2 Ind Cas 265 (266) (Cal)
- (See (1930) 1930 Lah 148 (149) Interest alone can be claimed where the principal has not become due)

Note 14

- 1 (1910) 3 Ind Cas 419 (420) 32 All 777 (780)
- (1930) 1930 Nag 199 (180)
- (1904) 31 Cal 922 (921)
- (1924) 1924 Cal 645 (646)
- (1912) 1912 Cal 35 (34)
- (1911) 3 Ind Cas 933 (939) (Mad)
- (But see (1932) 1932 All 439 (440) Suit on prom note—Compromise decree charging properties specified—Commission silent as to mode of enforcement—Held this Rule applies.)

3 Suit on the personal covenant on the mortgage—subsequent suit on the security itself not barred
[But see (1933) 1933 Bom 51 (54 55) Charge on moveables—Per out decree alone got—O 2 R 2 bars a subsequent suit to enforce the charge since O 34 applies only to immovables—But pleas and rights in defence are not barred]

- 2 (1851) 3 All 297 (302 303)
- (1851) 7 Cal 18 (51)
- (1883) 3 Cal 651 (652)
- (1878 80) 2 All 894 (893)
- (1891) 7 Cal 111 (716) (111) 3 Cal 363, Overruled
- 3 (1884) 1 All 23 (25 26)
- 4 (1891) 21 Cal 473 (488)

4 security bond, by proceedings in execution without a suit for sale being filed¹ (See Note 4, *supra*) Although a decree providing for the sale of the equity of redemption for arrears of interest due under the mortgage is contrary to the provisions of S 99 of the Transfer of Property Act it cannot be objected to in execution² (See Note 7, *supra*)

5 **R. 15.** [*New*] All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds¹¹ within the meaning of Section 58, and to a charge³ within the meaning of Section 100 of the Transfer of Property Act, 1882
[*Cf.* S 96 of Act IV of 1882]

Mortgages by the deposit of title deeds and charges

Local Amendment

ODDH

Read the present R 15 as R 15 (1) and add as sub rule (2) the following —

Where a decree orders payment of money and charges it on immovable property on default of payment the amount can be realised by sale of that property in execution of that very decree

Synopsis

	Note No.		Note No.
I Amendment after 1908	1	(e) Invalid mortgage if creates a charge	8
II Scope of the Rule	2	(f) Right of maintenance	9
III Charge	3	(g) Claim for dower	10
(a) Creation of charge by operation of law	4	IV Mortgage by deposit of title deeds	11
(b) Creation of charge by act of parties	5	V Charges enforceable by sale	12
(c) Charge under Rent Act	6	VI Charge on the surplus sale proceeds of sale for arrears of revenue or rent	13
(d) Priority between rent decree and mortgage decrees	7		

Other Topics

Charge distinguished from mortgage See Decree for charge final by itself—No fresh final decree needed See Note 2 Pt (2)
Note 3 Pts (1) and (2)

1 Amendments after 1908

The Rule has been substituted for old R 15 by the Transfer of Property Act (Amendment Supplementary) Act XXI of 1929 The main changes effected in the Rule are

(1) The words "which apply to a simple mortgage" have been substituted for the words "as to the sale or redemption of the mortgaged property"

(2) The words "mortgage by deposit of title deeds within the meaning of S 58" are new

2 Scope of the Rule

By force of this Rule O 34 R 6 applies also to suits to enforce charges¹ The Rule makes the provisions of the Code apply only so far as may be Hence,

Note 15

- 1 (1917) 1917 Pat 489 (489)
(1917) 1917 Pat 596 (596) 2 Pat L Jour
197
2 (1904) 31 Cal 922 (927)

Order 34 Rule 15—Note 2

- 1 (1930) 1930 Oudh 10 (10)
(1905) 2 All L J 379 (380)
(1932) 1932 Cal 775 (780 781) 59 Cal 1314

where a charge is declared by a decree, which in its terms is final, no fresh final decree is necessary.²

3 Charge

A charge is defined in S 100 of the Transfer of Property Act as follows —

“Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property

The distinction between a simple mortgage and a charge is often a question of great nicety, but there is a well-marked distinction between the two, viz., that a mortgage does and a charge does not, involve a *transfer of an interest* in immoveable property.¹ The Transfer of Property Act, S 100, now makes it clear that a charge is not enforceable against a *bona fide* transferee of the property for value without notice, while a mortgage is so enforceable.² A document purporting to create a charge in future in the event of non payment of the debt does not create any charge within S 100 of the Transfer of Property Act.³ That section also says that all the provisions of the Transfer of Property Act applicable to simple mortgages apply also to charges. As to limitation for suits to enforce charges, see the undermentioned cases.⁴

4 Creation of charge by operation of law

According to S 100 of the Transfer of Property Act, a charge may be created by operation of law or by act of parties. Thus, under S 55 of that Act the vendor of immoveable property has a charge on it for the unpaid purchase money.¹ A puisne mortgagee who is impleaded as a party to a suit by a prior mortgagee to enforce his mortgage is entitled to a charge on the surplus sale proceeds of the property remaining after satisfaction of the prior mortgage.² Under S 95 of that Act one of several co mortgageors who redeems the whole mortgage is entitled to a charge on the shares of the other co mortgageors for their respective portions of the mortgage debt.³ (Under the Section as amended by Act XX of 1929 the redeeming co mortgageor is subrogated to the rights of the mortgagee.) It has been held by the Madras High Court⁴ that where one of several co-sharers of property pays the entire Government revenue due on the land, in order to prevent its sale for arrears of revenue he is entitled to a charge on the shares of the others, for their

2 (1900) 1930 Nag 17 (19)

Note 3

1 (1902) 25 Mad 220 (237)
(1900) 33 Cal 985 (992)
(1887) 10 Mad 401 (519)
(1891) 13 All 25 (44)

2 The contrary view indicated in (1889) 12 Mad 63 (71) is clearly not good law now
(1914) 1914 Oudh 349 (351) Charge created by will

(1887) 14 Cal 730 (738, 739) Distinction between mortgage and charge drawn

Note 4

1 (1907) 30 Mad 524 (525) Unpaid vendor's

lien is non possessory

(1898) 21 Mad 141 (142) Limitation applicable to suit to enforce lien

(1900) 2 All L J 379 (383) Unpaid vendor's lien also gives a personal remedy

(1901) 31 Cal 57 (72) 30 Ind App 238 (P C) Unpaid vendor's lien under S 55 is different from similar lien in English law

2 (1906) 33 Cal 92 (99)

3 (1909) 31 All 166 (168)

(1906) 4 Cal L Jour 79 (84)

(1904) 26 All 227 (232)

(1906) 23 All 482 (487) 33 Ind App 81 (P C)

(1904) 26 All 407 (416) (F B) But not where only a portion of the mortgage money was paid

[See (1900) 9 Cal W N 805 (867)].

4 (1903) 26 Mad 606 (701) (F B)

[See (1887) 11 Bom 313 (319) Rule not applicable where the co-sharer who has paid the Government re-

5, respective portions of the amount due. But the Calcutta High Court has taken a different view.⁵ See also the undermentioned case.⁶

5 Creation of charge by act of parties

No formal words are necessary to create a charge, if the intention to do so is clear from the document read as a whole.¹ Thus where a Hindu executed a document agreeing to pay to his sister and after her death to her daughter Rs 10 per mensem from the produce of an estate, held that a charge was created on the profits of the estate for the payment of the amount.² A charge may be created for religious purposes and in such cases the property descends to the heirs or other representatives of the donor subject to the charge for the purposes mentioned.³ Similarly a testator may make a charge on his properties for the payment of his debts.⁴

6 Charge under Rent Act

A charge for the payment of rent under the Bengal Tenancy Act¹ or the Madras Estates Land Act² is not such a charge as is covered by S 100 of the Transfer of Property Act.

7 Priority between rent decree and mortgage decree

It has been held by the Calcutta High Court that a purchaser in execution of a rent decree has priority over the purchaser in execution of a mortgage decree.¹ But according to the High Court of Madras a sale for arrears of rent unlike a sale for arrears of revenue is not free of prior encumbrances.² Even where property is sold for arrears of Government revenue if the property is purchased by the mortgagor himself the mortgagee is entitled to have the property sold for the satisfaction of his mortgage debt. This is on the principle that a mortgagor cannot set up against a mortgagee an encumbrance created by himself.³

8 Invalid mortgage if creates a charge

An instrument which is intended to create a mortgage but which is invalid and fails to take effect as it does not fulfil the requirements of the law does not create a charge.¹

9 Right of maintenance

A right to maintenance is not a charge on the property out of which the maintenance is payable. But the right may be made a charge by act of parties or by a decree of Court.¹ As to the procedure for recovering maintenance charged on property by a decree of Court see Notes under R 14 *supra*.

venue has excluded the others from the joint property]

- 5 (1898) 20 Cal 505 (570)
(1887) 14 Cal 809 (820) (F B)
6 (1920) 1920 Pat 571 (533) 5 Pat L Jour 248

Note 5

- 1 (1900) 9 Cal W N 1001 (1002)
(1900) 32 Bom 356 (390)
2 (1884) 7 Mad 23 (24)
3 (1900) 32 Cal 129 (141) 31 Ind App 203 (1900)

4 (1900) 32 Cal 129 (141) 31 Ind App 203 (1900)
Note 6

charge for rent payable in money]

Note 7

- 1 (1909) 1 Ind Cas 35 (30) (Cal)
(1902) 6 Cal W N 534 (830)
2 (1885) 8 Mad 573 (575)
(1894) 7 Mad 31 (30)
3 (1903) 20 All 371 (374 375) 1

Note 8

- 1 (1890) 26 Cal 78 (81)
(1905) 32 Cal 729 (732)
(1906) 33 Cal 985 (993)
(1897) 1 Cal W N 81 (83)
(1900) 31 Mad 337 (337, 338)
(1900) 28 Mad 54 (56)

Note 9

- 1 (1909) 1 Ind Cas 761 (761) 31 All 161 The right may be enforced against the property in the hands of a transferee who collusively takes a transfer of the property
(1915) 1918 P O 156 (157) 42 Mad 581 46 Ind App 61 (P C)

The Rule applies to enforcement of a

10 Claim for dower

A claim for dower by a Muhammedan widow is not a charge on the estate in the hands of the heirs of the deceased husband but only ranks with ordinary debts¹ But her decree for dower is entitled to *priority* over a decree against the heir for the latter's personal debt²

11 Mortgage by deposit of title deeds

See Transfer of Property Act Ss 58 and 96 S 96 makes the provisions of the Transfer of Property Act as to simple mortgages applicable to mortgages by deposit of title deeds Similarly the present Rule makes the provisions of O 34 which are applicable to simple mortgages applicable also to mortgages by deposit of title deeds

12 Charges enforceable by sale

As the remedy of a simple mortgagee is only to sue for sale of the mortgaged property so the charge holder's remedy is also to sue for sale But if the sale proceeds of the property charged are not sufficient to satisfy the charge and if the balance is legally recoverable from the debtor's other properties or from him personally then a personal decree may be obtained under R 6 *supra* See Note 2 foot note 1 *supra*

13 Charge on the surplus sale proceeds of sale for arrears of revenue or rent

Under S 73 of the Transfer of Property Act where the mortgaged property is sold for arrears of revenue or rent the mortgage charge is transferred to the surplus sale proceeds and the mortgagee is entitled to have his mortgage debt satisfied out of such proceeds in preference to other creditors of the mortgagor¹ But if the sale was due to the mortgagee's own default he is not entitled to sue for his mortgage money²

ORDER XXXV**IN PLEADER.**

R. 1. [S 471] In every suit of interpleader the plaintiff shall, in addition to the other statements necessary for plaints, state—

Plaint in
interpleader suits

(a) that the plaintiff claims no interest in the *subject-matter in dispute other than for charges or costs*,

(b) the claims made by the defendants severally; and

(c) that there is no collusion between the plaintiff and any of the defendants

[1877—S 471; R S C, O 57, R. 2-A See S 88, C P. C.]

1 Plaintiff in interpleader suits — See Notes to S 68 *ante***Note 10**

- 1 (1871) 11 South W R 799 (246)
(1907) 25 Mad 658 (653)

- 2 (1901) 26 All 98 (36)

Note 13

- 1 (1906) 3 Cal L Jour 52 (55)
(1904) 8 Cal W N 332 (396)

(1900) 27 Cal 160 (163)

(1893) 20 Cal 241 (244)

(1881) 6 Cal 142 (147)

(1888) 15 Cal 546 (553)

(1901) 4 Cal W N 346 (359)

(1871) 16 South W R 721 (223)

(1906) 33 Cal 578 (580)

- 2 (1906) 3 Cal L Jour 220 (221, 222)

2

R. 2. [S. 472.] *Where the thing claimed is capable of being paid into Court or placed in the custody of the Court, the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit.*

[1877—S. 472.]

Synopsis.

"May be required to so pay or place it"	Note No 1	Payment to one of the contestants on security	Note No 2
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1 'May be required to so pay or place it'

Where the subject-matter of the dispute is a chose in action its disposition as the Court may direct is a sufficient compliance with the Rule¹. The Court has a discretion to make such orders as regards the subject-matter in dispute and the party is bound to obey the order before he can ask for any relief in the suit. This is a further condition that will be imposed upon the party to test his *bona fides* or disinterestedness. If he is not ready to pay or deliver the property to one of the defendants but disputes his title, the suit is not an interpleader suit². But if the plaintiff complies with the order of the Court he is fully discharged from liability. Thus where the plaintiff pays the amount in dispute into Court for payment to the right person, but the Court pays it to the wrong person the plaintiff cannot be made responsible for the mistake of the Court but is fully discharged from liability³.

2 Payment to one of the contestants on security

The money paid into Court cannot be handed over to one of the parties pending the suit even on security after the original plaintiff is discharged and one of the rival defendants to the interpleader suit is made a plaintiff. It must be kept under the control of the Court available for payment at any time to the successful party¹.

3

R. 3. [S. 476.] *Where any of the defendants in an interpleader suit is actually suing the plaintiff in respect of the subject-matter of such suit, the Court in which the suit against the plaintiff is pending shall, on being informed by the Court in which the interpleader suit has been instituted, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit; but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader suit.*

[*Cf.* R. S. C., O. 57. R. 6.]

Order 35, Rule 2—Note 1

1 (1890) 24 Q. L. D. 275 (279), *Robinson v Jenkins*

2 (1922) 1922 Cal 138 (139)

[See also (1894) 18 Bora 231 (236) In the case of a Railway company,

the claim for wharfage and demurrage was disallowed]

3 (1889) 2 C. P. L. R. 9 (14)

Note 2

1 (1913) 19 Ind. Cas. 219 (219) (Mad)

Synopsis

Legislative changes

Note No 1 | Appeal,

Note No 2

1 Legislative changes —

Under the old Code proceedings in another suit by the defendant against the plaintiff could be stayed only after a *decree* in the interpleader suit. Under the present Rule such proceedings could be stayed even on the institution of the interpleader suit¹

2 Appeal

An appeal lies from an order under this Rule. See O 43 R 1 (p)

Procedure at first hearing

R. 4. [S. 473] (1) At the first hearing the Court may—

(a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs and dismiss him from the suit; or

(b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit

(2) *Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed*

(3) *Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—*

(a) *that an issue or issues between the parties be framed and tried, and*

(b) *that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff, and shall proceed to try the suit in the ordinary manner*

[1877—S 473 Cf R S. C, O 57, R. 7]

Synopsis

Legislative changes

Note No 1 | Appeal
2 | Court feeNote No 3
4

1 Legislative changes —

Sub S (3) *new*. It has been adopted from the English Rule of the Supreme Court, O 57 R 7 and substituted for Cl (d) of the old S 473. The change expressly authorises a Court to make one of the claimants a plaintiff in lieu of or in addition to the original plaintiff.

The question whether a party to an interpleader issue shall be treated as plaintiff or defendant must be decided by the real merits of the case and not by the mere form of the issue itself¹. As to the power of a Court to add a party claiming to be interested in an interpleader suit upon his own application *see* the under-mentioned case².

2 Non appearance of claimants

On the non appearance of claimants in a properly instituted interpleader

son (Per Lindley L J)—*Referred to in* 1919 Cal 713 46 Cal 156

aw 2 (1886) 13 Cal 90 (33)

4 suit the proper course for the Court is laid down under sub rule (1) It is competent to the Court—

- (1) to discharge the plaintiff from all liability to the claimants defendants in respect of the subject matter in dispute and dismiss him from the suit
- (2) to direct the plaintiff to pay the amount into Court to the credit of the proper claimant after deducting his costs
- (3) to direct the claimants defendants to apply for payment and when they appear, make one of them a plaintiff and raise an issue and
- (4) to restrain by injunction either defendant in a proper case from taking any proceeding against the plaintiff¹

3 Appeal

An appeal lies from an order under this Rule See O 43 R 1, Cl (p) An order dismissing the interpleader suit itself¹ or an adjudication upon the claims of the defendants in the interpleader suit² will however be a *decree* and appealable as such under S 96 of the Code

4 Court fee

A memorandum of appeal from an order under this Rule is chargeable with a Court fee of one rupee under Art 11 Sch II of the Court fees Act VII of 1870

A suit or a memorandum of appeal against a decree declaring the right of one defendant as against another to the money held by the plaintiff is chargeable with Court fees under Art 17 of Sch II and not under S 7 Cl (1) (c) of the Court fees Act VII of 1870¹

5 **R. 5.** [S 474] Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords

Agents and tenants
may not institute
interpleader suits

Illustrations

- (a) A deposits a box of jewels with B as his agent C alleges that the jewels were wrongfully obtained from him by A and claims them from B B cannot institute an interpleader suit against A and C
- (b) A deposits a box of jewels with B as his agent He then writes to C for the purpose of making the jewels a security for a debt due from himself to C and afterwards alleges that C's debt is satisfied and C alleges the contrary Both claim the jewels from B B may institute an interpleader suit against A and C

[1877—S. 474]

Synopsis

Interpleader suits by agents	Note No 1		Note No
Interpleader suits by railway company	2	Interpleader suits by tenants	3

Other Topics

Apical See Note 3 F N (3)

1 Interpleader suits by agents

This Rule declares a prohibition and its concluding part provides an

Note 2
1 (1919) 1919 Bom 15 (16)

2 (1903) 30 All 22 (23 24)

Note 3
1 (1903) 4 Ind Cas 319 (320) 33 All 220

Note 4
1 (1921) 1221 Pat 305 (306)

exception. The reason for the Rule seems to be that an agent cannot ordinarily dispute the title of his principal. The illustrations to the Rule explain the Rule so far as the agent is concerned. In Illustration (a) *C* claims adversely to *A* but not through *A* whereas in Illustration (b) *C* claims through *A* as to the definition of agent and principal see S 182 of the Indian Contract Act.

2 Interpleader suits by Railway Company

A Railway Company by accepting goods for carriage does not become the agent of the consignor. It merely enters into an independent contract with the consignor. It can therefore file an interpleader suit against the consignor and another party claiming adversely to the consignor.¹

3 Interpleader suits by tenants

The prohibition that a tenant cannot file an interpleader proceeding against his landlord is based on the principle that he cannot dispute the title of his landlord during the subsistence of the tenancy.^{1a} A tenant cannot therefore bring a suit against his landlord for the purpose of compelling him to interplead with any person other than a person making claim through such landlord.¹ Thus where a tenant passed two *Kal dists* in favour of two persons in respect of the same land and then being threatened by suits by both of them instituted a suit praying that the Court may be pleased to declare which defendant has what right in which of the disputed land and in what right the plaintiff holds which of the said lands under whom it was held by the High Court of Calcutta that the suit was not maintainable.²

Where *A* leases certain lands to *B* and on *A*'s death two persons claim rent from *B* namely *A*'s heir on the one hand and a person who alleges that *A* was only a benumidar for *X* whose heir he is it has been held that the latter must be regarded as claiming through *A* and that therefore *B* can file an interpleader suit compelling the two claimants to interplead with each other.³

Where a mortgagee does not deny an assignment by him of his rights under the bond to *X* but only contends that it is a voidable one the mortgagee may treat the assignee as entitled to the money and is not bound to bring an interpleader suit compelling the mortgagee and *X* to interplead with each other.⁴

R. 6. [S 475] Where the suit is properly instituted the Court may provide for the costs of the original plaintiff by giving him a charge on the thing claimed or in some other effectual way.

[*Cf* R S C O 57, R 15]

		Synopsis	
		Note No	Note No
Scope of the Rule		1	2
Charge on plaintiff's costs	plain	Appeal	
1 Scope of the Rule			
This Rule provides for the award of costs to the original plaintiff. Such			
Order 35 Rule 5 Note 2		(1898) 9 Cal W N 61 (62-63)	
1 (1911) 111 Bom 29 (28)		[See however 5 Cal W N 34n]	
Note 3		9 (1910) 9 Ind Cas 7 (5-8) 37 Cal 557	
1a See S 116 of the Evidence Act		(1912) 18 Ind Cas 40 (41) (Cal)	
[See also (1896) 18 All 379 (391)]		3 (1909) 4 Ind Cas 319 (321) 33 Mad 220	
(1893) 92 Bom 498 (430)		Order dismissing the suit is a decree within the meaning of S. 2 and therefore appealable	
1 (1919) 1919 Cal 913 (914) 43 Ind Cas 133		4 (1914) 1914 Mad 674 (620)	
(735)			

- 6, costs when awarded will be deducted from the fund on its being brought to Court or will be a first charge upon the fund or subject-matter¹ But the plaintiff will not be entitled to costs which have been unnecessarily incurred²

2 Appeal

An appeal lies from an order under this Rule. See O. 43, R. 1 (p).

ORDER XXXVI.

SPECIAL CASE.

R. 1. [S. 527.] (1) Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,—

Power to state case for Court's opinion

(a) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them; or

(b) some property moveable or immoveable, specified in the agreement, shall be delivered by one of the parties to the other of them; or

(c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

(2) Every case stated under this *Rule* shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and *specify such* documents as may be necessary to enable the Court to decide the question raised thereby

[1877—S 527, 1859—S 328; R S. C., O. 34, Rr. 1, 6 and 9. See S. 90, C. P. C.]

Synopsis

Special case — Note No 1

Other Topics

"Agreement in writing" See Note 1, Pt (1)

1 Special case

This Order lays down the rules of procedure in respect of the statement of special case, its hearing, and other matters connected therewith and generally referred to in S 90 of the Code Rr 1 and 2 prescribe the form and contents of an agreement to state a case So far as possible, facts should be stated in a chronological order and in the form of a narrative Material documents should be referred to, and their effect or contents stated The statement must conclude

Order 35, Rule 6—Note 1

- 1 (1833) 1883 W N 176 19 Q B D 77n,
Seece v Mathews
 (1893) 18 Bom 231 (236)

- (1863) 1 Mad H C R 360 (361)
 2 (1842) 1 Haro 436 (444), *Crauford v Fisher*
 (1864) 9 L T 677, *Scottish Union Insurance Co v Steele*

with a formulation of the question to be decided by the Court and must be signed by the parties and their counsel if any¹ Where the agreement is duly entered into and filed in the Court having jurisdiction, the proceeding will be registered as a suit and heard and disposed of as such See Rr 2 to 5

Rule 5 enacts that the Court hearing a special case must be satisfied on three points —

1 *That the parties have a bona fide interest in the question stated* — The right to state a case for the opinion of the Court is not, therefore intended to enable parties to refer to the Court any hypothetical questions or matters of mere academic interest involving no substantial interest to the parties²

2 *That the agreement was duly executed by the parties* — The Court will not, therefore, interfere in a case where the parties have not provided in the agreement for an undertaking for payment of money, delivery of property, or the doing or the refraining from doing of any particular act in the event of a finding by the Court as required by R 1³

3 *That the case is fit to be decided* — A case is not fit to be decided unless the successful party will be able either to execute the decree or to base a suit upon the decree passed in it^{3a} Where there are special tribunals to try the question between the parties is for example a question relating to the adequate provision by a municipal corporation for the supply of water and for the protection against fire as regards an estate owned by a Port Trust, a special case cannot be stated for the opinion of the Court Nor will a mere declaration of the rights involved in such a case be a fit point for a special case⁴ So also a question which the Court is not competent to decide in an ordinary suit cannot be stated as a special case⁵

For instances of questions that can be stated as a special case, see the undermentioned cases⁶

As to the re opening of a decided special case see S 90 Note 2 and the undermentioned cases⁷

The provisions of this Order govern the procedure in regard to any dispute between two or more Government Wards referred to a Court for decision See the Bombay Court of Wards Act (1 of 1905) These provisions do not apply to proceedings under the Agia Tenancy Act (III of 1926) See Sch II, List I of the Act

Order 36 Rule 1—Note 1

1 See A 11 Practice 1930 Fdn p 523

2 (1910) 110 A C 233 (294) *Glasgow Navigation Co v Iron Ore Co*

[See also (1930) 1930 Bom 232 (234 235) 4 Bom 825]

(1876) 4 Ch D 169 (136 197) *Bright v Tyndall* Question as to what would be the rights of parties who were not in existence in circumstances which might never arise

3 (1930) 1930 Bom 232 (233) 54 Bom 825

3a (1930) 1930 Bom 232 (234 235) 54 Bom 825

4 (1930) 1930 Bom 232 (234 235) 54 Bom 825 Special remedy by an application to the Governor General in Council to act under Ss 518 and 520 Municipal Act Bombay

5 (1882) 9 Q B D 518 (521 522) *Bealey Local Board v West Kent Main Sewerage Board*

[See also (1930) 1930 Bom 232 (235) 54 Bom 825]

6 (1881 82) 6 Bom 42 (43 49) The validity of a trust deed by a Sunni Mahomedan

(1856) 10 Bom 415 (417 420) Powers of shareholders of a trading corporation to interfere with directors' discretion with declaration of dividend

(1907) 31 Bom 472 (475 477) Effect of a will by a Parsi upon a deed of settlement of a subsequent date

(1890) 17 Cal 786 (803) Whether subscribers to a general family pension fund are a company association or partnership for the purpose of carrying on business other than that of banking and whether they form a company under S 4 of the Indian Companies Act, 1882

7 (1884) Solicitors Journal 478, *Hamilton*

- 2 **R. 2.** [S 528] *Where* the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement
[1877—S. 528, 1859—S 328]

Where value of subject matter must be stated

- 3 **R. 3.** [S 529] (1) The agreement, if framed in accordance with the Rules hereinbefore contained may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject matter of the agreement
(2) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of them as defendant or defendants, and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented
[1877—S 529, 1859—S 329]

Agreement to be filed and registered as suit

- 4 **R. 4.** [S 530] *Where* the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statements contained therein
[1877—S 530, 1859—S 330]

Parties to be subject to Court's jurisdiction

- 5 **R. 5.** [S 531] (1) The case shall be set down for hearing as a suit instituted *in the ordinary manner*, and the provisions of *this Code* shall apply to such suits so far as the same are applicable
(2) *Where* the Court is satisfied, after examination of the parties, or after taking such evidence as it thinks fit,—
(a) that the agreement was duly executed by them
(b) that they have a *bona fide* interest in the question stated therein, and
(c) that the same is fit to be decided
it shall proceed to pronounce judgment thereon in the same way as in an ordinary suit, and upon the judgment so pronounced a decree shall follow
[1877—S 531, 1859—S 331]

Hearing and disposal of case

Synopsis

Hearing and disposal of case Note No 1 Appeal

Note No 2

1 Hearing and disposal of case

See also Note 1 to R 1 This Rule enacts that the provisions of the Code so far as may be applicable shall apply to a special case registered as a suit. An infant born after a special case is set down for hearing must be added as a party¹

2 Appeal

The decree passed upon a special case is open to appeal under S 96 C P C. But if in a pending suit the parties agree to abide by the decision of the Court and refer the matters in dispute to the Court the decree cannot be appealed against as it is in the nature of an arbitration award¹

ORDER XXXVII

SUMMARY PROCEDURE ON NEGOTIABLE INSTRUMENTS

Application of Order **R. 1.** [S 538] This Order shall apply only to—

- (a) the High Courts of Judicature at Fort William, Madras and Bombay;
- (b) the Chief Court of Lower Burma;
- (c) the Court of the Judicial Commissioner of Sind; and
- (d) any other Court to which sections 532 to 537 of the Code of Civil Procedure, 1882, have been already applied

Local Amendments

ALLAHABAD

add the following Cl (e) —

- (e) any Court in the province of Agra exercising the powers of a Small Cause Court

CALCUTTA

(a) In clause (c) the word and shall be omitted

(b) After clause (c) the following clause shall be inserted namely

- (cc) all civil Courts (except Courts of Small Causes) in the districts of Chittagong, Dacca, Dhaka and 24 Parganas and

LAHORE

The word and and new Cl (e) were added —

- (e) the Courts of the District Judge and Subordinate Judges of the First Class of the Delhi Province and the Courts of the District Judges and the Subordinate Judges of the first class in the Civil Districts of Lahore and Amritsar in the Province of the Punjab

Order 36 Rule 5—Note 1

- 1 [See also (1870) L R 11 Eq 363 (369) *Larnaby v Lassell* born a few days before but omitted by accident
- (1871) L R 11 Eq 274 (264) *Savage v Snell* [But see (1871) 13 Eq 250 (254)]

Palmer v Flower

Note 2

- 1 (1899) 23 Bom 752 (755)
- (1896) 1896 1 C 136 (138) *Burges v Morton*
- Referred to in (1906) 10 Cal W N 830 (839)

Synopsis

	Note No		Note No
Legislative changes	1	instruments should be instituted	See
Scope and applicability of the Rule	2	Note 2 <i>ante</i>	4
Courts of Small Causes	3	Clause (e)—Lahore High Court	5
Courts in which suits on negotiable			

1 Legislative changes —

- 1 The words 'the Courts of Small Causes in Calcutta Madras and Bombay which occurred in Cl () of the old S 538 have been omitted as their appropriate place will be in Rules under the Presidency Towns Small Cause Courts Act, 1832 (Report of the Select Committee)
- 2 The words 'the Court of the Judge of Karachi which occurred in Cl (d) of the old section have been omitted and the words 'The Court of the Judicial Commissioner of Sind' have been newly added as Cl (e) to the present Rule
- 3 Cl (e) and the last three paragraphs of the old section have been omitted and the present Cl (d) newly added

2 Scope and applicability of the Rule

The provisions of this Order are merely rules of procedure to be applied after the plaint is admitted. They do not alter in any way the nature of the suit or the jurisdiction of Courts.¹ Consequently, suits can only be filed in the Courts which have jurisdiction to try them.^{1a} If they do not happen to be Courts to which the provisions of this Order have been applied under Cl (d) of this Rule, the suit will have to be tried in the ordinary manner.²

Section 192, Cl (a) of the Madras Estates Land Act, 1908, excludes the applicability of this Order to suits appeals and other proceedings under that Act

3 Courts of Small Causes

By virtue of O 51 *infra* this Order will not apply to Presidency Small Cause Courts save as otherwise provided by the Presidency Small Cause Courts Act XV of 1882. Under S 9 of the latter Act the High Court may, from time to time, prescribe the procedure to be followed by the Small Cause Court and may, therefore, extend the Rules of this Order also to such Courts. As regards the Provincial Small Cause Courts, S 17 of the Provincial Small Cause Courts Act IX of 1887 read with O 50 of this Code, makes it clear that this Order will apply to such Courts if the conditions mentioned in this Rule are satisfied. In other words, if a Provincial Small Cause Court is a Court coming within Cl (d) of this Rule, it can follow the procedure provided by this Order but not otherwise.

Where a Small Cause Court has exclusive jurisdiction in a suit, the fact that the Court has no power under this Order to try it summarily will not enable the suit being filed in some other Court which has such power. The only proper course is to file the suit in the ordinary way in that Small Cause Court.¹

A Subordinate Judge who is presiding over an ordinary Sub Court but who is exercising Small Cause powers cannot at that time be taken to be exercising his original jurisdiction and cannot, therefore, try suits summarily on the ground of his being a Subordinate Judge.²

4 Courts in which suits on negotiable instruments should be instituted—See Note 2.

2 (1912) 13 Ind Cas 244 (246, 249) 5 Sind L R 155

Court of Small Causes

Note 3

2 (1928) 1928 Mad 517 (518) 51 Mad 491

1 (1912) 13 Ind Cas 244 (249) 5 Sind L R

5 Clause (e)—Lahore High Court

Clause (e) added to this Rule by the Lahore High Court is not *ultra vires* notwithstanding that it is not one of the Courts mentioned in Cl (a) of this Rule¹

R. 2. [S 532] (1) All suits upon bills of exchange hundies or promissory notes may, in case the plaintiff desires to proceed *hereunder*, be instituted by presenting a plaint in the form prescribed, but the summons shall be in Form No 4 in *Appendix B* or in such other form as may be from time to time prescribed

Institution of summary suits upon bills of exchange etc

(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter *provided* so to appear and defend, and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, *the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree*

(a) for the principal sum due on the instrument and for interest calculated in accordance with the provisions of section 79 or section 80, as the case may be, of the Negotiable Instruments Act, 1931, up to the date of the institution of the suit, or for the sum mentioned in the summons, whichever is less and for interest up-to-date of the decree at the same rate or at such other rate as the Court thinks fit, and

(b) for such subsequent interest, if any, as the Court may order under section 34 of this Code, and

(c) for such sum for costs as may be prescribed

Provided that, if the plaintiff claims more than such fixed sum for costs, the costs shall be ascertained in the ordinary way

(3) A decree passed under this Rule may be executed forthwith

[1877—S 532]

Local Amendments

BOMBAY

In sub rule 1 after the words promissory notes the following words shall be inserted namely —

and all suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest arising on a contract express or implied or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty, or on a guarantee where the claim against the principal is in respect of a debt or a liquidated demand only

RANGOON

In sub rule (2) the following shall be inserted after the words *pursuance thereof* —

Or of his applying for such leave within ten days from the service of the summons on him and on proof that the summons was duly served on him more than ten days before

2,

Synopsis

Legislative changes	Note No		Note No
	1	deemed to be admitted	6
	2	Limitation for application for leave to	
	3	defend	7
	4	Interest	8
	5	Negotiable instruments—Meaning of	9
		Suit against firm See Note 3 <i>supra</i>	10

Other Topics

Scope and object See Note 2

1 Legislative changes

- 1 The words 'In any Court to which this section applies' and the words 'High Court' which occurred in the first paragraph of S 532 of the old Code have been omitted
- 2 The words 'The allegations in the plaint shall be deemed to have been admitted' have been newly added in substitution of the *explanation* annexed to the old section and the words 'by a Rule of the High Court' which occurred in the old section have been omitted
- 3 The provision for immediate execution of decrees at the end of the second paragraph of S 532 has been incorporated in sub rule (3) with the word 'executed' substituted for the word 'enforced'
- 4 The third paragraph of the old section has been omitted

2 Summary Suits and Ordinary Suits

The Rule is only an enabling provision. A plaintiff wishing to enforce a bill of exchange a hundi or a promissory note may at his option bring a summary suit under this Order or a suit under the ordinary procedure. A summary suit, however, can only be brought in the Courts mentioned in R 1 and within one year from the date when the debt becomes due¹. But the corresponding advantage to the plaintiff choosing this procedure is that the defendant is not entitled as of right to be heard in defence. He must apply for leave within 10 days of the service of summons upon him² and if he does not apply for such leave or if the leave is refused the plaintiff is entitled to a decree.

Suits under the Madras Estates Land Act (I of 1908) are not governed by this Order. See S 192 A of the Act.

3 Form of summons in summary suit

See Form No 4 of Appendix B *infra*. Where the High Court of Madras framed Rules under S 9 of the Presidency Small Cause Courts Act XV of 1882 prescribing the form of summons in summary suits under that Act, it was held that the fixing of 3 days thereon as the time within which the defendant should apply for leave to defend was unreasonable and *ultra vires*¹.

The summons under this Rule should be served in the same manner as is provided for the service of ordinary summons under O 3².

4 Limitation for summary suits

Art 5 of the Limitation Act 1877 prescribed a period of 6 months for suits on negotiable instruments instituted under Chapter 39 of the Old Code (corresponding to O 37). There was no specific provision for other summary suits such as those specified in S 128 of this Code. When this latter section was newly introduced in the present Code in 1908 Art 5 was also amended by the Limitation Act of 1908 by providing a period of 6 months for suits under the summary procedure referred to in S 128 (2) (f) of the Code of Civil Procedure 1908, the intention of the Legislature obviously being to provide for all summary suits under the Code. It was however held by the High Court of Calcutta in the undermentioned

Order 37 Rule 2—Note 2

¹ *Art 5 of Sch I of the Limitation Act as*

² *rule 1 of Sch I of the Limitation Act*

Note 3

¹ (1921) 1924 Mad 46 (17 48) 15 Mad 81

² [See (1866) 1 Ind Jour NS 293 Case under Act V of 1866.]

case,¹ that the words "summary procedure referred to in S 128 (2) (f), Code of Civil Procedure' did not include suits under O 37 Art 5 hrs, in view of this, been again amended by Act, XXX of 1925, so as to include suits under this Order. The period of 6 months hrs also been increased to one year. At present, therefore, a summary suit whether under this Order or under S 128 of the Code should be filed within one year from the date when the debt becomes payable or when the property becomes recoverable²

5 'Unless he obtains leave

The High Court of Bombay has held that a defendant who has obtained no leave to appear and defend the suit under this Rule, cannot be allowed to participate in the trial of the suit and that, therefore, he cannot appear at the hearing and ask the Court to make the decree amount payable in instalments¹. But the High Court of Rangoon has taken a contrary view that the defendant is entitled to be heard on such a question whether or not he has obtained leave to appear or to defend the suit^{1a}

Where in a summary suit against a firm under O 30 of the Code a partner enters appearance he should obtain leave to defend as required by this Rule². Before granting a decree under this Rule the Court should be satisfied that the defendant has had full opportunity to obtain leave to defend³

6 Allegations in the plaint shall be deemed to be admitted

This clause is new and has been substituted for the explanation contained in the old section. It embodies an exception to the fundamental principle that a plaintiff must prove the case with which he comes to Court and dispenses with such proof in view of the special nature of the documents mentioned in the Rule¹

The effect of this provision is that in the special class of suits under consideration, where leave is not applied for or is applied for and refused the plaintiff gets a decree without adducing any evidence but on mere proof of service of summons². The admission as regards the allegations in the plaint mentioned in this Rule does not apply to *interest* as to which there is a specific provision in sub rule 2, clause (a)³. Thus, where in a summary suit on a hundi, which did not contain any agreement for interest the plaintiff claimed in the plaint interest at the rate of 33 1/3 *per cent per annum* it was held that the interest claimed could not be deemed to have been admitted and the Court could award interest only at the rate of 6 *per cent per annum* under S 80 of the Negotiable Instruments Act⁴

7 Limitation for application for leave to defend

An application for leave to defend should be made within 10 days of the date of service of summons on the defendant¹. This period which is fixed by the Limitation Act cannot be extended by the Court under the provisions of S 148

Note 4

- 1 (1925) 1925 Cal 781 (782) 52 Cal 954
2 (1927) 1927 Sind 90 (92) 21 S and L R 257

Note 5

- 1 (1926) 1926 Bom 250 (251) 50 Bom 267 The only way open to such a defendant is to apply for instalments either under O 20 R 11 (2) or under O 37 R 4 of the Civil Procedure Code
1a (1933) 1933 Rang 212 (216 247) 11 Rang 421
2 (1926) 1926 Bom 585 (588) 50 Bom 665
3 (1866) 1 Ind Jur N S 395

Note 6

- 1 (1917) 1917 Cal 269 (272) 43 Cal 1001 (F L)
2 [See (1876) 1 Cal 130 (132)]
3 (1933) 1933 Mad 299 (300) 56 Mad 598
4 (1933) 1933 Mad 299 (300) 56 Mad 398

Note 7

- 1 Art 159 of Sch I of the Limitation Act 1908
(1905) 23 Cal 573 (575) In determining any question as to limitation arising on an application under this Rule the date shown in the sheriff's return as the date of service should only be

of the Code² The High Court, may, however under its rule making powers, extend S 5 of the Limitation Act to applications under this Rule, and where it has been so extended, the Court may, for sufficient cause excuse the delay in making the application The Bombay High Court has so extended S 5 of the Limitation Act to applications under this Rule It has also been held by the same High Court that under R 193 of the High Court Rules, a discretion is vested in the Chamber Judge in a fit case, to extend the period of 10 days allowed under that Rule in cases to which this Order is applicable³

Where an *ex parte* decree is passed in a summary suit and the defendant shows sufficient cause for his inability to appear and apply in time for leave to defend the *ex parte* decree will be set aside⁴

8 Interest

Before the amendment of this Rule by Act XXX of 1926 interest was awardable at the rate specified, if any, up to the date of the decree Under the present Rule as amended by Act XXX of 1926 interest is to be awarded as follows—

- (a) Up to the institution of the suit in accordance with the provisions of S 79 or S 80 of the Negotiable Instruments Act, 1881, i.e., at the rate specified in the document or where no rate is so specified, at 6 per cent per annum¹
- (b) From the institution of the suit up to the date of the decree at the same rate as mentioned above or such other rate as the Court thinks fit
- (c) From the date of the decree up to date of realisation as the Court may order under S 34 of the Code

9 Negotiable Instrument—Meaning of

See S 13 of the Negotiable Instruments Act 1881 and the undermentioned cases¹ For the definition of a promissory note and a bill of exchange see Ss 4 and 5 of the said Act

10 Suit against firm—See Note 3 supra

R. 3. [S 533] (1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application

Defendant showing
defence on merits to
have leave to appear

- referred to
- (1903) 7 Cal W N 202
 - 2 (1901) 5 Cal W N 259 (267)
 - (1896) 23 Cal 573 (575)
 - {But see (1877 78) 3 Cal 539 (539)
 - which is a case under the Code of 1877}
 - (1866) 1 Ind Jur N S 395
 - 3 (1926) 1926 Bom 578 (578)
 - 4 (1911) 11 Ind Cas 433 (434) (Lah)
 - (1877 78) 2 Bom 643 (647 648) Case under Act V of 1866

Note 8

- 1 (1927) 1927 Cal 513 (514) 43 Cal 710 No rate specified—Only six per cent can be granted notwithstanding oral agreement to the contrary

- (1933) 1933 Mad 999 (300) of Mad 395 Summary suit on Hundi—Interest not mentioned—Plaintiff is not entitled to interest asked for in plaint but only as provided in S 50 of Negotiable Instruments Act [See also (1903) 30 Cal 446 (448)] [See also (1870-71) 6 Mad H C R 257 (257)]

Note 9

- 1 (1883) 13 Bom 669 (670)
- (1892) 10 Bom 683 (693)
- (1894) 17 Mad 85 (86)
- (1900) 23 Mad 106
- (1904) 27 Mad 1 (3) (17 B)
- (1866) 1 Ind Jur N S 217

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit.
[1877—S. 533].

Local Amendments

BOMBAY.

The following sub rule (3) shall be inserted —

(3) The provisions of S. 5 of the Indian Limitation Act, 1908 shall apply to applications under Sub R. (1)

LAHORE.

The following Sub Rule was added —

(3) The provisions of S. 5 of the Indian Limitation Act 1908 shall apply to applications under Sub R. (1)

Synopsis

	Notes	No		Note No
Legislative changes		1	Sub rule (2)	3
The affidavit must disclose a defence		2	Limitation	See Note 7 to R. 2 <i>supra</i>
Leave when granted conditionally			Appeal	5

1 Legislative Changes

1 The words upon the defendant giving into Court the sum mentioned in the summons or which occurred in the old S. 533 have been omitted. As to the effect of this omission see Note 2 *infra*

2 The words and on such terms as to security, framing and recording issues, or otherwise as the Court thinks fit which occurred at the end of the old section have been omitted and the present sub rule (2) has been substituted in their place. See Note 4 *infra*

2 The affidavit must disclose a defence

The application for leave to defend must be supported by an affidavit disclosing a defence.¹ If the affidavit discloses a triable issue, that is, a plea which is at least plausible then leave should be granted,² whether the defence is a legal or an equitable one³ and even though it may not ultimately turn out to be a good defence.⁴ On the other hand, if no triable issue is disclosed by the affidavit leave should be refused.⁵

Leave to defend was granted in the following cases —

(a) Where the claim was based on an endorsed promissory note and the defendant pleaded that the endorsement was a forgery.⁶

(b) Where a suit was instituted against a member of a joint Hindu family on a *hundi* drawn by the manager thereof, and the defendant pleaded that no notice of dishonour was given to the drawee.⁷

(c) Where the defendant preferred a cross claim for damages for wrongful arrest before judgment in the very suit instituted against him.⁸

Order 37 Rule 3—Note 2

1. (1919) 1919 Sind 88 (83) 12 Sind L R 70

If has to defend—if triable issue is raised by defendant, only trial Judge can go into merits and discover whether that case is a true one

(1935) 1935 Mad 302 (303)

3 (1906) 19 Mad 308 (375)

4. (1871) 6 Beng L R App 64 (64, 65).

[See also (1935) 1935 Mad 43 (45) 58 Mad 116 At the time of granting leave it is not open to the Court to go into the merits and discover whether the case is a true one]

5 (1925) 1925 Cal 123 (121)

(1933) 1933 Lah 440 (441) On defendant's own showing that suit *hundi* was not without consideration, leave refused

6 (1900) 24 Bom 65 (73)

(1905) 32 Cal 793 (815)

7 (1896) 20 Bom 488 (490).

8 (1834) 18 Bom 717 (720).

3

Leave to defend was refused in the following cases —

- (a) Where the defendant's plea was that the plaintiff was only a *benami-dar* for another⁹
- (b) Where the defendant pleaded partial failure of consideration which was not ascertainable in money without collateral enquiry¹⁰
- (c) Where the defendant pleaded that the note sued on formed part of an account of the mutual dealings between him the plaintiff and other parties¹¹
- (d) Where the defendant pleaded a collateral agreement to discharge a promissory note not inconsistent with the note which contained an absolute promise to pay¹²
- (e) Where the defendant made a counter claim for damages caused by the failure of the plaintiff to supply goods of the right sort¹³
- (f) See also the following case¹⁴

3 Leave when granted conditionally—Sub Rule 2

The Court has a discretion in the matter of attaching conditions to the grant of leave to defend. As a rule where a valid defence or triable issue is disclosed, the leave should be granted unconditionally¹. It is only in cases where there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in only to obtain further time, conditions should be attached to the grant of the leave². In such cases the proper course is to grant the leave on the defendant depositing the money into Court³.

In cases where money is deposited as a condition to obtaining leave to defend the decretal amount will be a charge on such deposit⁴.

4 Limitation—See Note 7 to Rule 2 *supra*

5 Appeal

The High Court of Bombay has held that an order by a Judge in Chambers granting leave on a condition which the defendant is not able to comply with is a judgment within the meaning of Cl 15 of the Letters Patent and hence appealable under that clause¹. But the High Courts of Calcutta² and Rangoon³ have held that a conditional order granting leave under this Rule is not a judgment and hence not appealable.

- (1935) 1935 Mad 302 (302)
 2 (1924) 1924 Mad 612 (613 614)
 (1927) 1927 Sind 60 (61)
 3 (1920) 1920 Mad 969 (9 0)
 (1871) 6 Ben L R App 64 (65)
 4 (1918) 1918 Mad 1158 (1158)

47

to
 liquidate the amount due by fortnightly consignments was a collateral undertaking consistent with the existence of the note containing an absolute promise to pay—Such collateral agreement was no answer to the suit on the promissory note and the plaintiffs were entitled to a decree

- 13 (1929) 1929 Notes 25 (c) 120 Ind Cas 528 (Sind)
 14 (1929) 1929 Sind 172 (172) 23 Sind L R 479

Note 3

- 1 (1929) 1929 Mad 841 (841)
 (1935) 1935 Mad 13 (45) 58 Mad 116

[See also (1920) 1920 Cal 525 (526)
 An order charging the property of an insolvent debtor for the repayment of plaintiffs' claim on condition of granting permission to defend his suit is a permanent charge till repayment of claim]

Note 5

- 1 (1932) 1932 Bom 163 (165) 6 Bom 265
 [See also (1930) 1930 Bom 364 (364 365)]
 2 (1915) 1915 Cal 771 (771) 42 Cal 735
 3 (1935) 1935 Rang 245 (246) 13 Rang 239
 In appeal from the decree validity of order granting conditional leave can be canvassed

R. 4. [S 534] After decree, the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to *the defendant* to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit

[1877—S 534]

Synopsis

Power to set aside decree Note No 1

1 Power to set aside decree

A defendant who has not obtained leave to defend will not be allowed to appear at the hearing of the suit. In such cases a decree should follow. Thereafter the remedy of the defendant is to apply under O 20 R 11 or to apply under this Rule to set aside the decree.¹ If on such application the defendant satisfies the Court about his being prevented by sufficient cause from appearing in time and getting leave to defend the decree against him will be set aside and he will be allowed to contest the claim.²

R. 5. [S 535] In any proceeding under this *Order* the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof

Power to order bill etc to be deposited with officer of Court

R. 6. [S 536] The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non acceptance or non-payment or otherwise by reason of such dishonour, as he has under this *Order* for the recovery of the amount of such bill or note

[1877—S 536]

R. 7. [S 537] *Save* as provided by this *Order*, the procedure in suits *hereunder* shall be the same as the procedure in suits instituted in the ordinary manner

Synopsis

Procedure in Suits Note No 1

Order 37 R 4 Note 1

- 1 (1926) 1326 Bom 250 (251) 50 Bom 26
(1301) 5 Cal W N 250 (260)
(1311) 11 Ind Cas 433 (434) (Lab)
(1872) 18 Suth W R 424 (428)
- 2 (1311) 11 Ind Cas 433 (434) (Lab)
(1301) 3 Beng L R O C 83 (84)
(1836) 23 Cal 573 (575) The question as to what took place upon the occasion of the service of summons by the

Sheriff: one which may properly be taken into consideration on an application under this section to set aside the decree
(1869) 3 Beng L R App 7 (5) But irregular service of summons on two out of three defendants to an action brought on a joint promissory note does not give the defendant properly served any ground to question the decree passed against him.

1 Procedure in suits

The Court has power, under O 6 R 17 of the Code to amend the plaint filed under this Order so as to connect it with an ordinary suit¹

ORDER XXXVIII

ARREST AND ATTACHMENT BEFORE JUDGMENT

Arrest before Judgment

R. 1. [Ss 477, 478] *Where at any stage of a suit other than a suit of the nature referred to in section 16, clauses (a) to (d), the Court is satisfied, by affidavit or otherwise,—*

1 Where defendant is called upon to furnish security for appearance

(a) that the defendant with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him,—

(i) has absconded or left the local limits of the jurisdiction of the Court or

(ii) is about to abscond or leave the local limits of the jurisdiction of the Court, or

(iii) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof, or

(b) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim, and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court

[1877—Ss 477, 478, 1859—Ss 74, 75 See Ss 94 and 95]

Synopsis

	Note No		Note No
I Legislative changes	1	V Suit must be bona fide	6
II Scope of the Rule and of the Order	2	VI To show cause why he should not furnish security for his appearance	7
III Distinction between Cls (a) and (b)	3	VII Consequences of arrest on insufficient grounds—See Notes to S 90 ante	8
(a) Affording reasonable probability —See Note 3 above	4	VIII Form—See Appendix 1 Form No 1	9
IV Is satisfied by affidavit or otherwise	5		

Other Topics

Appeal See S 104 Note 15

Money deposited—If liable to rateable distribution See S 73 Note 4 Pt (35)

1 Legislative changes

The following are the material changes introduced in the Rule —

- 1 The words "other than a writ for the possession of the immovable property which occurred in the old Section have been substituted by the words "other than a writ of the nature referred to in S 16 Cl (1) to (1)"
- 2 The proviso to the Rule is new and is similar to R 38 of O 21
- 3 The provision for the examination of the applicant which occurred in S 48 of the old Code has been omitted See Note 3 below

2 Scope of the Rule and of the Order

The normal remedy available to a creditor having a demand against his debtor is to first obtain a decree against him and *then* to arrest him or to attach his property in execution of that decree under the provisions of O 21. Under special circumstances however which are specified in this Rule and R 3 *infra*, the creditor can take out arrest or attachment against his debtor even *before* judgment. The object of such a provision is to prevent any attempt on the part of the defendant to defeat the realisation of the decree that may be passed against him.

Before the creditor can resort to the extraordinary procedure provided by this Rule he must show that there is good reason to believe that the debtor is about to depart from the jurisdiction of the Court or to make away with his property (See Note 3 *infra*). The Rule will not enable him to take out arrest before judgment merely because it would secure easy execution of the decree.¹

3 Distinction between Cls (a) and (b)

In order to apply Cl (a) it is necessary to show that the defendant has committed or is about to commit any of the acts specified therein *with intent* to delay the plaintiff or to avoid the process of the Court or to obstruct or delay the execution of any decree that may be passed against him.¹ No such intention need be proved in cases coming under Cl (b). It is only necessary to show that the circumstances under which the defendant is about to leave British India afford a *reasonable probability* that the plaintiff will be obstructed or delayed in realising his decree.²

4 Affording reasonable probability See S 13 above**5 Is satisfied by affidavit or otherwise**

Under S 178 of the old Code the Court could issue a warrant to arrest the defendant before judgment where after examining the applicant and making such further investigation as it thinks fit it is satisfied that the defendant has committed or is about to commit any of the acts specified in Cls (a) and (b).¹ This provision has now been omitted and the Court can without any such examination or investigation act under this Rule if it is satisfied by *affidavit or otherwise* of the existence of the circumstances specified in those clauses. Before the Court can act under this Rule it must have reason to believe on adequate materials, that, unless the jurisdiction is exercised there is real danger that the defendant will remove himself or his property from the ambit of the powers of the Court.^{1a}

Order 38 Rule 1—Note 2

1 (1874) 13 South W R 278 (249)

Note 3

1 (1870) 13 South W R 278 (279)

2 (1870) 1 Ind Jur N S 265

(1866) 1 Ind Jur N S 231

(1855) 5 Mal 205 (61)

See (1897) 14 Cal 636 (102)

Note 5

1 See (1870) 13 South W R 278 (102)

1 (1926) 13 Cal 636 (102) 10 Ind.

(1869) 1 N W P H C R 91 (93)

(1870) 13 South W R 278 (279)

2 Hyde 181

Where there was reason to believe that the defendants were removing goods and selling them at less than cost price, and that they were evading arrest without furnishing any security, it was held the Rule was properly applied to the case.² But where the defendant had to leave his place of residence for attendance in a criminal Court, it was held that the departure could not be said to be with a view to delay the plaintiff or to avoid the process of the Court or to obstruct or delay execution and that therefore an order under this Rule should not be passed.³

6 Suit must be bona fide

Before exercising the powers conferred by this Rule a Court should be satisfied that the plaintiff's suit is *bona fide*¹ and that his cause of action is *prima facie* an unimpeachable one subject to his proving the allegations made in the plaint.²

Where the plaintiff is indisputably entitled to a part of his claim the mere circumstance of the rest of the claim being of a disputable character does not render the suit *mala fide*.³

7 To show cause why he should not furnish security for his appearance

Where the Court issues a warrant of arrest against the defendant, he is entitled to show cause against his arrest. The cause must be either that he is not going to leave the jurisdiction of the Court or not for so long a time as will obstruct or tend to obstruct the plaintiff should he succeed or that the suit is not a *bona fide* one or that even if it is the institution of it has been vexatiously delayed till the defendant is about to depart in order to embarrass or coerce him.¹

8 Consequences of arrest on insufficient grounds—See Notes to S 20 ante

9 Form—See Appendix F Form No 1

R. 2. [S 479] (1) Where the defendant fails to show such

Security

cause the Court shall order him either to deposit in Court money or other property sufficient to

him or to furnish security for his
en called upon while the suit is pending
ny decree that may be passed against
him in the suit, or make such order as it thinks fit in regard to the
sum which may have been paid by the defendant under the proviso to
the last preceding Rule

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit

[1877—S 479, 1859—S 76]

2 (1974) 1974 Rangooli (361-362) 2 Rangooli 362. Court has power even to issue simultaneous execution for arrest and attachment before judgment.

(1) 1971 Jour. 3 (2) (Lab) Note 6

1 (1866) 1 Ind. Jur. N 234.

(184) 14 Cal 635 (0)
2 (1906) 1906 Mad 584 (584) 10 Ind.
3, (188) 14 Cal 690 (0)

Note 7

1 (1866) 1 Ind. Jur. N 234

Synopsis

	Note No		Note No
Security	1	Or to furnish security for his appearance	4
Deposit not open to rateable distribution	2	Extent of surety's liability	5
Deposit by defendant—Effect of insolvency	3	Appeal	6
		Form—See Appendix F Form No 2	7

Other Topics

Payment by surety—Rateable distribution See S 73 Note 4 Pt (14)

1 Security

In a suit for the recovery of Rs 29 508 the plaintiff obtained a warrant for arrest of the defendant but the warrant directed the warrant officer to demand Rs 10,000 and if the sum was not paid then, to arrest him. The defendant did not pay the amount and was arrested and brought before the Court. It was held that the Court should limit the security to be given to Rs 10 000 as per terms of the notice in the warrant and not to order security to be given for amount claimed in the suit¹

2 Deposit not open to rateable distribution—See the last paragraph of Note 4 to S 73

3 Deposit by defendant—Effect of insolvency

Money or other property deposited by a defendant arrested before judgment sufficient to answer the claim is earmarked for the suit and is subject to the lien of the plaintiff in the event of his success. Consequently if the defendant becomes insolvent the plaintiff is entitled to appropriate it to the exclusion of the Official Receiver and other creditors. But a security given for the appearance of the defendant in Court whenever called upon cannot be said to be to the credit of the suit or earmarked to the general purposes of the suit¹

4 Or to furnish security for his appearance

Where a judgment debtor was released on furnishing security for his appearance on a certain day and the surety executed a bond for the due performance of the decree on failure of the judgment debtor to satisfy it it was held that the bond was not in accordance with the Court's order and the surety was discharged from his responsibility on the appearance in Court of the judgment debtor on the specified day¹. Where on an application by the plaintiff for arrest of the defendant a pleader appeared on behalf of the latter and stood bail and thereupon the defendant was not arrested it was held that the surety could not be allowed afterwards to contend that the security was illegal by reason of the fact that the defendant was not arrested²

5 Extent of surety's liability

The security to be furnished under this Rule is for the appearance of the defendant while the suit is pending and until satisfaction of any decree that may be passed against him. But the fact that the surety bond went beyond the terms of this Rule and provided for the payment of the amount claimed in the suit in the event of a decree being passed against the defendant will not render the bond unenforceable¹. Nor will a surety for the appearance of the defendant, be relieved of his obligation merely because the decree is a compromise decree instead of being

Order 38 Rule 2—Note 1

1 (1919) 1920 Cal 732 (733) 56 Cal 400

Note 3

1 (1919) 1919 Mad 607 (608) 41 Mad 103

Note 4

1 (1914) 1914 L B 54 (55)

2 (1868) 1868 L un Re No. 77

Note 5

1 (1929) 1929 Notes 2 (c) 115 I C 244 (Mad)

one on trial²

The object of the security bond under this Rule is merely to secure the rights of the judgment-creditor. The Government is not interested in the proceedings in any way. On the failure of the defendant to appear as required the Court cannot *suo motu* make an order forfeiting the bond and direct him to pay the whole of the maximum sum therein stipulated to Government. The enforcement of the bond should only be made on the application of the judgment creditor and then only to the extent of the sum of money found payable under the decree³

See also Notes to S 145, *ante*

6 Appeal

An order for arrest before judgment is appealable under S 104 (h) of the Code

An order under this Rule is appealable under O 43, R 1 (g)¹

7 Form—See appendix F, Form No 2

R. 3. [S 480] (1) A surety for the appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

Procedure on application by surety to be discharged

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security

[1877—S 480; 1861—S 24; 1859—S. 78.]

Synopsis

Scope of the Rule Appeal	Note No 1	Form See Appendix F Form No 3	Note No 3
	2		

Other topics

Discharge of surety	See S 145, Note 9	Voluntary surrender to (3)	See Note 1, Pts (1)
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1 Scope of the Rule

A surety for the appearance of the defendant may apply under this Rule to be discharged from his obligation. But before he is so discharged it is essential that the defendant should appear before the Court either *voluntarily* or *in pursuance of a summons or warrant of arrest* issued against him under sub rule (2)¹. If he is present in Court under circumstances which exempt him from arrest,² or if he appears under a protection order of the insolvency Court in his favour³ the surety will not be entitled to be discharged from his obligation under this Rule. Nor will the insolvency of the defendant release the surety from his obligation^{3a}

² (1920) 1920 Mad 356 (356) 43 Mad 272

³ (1914) 1914 Sind 144 (144) 8 Sind L R 270

Note 6

¹ (See (1867) 7 South W. R 503 (508) Case under the Code of 1859).

Where the defendant appears before the Court under this Rule, the Court should direct him to find fresh security, an order directing his detention without calling upon him to find fresh security is not legal and if the defendant leaves the Court in defiance of the order he cannot be convicted for an offence under S 225 B of the Penal Code⁴

A surety for the *due performance* of any decree that may be passed against the defendant cannot apply under this Rule for being discharged from his obligation⁵

As to the maintainability of a suit for a discharge of the obligations under surety bond, see Note 9 to S 47 and Note 11 to S 145 ante and the under-mentioned case⁶

2 Appeal

An order under this Rule is appealable under O 43, R 1 (g)

3 Form—See Appendix F Form No 3

R. 4. [S 481] *Where the defendant fails to comply with any order under Rule 2 or Rule 3 the Court may commit him to the civil prison until the decision of the suit or where a decree is passed against the defendant until the decree has been satisfied*

Procedure where defendant fails to furnish security or find fresh security

Provided that no person shall be *detained in prison* under this Rule in any case for a longer period than six months nor for a longer period than six weeks when the amount or value of the subject matter of the suit does not exceed fifty rupees

Provided *also* that no person shall be detained in prison under this Rule after he has complied with such order

[1877—S 481, 1859—S 78]

Synopsis

Scope of the Rule	Note No	Form	See Appendix F	Form No	Note No
Appeal	1	2	3	4	5

1
2

Scope of the Rule
Appeal

1 Scope of the Rule

It is only in the event of a failure to comply with any order under Rule 2 or Rule 3 *or in the event of failure to furnish security or to make a sufficient deposit* that the defendant can be committed to custody under this Rule¹ The whole period of detention before and after decree should not exceed six months

2 Appeal

An order under this Rule for the arrest of the defendant is appealable under S 104, Cl (h)

3 Form—See Appendix F Form No 4

Attachment before Judgment

R. 5. [Ss 483, 484] (1) *Where at any stage of a suit the Court⁹ is satisfied¹¹ by affidavit or otherwise that the defendant, with intent to obstruct or delay¹³ the execution of any decree that may be passed against him,—*

Where defendant may be called upon to furnish security for protection of property

Order 38 Rule 4—Note 1

- 1 (15 0) 13 Suth W R 9 5 (7 J)
 (1974) 1974 Rang 361 (361) 2 R 10 4
 (1953) 11 Com 421 (436)

decree that may be passed against him¹ It follows that the Rule applies only where the defendant is *about* to dispose of, or remove from the local limits of the jurisdiction of the Court, his properties, and not to cases where he has *already* disposed of them² It is also necessary, before the Rule can be applied, to show that the defendant has acted, or is about to act with the intent to obstruct or delay the execution of any decree that may be passed against him³

The Rule applies, in terms, to *suits* An application to enforce an award under paragraph 20 of the second schedule to the Code, when numbered and registered as a suit, becomes a suit for the purposes of this Order and the Court can pass an order for attachment before judgment under this Rule⁴ It has been held by the High Court of Lahore that this Rule may be applied to proceedings other than suits by virtue of S 141 of the Code, and that therefore a liquidation Court dealing with the proceedings under the Companies Act can make an order under this Rule for attachment before judgment⁵ According to the High Court of Calcutta an attachment before judgment is a matter of *relief* and not of procedure⁶ It would seem to follow from this that S 141 under which the *procedure* provided in the Code in regard to suits should be followed in other proceedings also, will not enable the Court to apply this Rule to such proceedings

An application under this Rule should specify the property to be attached and the estimated value thereof, an application generally for security being taken for the satisfaction of any decree that may be passed, without specifying any property is not one falling within the scope of the Rule⁷ In the undermentioned case⁸ where an application for injunction was made to restrain the defendant from withdrawing certain amounts standing to his credit, it was held that the order issued thereon really amounted to an attachment before judgment

The Court can pass orders under this Rule even if the trial of the suit has been stayed under S 10 of the Code (See Note 12 to S 10, *ante*) As to whether the Court has power in cases not covered by this Rule, to pass orders for attachment before judgment, see Note 2 to S 94

The provisions of the Code relating to attachment before judgment apply to all proceedings referred to in S 265 (3) of the Chota Nagpur Tenancy Act (VI of 1908) and in S 16 of the Bengal Rent Act (VI of 1862)

3 Mortgage suits

The provisions of this Rule are not inapplicable to mortgage suits Where there is a reasonable probability of the mortgaged property being insufficient to discharge the mortgage debt and of the mortgagee being entitled to get a personal decree in his favour for the balance, properties of the defendant other than those covered by the mortgage can be attached before judgment under this Rule, if the requirements of the Rule are satisfied¹ The Courts should, however, act with extreme caution in such cases²

4 Divorce proceedings

It has been held by the High Court of Calcutta that an attachment before
Order 38 Rule 5—Note 2

1 (1869) 13 Suth W R 9 (11)

[See also (1899) 26 Cal 531 (538)]

2 (1923) 1923 Lah 772 (772 773)

3 See Note 12, below

4 (1927) 1927 Bom 259 (260)

(1933) 1933 All 131 (192) 55 All 179 Application for final decree pending—Application under this Rule is maintainable

Note 3

1 (1931) 1931 Bom 329 (329)

(1934) 16 All 156 (156)

5. judgment is a matter of *relief*, not of *procedure*, that therefore in divorce cases to which the Divorce Act, 1869 is applicable the Court is to be guided by S 7 of that Act and that it cannot pass an order under this Rule for attachment before judgment¹

5 Application for leave to sue in forma pauperis

It has been held in the case cited below that an application to sue in *forma pauperis* does not become a suit until the same has been granted, and that consequently, the Court has no jurisdiction to make an order for attachment before judgment under this Rule¹ The decision does not however, advert to the applicability or otherwise of S 141 in such cases

6 Applicability of O 21 R 63 to attachments under this Rule See Note 6 to O 21 R 63 and Notes to R 8 below

7 Applicability of S 64 to such attachments See Note 4 to S 64 and the cases cited below¹

8 Attachment before judgment if becomes attachment in execution See R 11 and also Note 8 to O 21 R 67

9 Power of Small Cause Court to attach before judgment See R 13 below

10 Power of Insolvency Court to attach properties

Under S 21, Cl (2) of the Provincial Insolvency Act 1920, the Insolvency Court can attach the property of the debtor under circumstances similar to those specified in this Rule¹

11 Where the Court is satisfied

Under S 484 of the old Code the Court could issue an order for attachment before judgment where *after examining the applicant* and making any further investigation which it thought fit it was satisfied that the defendant had removed or was about to remove or dispose of his property with the intention of obstructing or delaying the execution of any decree that may be passed against him This provision has now been omitted and the Court can, without any such examination or investigation act under this Rule if it is satisfied by *affidavit or otherwise* of the existence of the specified circumstances

The jurisdiction of Courts in attaching property before judgment is of an extraordinary nature and should be exercised sparingly and strictly in accordance with the procedure prescribed by the Code¹ The Court should be satisfied on two points namely —

- (1) that the defendant is about to dispose of the whole or part of his property, and
- (2) that the disposal is with the intention of obstructing or delaying the execution of any decree that may be passed against him²

- Note 4**
1 (1910) 7 Ind Cas 792 (793) 37 Cal 613
Note 5
1 (1917) 1917 Cal 802 (803)
Note 7
1 (1865) 1 N W P H C R 172 (186) Private

- absolute right to ask for attachment before judgment—It is in the discretion of the Court
2 (1924) 1924 Pat 312 (314)
(1934) 1934 Cal 694 (695) 61 Cal 814 Plaintiff must show that he has a *prima facie* case before attachment can be given
(1918) 1918 1st 387 (388)

- Note 10**
1 (1914) 1914 All 264 (265) 36 All 63
Note 11
1 (1929) 1929 LAL 376 (378)
(1931) 1931 All 165 (166) Creditor has no

Attachment granted only on ground of difficulty to plaintiff to realize his decree is on insufficient grounds

There must be definite evidence on these points and not merely vague allegations.³ But the Court is not restricted to examine attempts at dissipation made after the commencement of the action: it is open to it to look to the conduct of the parties immediately before the suit and to examine also the surrounding circumstances.⁴

12 Is about to dispose of the whole or any part of his property

Before exercising jurisdiction under this Rule and passing orders for the attachment of properties before judgment the Court should satisfy itself of the practical certainty of the plaintiff's success and of the existence of a grave danger and of a real fear that a dishonest defendant, undoubtedly liable, is making away with the probable fruits of the judgment.¹ For this purpose it is not sufficient to merely allege that the defendant is *likely* to dispose of the property. Nor is it sufficient to state that he is about to dispose it of, without stating the sources of such information.² The word 'property' includes property of every description whether moveable or immovable³ and whether in the possession of the defendant or of some other person on his behalf.⁴ It includes a debt⁵ or a chose in action.⁶ But the debt must be one that is accruing or has accrued.⁷ Joint property belonging to a partnership of which the judgment debtor is a member is not the property of the judgment debtor and cannot be attached before judgment under this Rule.⁸

13 With intent to obstruct or delay

The Court must be satisfied not only that the defendant is about to dispose of his property or to remove it from the jurisdiction of the Court but also that his object in so doing, is to *obstruct or delay* the execution of any decree that may be passed against him.¹ Such an intention cannot be inferred merely from the fact that the defendant has entered into an agreement to sell a portion of his property,² or that he has actually alienated a portion of his properties³ or that he has allowed his properties to be sold in execution of decrees or for arrears of revenue⁴ or that he is running into debts or is attempting to secure debts already incurred by executing a mortgage in respect thereof.⁵ A man is not debarred from dealing

- 3 (1918) 1918 Pat 387 (358)
 (1931) 1931 Cal 634 (637) 61 Cal 814
 (1927) 1927 Bom 2 6 (27r) 46 Bom 431
 (1921) 1921 1 at 312 (314)
 (1919) 1919 Mad 20 (20)
 (See also (1915) 1915 All 277 (278)
 37 All 493)
 (1911) 1911 Suth W R 403 (409) The most per
 on the

- Hyde 183 (Cools)
 (1866) 1 Ind Jur N S 241 (ship)
 [See also (1898) 22 Bom 1797 (1799)]
 (1890) 17 All 82 (90)
 (1925) 1925 Cal 561 (563)
 (1901) 9 Bom L R 463 (463)
 (1925) 1925 Cal 561 (563)
 (1907) 9 Bom L R 540 (541)

Note 13

- 1 (1921) 1921 1 at 312 (314)
 (1883) 13 Cal L Rep 306 (30)
 (1915) 1915 All 977 (778) 37 All 421
 (1912) 10 Ind Cas 604 (601) (Cal)
 (1897) 21 Bom 273 (278)
 (1914) 1914 Pat 387 (388)
 (1926) 1926 Lab 330 (337)
 [See also (1931) 1931 Dig 169 (171)]
 2 (1921) 1921 Bom 69 (69) 45 Bom 1256
 3 (1932) 1932 Cal 790 (790 791)
 (1934) 1934 Cal 694 (697) 61 Cal 814 There
 must be a present intention
 (1927) 1927 Cal 354 (357) Mortgage
 (1906) 1906 Cal 855 (850)
 4 (1932) 1932 Cal 790 (791)
 5 (1927) 1927 Cal 354 (356)

Note 12

- 1 (1926) 1926 All 406 (408) 48 All 10
 (1934) 1934 Cal 694 (697) 61 Cal 814

5 with his property simply because a suit has been filed against him⁶ Nor can an attachment be ordered merely because the defendant has failed to give an undertaking⁷

14 Court may direct security to be furnished for producing the attached property in Court

The expression has reference only to such property as is capable of being produced in Court¹

15 Extent of surety's liability — See Note 9 to S 145 ante

The surety is liable whether the decree is passed on a compromise¹ or on an award² In a recent Bombay case, however, where a decree was passed on the consent of parties allowing the payment of the decree amount in 9 monthly instalments the Court applied the principles of S 133 of the Contract Act and held that the surety was discharged from liability on the ground that the compromise which was subsequently embodied in the decree prejudiced the rights of the surety against the debtor and that such a decree was not in the contemplation of the surety when he gave the bond³ Again where a surety for the production before the Court of property released from attachment before judgment was not put in possession of the property so released it was held that he could not be proceeded against in the event of a decree being passed⁴

But a mere notice given by the surety to the effect that he intends not to be surety any longer will not enable him to withdraw from the guarantee at any time⁵ Nor will the death of the defendant operate to discharge him⁶ It has been seen in Note 9 to S 145 that the dismissal of a suit will put an end to the liability of the surety But if the dismissal is one for *default* and the suit is immediately restored the surety will remain liable under the bond⁷

16 Whether the Court can extend time for furnishing security

The Court may under its general powers extend the time for furnishing the security directed to be given under this Rule¹

17 Property situated outside jurisdiction

As has been seen in Note 7 to S 136 *ante* there was a conflict of decisions under the old Code as to whether a Court could attach before judgment property situate outside its jurisdiction¹ but in view of the omission in the present section of the words 'within the jurisdiction of the Court, the Court can now order the attachment of properties whether situated within or without its jurisdiction² though in the latter case the proper procedure for attachment is to transmit the order to the Court in whose jurisdiction the property is situate³

But a Court cannot order the attachment of properties outside British India⁴

6 (1921) 1921 Bom 69 (6J) 45 Bom 1286

7 (1923) 1923 Pat 172 (173)

Note 14

1 (1895) 17 All 82 (85)

Note 15

2 (1911) 12 All 111 (12 14)

Note 16

1 (1923) 1923 Cal 639 (611) 50 Cal 214

Note 17

1 (1871) 9 Bom 11 C R 29 (34 35) (No)

(1878) 1 Cal L Rep 336 (338) (No)

(1872) 8 Beng L R 335 (337) (No)

(1907) 1907 U B R Civ Pro 13 (No)

(1905 06) 3 L B R 255 (256) (No)

[See also the cases cited in foot notes (1) and (2) of Note 7 to S 136]

2 (1926) 1926 Lah 330 (331)

(1911) 10 Ind Cas 74 (95) (L B)

(1923) 1923 Lah 376 (378)

(1931) 1931 Rang 279 (280) 9 Rang 561

[But see (1914) 1914 U B 17 (18) 2 U B R 16]

(1918) 1918 Cal 911 (912)

3 (1926) 1926 Bom 273 (278)

[See also (1669) 6 Bom H C R 170 (173)]

4 (1931) 1931 Lah 723 (724)

(192) 1925 Mad 1100 (1101)

18 Effect of attachment

See Note 5 to S 64 and Note 11 to O 21, R 54. An attachment of property involves the attachment of the profits of that property, but the creditor does not thereby become entitled to such profits. The debtor who collects such profits cannot be called upon to account for the profits received by him.¹ An attachment of a debt, does not prevent the creditor from *suing* for the debt.² See also Note 16 to O 21, R 46. An attachment before judgment without complying with the provisions of R 5 is *ultra vires* and does not come in the way of an alienation pending such attachment.³

19 Money deposited into Court in pursuance of the attachment, if liable to rateable distribution

Where money and moveables are attached before judgment by several creditors in various suits and they are realized by Court before any of them has obtained a decree, they should be held to the credit of all the suits and distributed rateably among all the creditors who have obtained decrees, before any of the others apply for payment.¹ Attachment before judgment does not give any priority over another who attaches in execution and may be defeated by a decree holder who attaches in execution and applies for payment.² Money paid by a surety after the decree holder takes out execution is also liable to rateable distribution.³ (See also Notes to O 21 R 52 and Note 4 to S 73.) Where however, property attached before judgment is released on the defendant giving security of some of the items attached the plaintiff on obtaining the decree is entitled to a preferential right and can execute against the security.⁴

20 Vesting order in insolvency how affects attachment before judgment

Where the property of the defendant is attached before judgment and subsequently the defendant becomes insolvent, the attachment will not give any priority to the plaintiff over the Official Receiver or Official Assignee in respect of such properties.¹ If the defendant pays money into Court as security for raising the attachment and subsequently becomes insolvent, the plaintiff will not get any charge over the money as against the Official Assignee.² (See also Notes 10 and 14 to S 64 and the case noted below.³)

21 Right of survivorship if defeated by attachment

There is a conflict of opinion as to the effect of attachment before judgment on the right of survivorship among members of a joint Hindu family. According to the High Courts of Bombay and Patna where the judgment debtor dies after in attachment before judgment but before it is converted into an attachment in execution the right of survivorship would prevail over the attachment.¹ The High Court of Madras has dissented from the said view and has held that as soon as a decree is passed in the suit the attachment before judgment would operate so as to defeat the right of survivorship and that it is not necessary that any steps need

Note 18

- 1 (1869) 12 Suth W R 391 (902)
- 2 (1892) 14 All 162 (168)
- (1895) 17 All 193 (211) 22 Ind L J 91 (I C)
- (1918) 1918 Cal 631 (632)
- 3 (1922) 1922 Nag 233 (239)

Note 19

- 1 (1885) 12 Bom 400 (106 407)
- 3 (1922) 1922 Cal 19 (20)

C P C 315 & 316

4 (1920) 1920 Mad 409 (410)**Note 20**

- 1 (1866) 1 Ind Jur N S 925 (779)
- (1884) 1333 Cal 675 (676) (Obiter)
- (1884) 2 Bom H C R 146 (159 160)
- (1930) 1930 Ind 127 (1-5)
- 2 (1917) 1917 Mad 443 (745) 39 Mad 903
- (1916) 1916 Cal 531 (532)
- 3 (1910) 14 Suth W R 33 (30) (F B) Attachment in execution previous to vesting order under Code of 1859—Vesting order did not prevail over the attachment

Note 21

- 1 (1914) 1914 Bom 250 (257) 39 Bom 105

5 be taken for converting the attachment into one in execution² Where the judgment debtor dies *before* decree the attachment before judgment will not have the effect of defeating the right of survivorship³ See also Note 10 to S 64, *ante*

22 Liability for wrongful attachment

The general principle is that it is not an actionable wrong to institute Civil Proceedings But proceedings taken for the arrest of the defendant or for the attachment of his property form an exception to the general rule and a suit is maintainable for damages for wrongful arrest or attachment¹ In such a suit the plaintiff must show that the defendant was actuated by *malice*, that the proceedings were *without reasonable and probable cause* and that damages have been sustained thereby² It should also be shown that the attachment was withdrawn in plaintiff's favour^{3a} General and special damages may be awarded according to the circumstances of the case³

The cause of action for the suit is the date of the wrongful seizure and not the date when the seizure is declared wrongful⁴

See also Note 20 to S 9 Note 4 to S 62, and S 95 and also the under mentioned case⁵

23 Conditional attachment

'Conditional attachment' means an immediate attachment of a provisional kind conditioned to become plenary if security should not be furnished or cause shown according to the terms of the order¹ The power given by O 38 R 5 to make an alternative order directing the defendant within a specified time to furnish security or to appear and show cause carries with it as an incident the power to confirm the order that security be furnished² A conditional order of attachment cannot be made without at the same time making an order directing the defendant to furnish security or to show cause why he should not furnish security without such an order the order of attachment will be invalid³ A conditional order of attachment pending the disposal of an application for the appointment of a guardian cannot be said to be invalid merely because the guardian proposed subsequently comes and states that he is unwilling to act⁴ When after a conditional order is passed under this Rule the suit is transferred to another Court the latter Court can pass further necessary orders in the matter⁵

A conditional order has effect only till the defendant shows cause or furnishes security⁶

24 Appeal

No appeal is provided for against orders under this Rule in O 43 R 1 An order made under the provisions of O 38, R 5 is not a Judgment within the meaning of the Letters Patent and is not appealable as such under the Letters Patent¹

(1921) 1924 Pat 465 (467) 3 Pat 250

2 (1926) 1926 Wad 72 (77)

3 (1914) 1914 Wad 118 (118)

3 (1931) 1931 Wad W N 1015 (1016) 1931

(1934) 1934 All 165 (167) No notice of application to debtor-defendant—Defendant not called upon to furnish security—Attachment *in ultra vires* and plaintiff cannot claim benefit

Note 22

1 (1895) 1895 Pun Re No 86 page 407

2 See cases cited in foot note (1) to Note 13

G. (1914) 1914 All 511 (511)

Note 24

1 (1925) 1925 Rang 267 (269) 3 Rang 307

25 Forms

For form of attachment before judgment with order to call for security see Appendix 1, Form 5. Where, on an application under this Rule before Judgment, the Court instead of issuing a notice in form No 5 Appendix F, issues a notice to show cause in the general form, the provisions of this Rule are not complied with and its action amounts to an irregularity.¹

For form of security see Appendix F Form 6

R. 6. [S 485] (1) Where the defendant fails to show cause

Attachment where cause not shown or security not furnished

why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

[1877—S 485; 1859—S 84]

Synopsis

	Note No		Note No
Scope of the Rule	1	Form—see Appendix F Form No 7	4
Property specified—See Notes 1 and 17 to R 5, above	2	Enforcement of security bond given under this Rule	5
Appeal	3		

Other Topics

Effect of Attachment—See R 5 Note 18

1 Scope of the Rule

A conditional order of attachment passed under R 5 above has effect only until the defendant furnishes security or appears to show cause.¹ An unconditional order of attachment under this Rule can be passed only if the defendant fails to show cause why he should not furnish security or on his failure to furnish the security required.² The question whether there has been a failure to do so is one that must be judicially determined before drawing up the writ of attachment.³

Where a conditional order of attachment before judgment has been issued under Rule 5 and it is not necessary to issue or serve a fresh warrant of attachment after the conditional order has been made absolute.⁴

Where, in order to prevent an attachment, security is furnished the Court has not power under this Rule to

(1867) 7 Suth W R 508 (508)
(1898) 1898 All W N 18 (19)

Note 25

1 (1934) 1934 All 456 (457)

Order 38, Rule 6—Note 1

1 (1914) 1914 All 511 (511)

(1914) 1914 All 511 (511)

3 (1927) 1927 Cal 304 (355)

3a (1934) 1934 Cal 251 (252)

5, the security should not be furnished ⁴

2 Property specified—See Notes 1 and 17 to Rule 5 above

3 Appeal

This Rule contemplates orders of two kinds—

- 1 An unconditional order directing attachment under Cl 1 on the defendant's failure to furnish security or to show cause against the order for security, and
- 2 An order withdrawing a conditional attachment made under R 5 on the defendant furnishing security or showing cause

Both these orders are appealable under O 43, R 1 (q)¹ but an order directing security to be furnished is not appealable². Similarly where on an application for attachment under R 5 the Court issued notice to the defendant without ordering any conditional attachment and on the defendant's showing cause, in answer to the notice the Court dismissed the application, it was held that the order of dismissal was not one under Cl 2 of this Rule and is therefore not appealable³. But where the defendant appears in answer to the notice and gives an undertaking not to alienate certain properties and the petition is thereupon closed, it has been held by the High Court of Madras that there is an order under this Rule from which an appeal lies⁴.

An appeal against an order directing attachment before judgment is not restricted to the grounds mentioned in Rule 5 *ante* and this Rule. Thus the question whether a certain property can be attached having regard to the provisions of S 60 *ante*, can be raised in the appeal⁵. An order passed under this Rule is a discretionary order and therefore, an appellate Court ought not to interfere with the exercise of the discretion by the first Court, unless it is satisfied that it acted on wrong principles. The mere fact that the appellate Court might have taken a different view is not a sufficient ground for interference⁶.

An appeal against an order of attachment before judgment under this Rule does not become infructuous merely because of a decree having been passed in favour of the plaintiff.

4 Form—See App F Form No 7

5 Enforcement of security bond given under this Rule

A security bond executed by a defendant under this Rule, for the purpose of removing the attachment before judgment can be enforced in execution. A suit under S 67 of the Transfer of Property Act is not necessary to enforce it¹.

4 (18-0-81) 5 Bom 643 (644 646)

Note 3

1 (1905) 1925 Rang 767 (260) 3 Rang 307

(1870) 21 All 231 (293)

(1907) 1912 All 209 (270) Withdrawal of attachment

(1907) 21 Bom 273 (276) Order of attachment

(1913) 1923 Cal 639 (640) 50 Cal 215 (Do)

[See also (1927) 1927 Cal 354 (356)]

Order for security and order for attachment combined—Combined order

is not always proper—If combined order leads to doubt as to competence of appeal

competence of appeal depends on doubt goes to appellate

1 3) 1923 Lah 445 (445) An order for attachment before judgment which is

unconditional must be deemed to be an order under O 33 R 6 of the Civil Procedure Code even though it is stated to be passed under R

2 (1923) 1923 Cal 639 (640) 50 Cal 215 (1931) 1934 Lah 594 (594) But order direct

3

4 (1923) 1923 Cal 639 (640) 50 Cal 215 (Do)

5 (1933) 1933 Cal 757 (758) 60 Cal 131

6 (1934) 1934 Cal 634 (637) 61 Cal 814

7 (1933) 1933 Cal 77 (77) 60 Cal 1351

Note 5

1 (1931) 1934 Cal 64 (67) 60 Cal 1294

R. 7. [S 486] *Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree*
 [1877—S 486; 1859—S 85]

Mode of making
attachment

Synopsis

Mode of making attachment

Note No
1

Other Topics

Attachment before judgment if becomes one in execution See R 5 Note 8

1 Mode of making attachment

This Rule provides that the attachment before judgment shall be made in the manner provided for the attachment of property in execution of a decree i.e., in the manner provided in O 21^{1a}

Thus an attachment before judgment of immoveable property must be effected in the manner provided by O 21 R 34 by a *prohibitory* order. Where no such order is passed or published there is no legal attachment¹. Similarly an attachment before judgment of a debt must be made in the manner prescribed by O 21 R 46 and as in cases under that Rule the Court cannot enquire into the truth or genuineness of the debt². See also Note 7 to O 21 R 46.

Where there is no positive evidence that the attachment was not effected in accordance with the law the Court should give effect to the presumption regarding the regularity of official acts³. See S 114 of the Evidence Act Note 3 to S 64 and Note 5 to O 21 R 34.

An attachment ordered before judgment cannot be treated as a nullity merely because it is not *completed* till after judgment⁴.

R. 8. [S 487] *Where any claim is preferred to property attached before judgment such claim shall be hereinbefore proclaimed to property decreed for the payment of money*

Investigation of
claim to property
attached before
judgment

[1877—S 487 1859—S 86 See O 21, R 56]

Synopsis

Investigation of claims to property
attached before judgment

Note No
1

Revision

Note No
2

1 Investigation of claims to property attached before judgment—See also Note 6 to O 21 R 63

The procedure to be followed in the investigation of claims under this Rule is the same as that provided

Order 38 Rule 7—Note

1a [See also (1931) 1934 Cal 251 (9)]

1 (192) 1927 Cal 685 (880)

8. to property attached in *execution* of a decree¹ Thus the claimant to a property attached before judgment must show that, at the date of attachment he had some interest in or was possessed of the property attached^{1a} If it is not possible to decide the question without going into the question of *title* the Court can go into that question also² Order passed on claims under this Rule is governed by O 21 R 63 of the Code³

The Official Assignee of the property of a defendant who has become insolvent⁴ or the assignee of a decree attached before judgment⁵ can prefer a claim under this Rule

The omission to object to the validity of the attachment before judgment at the time of the application for such attachment is no bar to such objection being taken when an application is made for execution of the decree in the suit⁶

As to the effect of the dismissal of the suit on the attachment before judgment see Note 9 to S 64 *ante* and Notes to R 9 *infra*

See also the undermentioned case⁷

2. Revision

An order refusing to release property attached before judgment is not reversible inasmuch as another remedy by suit is open¹

9. **R. 9.** [S 488] Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed

[1877—S 488, 1859—S 87]

Synopsis

Scope of the Rule Note No 1

Other Topics

Reversal of attachment See Note 1 Pt (1)

1 Scope of the Rule

Sub Rule (2) of R 6 refers to the withdrawal of a *conditional* attachment made under R 5 while this Rule refers to the withdrawal of an *unconditional* attachment effected under R 6, and provides that the Court shall order such attachment to be withdrawn where

(a) the defendant furnishes the security required together with security for the costs of attachment or

[See also (1914) 1914 All 204 (260)
36 All 60 Attachment of properties of insolvent—Investigation should be as provided by the Code]

1a (1900) 1900 Cal 162 (167)

See also Note 6 to O 21 P 53

(1929) 1929 J 1 at 747 (748)

(1907) 1907 Sind 114 (115)

See also Note 20 to O 21 R 63

King 213 (200) 9 Rang 661
All 275 (77) 38 All 515
n 403 (401)

5 1907 24 Cis 938 (931) 33 Ind 61

6 (1911) 10 Ind Cis 505 (50) 34 C 1444

7 (1933) 1333 All 481 (481) Attachment before judgment of debt is not injunction nor objection to such attachment that debt did not exist one under O 38 R 4

Note 2

1 (1933) 15 All 400 (401)

Other Topics

Attachment before judgment and right of survivorship in Hindu law See Note 21 to R 5

1 Rights of third persons not affected by attachment before judgment

An attachment before judgment does not affect the rights of persons not parties to the suit. Thus a stranger to whom the property has been transferred before attachment¹ or a receiver of the property who is not a party to the suit² is not affected by the attachment. Where an agreement for sale has been entered into in respect of a property before the attachment thereof the right of the purchaser to have the conveyance executed is not affected by the attachment.³ A puisne mortgagee has a charge over the surplus sale proceeds in Court after the property was sold at the instance of the prior mortgagee. He is not affected by an attachment before judgment effected subsequent to the mortgage.⁴

As to the effect of attachment on the right of survivorship in a joint Hindu family see Note 21 to R 5

2 Other decree holders' right to execute their decree not affected

It has been seen in Note 5 to S 64 and Note 11 to O 31 R 54 that an attachment does not confer any title charge lien or priority in the property in favour of the person attaching it.^{1a} It will not therefore prevent the property from being attached and sold in execution of any other decree against the same judgment debtor.¹ Where A attaches before judgment money deposited in Court to satisfy B's decree he does not thereby get any right or title to the money and cannot apply to the Court holding the money for payment. He must apply for execution of his decree and for transfer of the money to his own suit.²

3 Effect of adjudication on attachment before judgment See Note 20 to Rule 5 and Note 14 to S 64 ante

R 11 [S 490] Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re attachment of the property

Property attached before judgment not to be re attached in execution of decree

[1877—S 490]

Order 38 Rule 10—Note 1

- 1 (1928) 19 S Lom 545 (546)
(1931) 11 J Rang 49 (50) S Rang 494
Mortg Co
- 2 (1929) 1329 Bom 29 (2 0)
- 3 (1924) 19 S L 119 (200)
(1916) 1916 Cal 92 (92b)
See also Note 15 to S 64 for fuller discussion
- 4 (1917) 1917 M D GJ2 (GJ2)

Note 2

- 1a (1931) 1931 Lat 413 (417) 13 Lat 30
Attachment before judgment does not create any title or interest in property to attaching creditor — Absent by such person consenting to sale of property does not

- (1916) 1916 Cal 371 (3 2)
- (1906) 33 Cal 639 (613)
- (16 0 71) 6 M D 11 C R 105 (180)
- (1921) 1921 Lat 409 (409)
- (1906) 1906 Rang 60 (8)

CO.

Under the Code of 1853 the creditor who first attached was entitled to priority see Note 2 to S 43 and the following cases

- (1895) 1ourke O C 260
- (1878) 1878 O C 146
- (1866) 1 Ind Jur NS 333
- (1855) 1ourke O C 32
- (18 0) 7 Lom 11 C R (O C) 183 (185)
- 2 (1926) 1926 Mad 1101 (1105)

Synopsis.

	Note No		Note No
Legislative changes	1	attachment	3
Scope of the Rule	2	Objection that property is not attach-	
Re-attachment, if operates as waiver of		able can be raised after decree	4

1 Legislative changes

The words "upon an application for the execution of such decree to apply for re attachment of the property" have been substituted for the words "to re attach property in execution of such decree". The words "upon an application" make it clear that after decree the plaintiff must apply like any other execution creditor.

2 Scope of the Rule

Where an attachment before judgment has been made, the decree passed in the suit does not determine the attachment. It, therefore, continues to remain in force in the absence of a specific order of the Court raising it.¹ Upon an application for execution of the decree, it is not necessary to re-attach the properties.²

But as has been seen in Note 10 to S 73 an attachment before judgment confers no right on the party who obtains the attachment, and he will not thereby become entitled to get rateable distribution under S 73 unless like other decree holders, he applies for execution after getting his decree.³

3 Re-attachment if operates as waiver of attachment

If an attachment is made before judgment it does not terminate with the decree unless there is proof of an intention on the part of the plaintiff to abandon it. The mere fact that the properties were re attached after judgment is no proof of such abandonment.¹

4 Objection that property is not attachable can be raised after decree

When attachment before judgment is asked for the defendant is not bound to take exception to the validity of the attachment on the ground the property is inalienable. He could take such objection when an application is made for execution of the decree passed in the suit.¹

R. 12. [New] *Nothing in this Order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce.*

Agricultural produce not attachable before judgment

Order 38 Rule 11—Note 2.

- 1 (1926) 128 Com 444 (446)
(1929) 153 Cal 5 (5) 60 Cal 1351
(1925) 1925 Mad 1041 (1043)
(1919) 1515 1 at 454 (463)
(1839) 26 Cal 531 (534)
- 2 (1929) 1929 Com 455 (455)
(1869) 1 N W P H C R 172 (186)
(1929) 1929 Com 321 (323) 53 Com 543
(1928) 1928 Com 545 (547)
(1888) 12 Com 400 (405)
(1927) 1927 Cal 240 (242)
(1906) 33 Cal 629 (643)
(1902) 1 Cal L Jour 97 (100) 29 Cal 773
(1910) 7 Ind Cas 856 (857) 34 Mad 25
(1907) 17 Mad L J 480 (489)
(1871 74) 7 Mad II C R 347 (348)
(1909) 3 Ind Cas 31 (39) 31 All 527
(1925) 135 Mad 49 (49)
(1921) 1921 Mad 163 (167) 44 Mad 902

- (1921) 1921 Pat 140 (141) 6 Pat L Jour 332
(1924) 1924 Mad 210 (211) 47 Mad 176

The following cases are no longer law

- (1869) 4 Leng L R 63 (64) (F 1)
(1870) 2 N W P H C R 365 (366)
3 (1915) 1915 All 275 (27) 37 All 578
(1910) 7 Ind Cas 856 (857) 34 Mad 25
(1909) 31 Mad 502 (504)
(1888) 12 Com 400 (405)
(1909) 3 Ind Cas 856 (857) (Cal)
(1906) 43 Cal 639 (643)
(1869) 4 Leng L R 63 (67) (F B)

Note 3

- 1 (1929) 1929 Cal 465 (467) 56 Cal 416
(1915) 1915 Mad 386 (386)
(1912) 16 Ind Cas 567 (567) (Mad)
(1919) 1919 Pat 454 (464)

Note 4

- 1 (1911) 10 Ind Cas 305 (306) 35 Cal 449

13

R. 13. [New] *Nothing in the Order shall be deemed to*
Small Cause Court *empower any Court of Small Causes to make*
of to attach immoveable *an order for the attachment of immoveable pro-*
erty.

Synopsis

Attachment of immoveable property—Small Cause Courts Note No 1

1 Attachment of immoveable property—Small Cause Courts

As has been seen in the Notes to S 7 *ante*, that before Act I of 1926 was passed it had been held that an attachment of immoveable property before judgment could be passed by a Small Cause Court¹ This Rule newly introduced in this Order now makes it clear that such an order cannot now be passed by a Small Cause Court²

It has been held in the undermentioned case³ that Act I of 1926 operates retrospectively and that an order for conditional attachment before judgment made before the Act came into force cannot be confirmed and made absolute after the Act came into force

ORDER XXXIX

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS

Temporary Injunctions

1 Cases in which temporary injunction may be granted

R. 1. [S 492] *Where in any suit it is proved by affidavit or otherwise—*

(a) that any property in dispute in a suit^a is in danger of being wasted, damaged or alienated by any party to the suit,^b or wrongfully sold in execution¹⁰ of a decree, or

(b) that the defendant threatens, or *intends*, to remove or dispose of his property with a view to defraud his creditors the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit *until the disposal of the suit or until further orders*¹⁶

[1877—Ss 492, 503, 504; 1859—S 92 See S 45 of the Supreme Court of Judicature Act, 1925 and R S C, O 50, R 6]

Local Amendments

ALLAHABAD

Delete the word *sale* after the words *damaging alienation*

CALCUTTA

Insert after R 1 as R 1 (1) and add the following as sub rules (2) and (3)

(2) In case of disobedience or of breach of the terms of such temporary injunction or order the Court granting the injunction or making such order may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the Civil Prison for a term not exceeding six months unless in the meantime the Court directs his release

Order 38 R 13—Note 1

See cases cited in foot note (3) to Decree of S 7

1 See (117) 1917 Nag 55 (55) 14 Nag 1 R 1

2 See Note 2 to S 7 *ante*

3 (107) 1924 Mad 11,3 (1173)

(3) The property attached under sub rule (2) may, when the Court considers it not so to direct be sold and out of the proceeds, the Court may award such compensation to the injured party as it finds proper and shall pay the balance if any, to the party entitled thereto.

NAGPUR

In Cl (a) omit the words "or wrongfully sold in execution of a decree."

Omit the word 'sale' and after the words "further orders" insert the following proviso—

Provided that, if it appears to the Court that the property in suit is in danger of being wrongfully sold in execution of a decree, the Court may also by order grant a temporary injunction restraining the Court executing the decree from confirming the sale held in execution of the decree until the disposal of the suit or until further orders.

POUDH

Delete the words "or wrongfully sold in execution of a decree" in Cl (a) and delete the word 'sale' after the words "diminishing alienation" and add the following proviso to the Rule—

Provided that if it appears to the Court that the property in suit is in danger of being wrongfully sold in execution of a decree the Court may also by order grant a temporary injunction restraining the Court executing the decree from confirming the sale held in execution of the decree until the disposal of the suit or until further orders.

RANGOON

In Cl (a) the words "or wrongfully sold in execution of a decree" shall be deleted.

In the last sentence the word 'sale' occurring between the words "alienation" and "removal" shall be deleted.

Synopsis

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Powers of High Court to restrain acts of pub			

1 Legislative changes

In the last paragraph of the Rule the words (or refuse such injunction or other order) which occurred at the end of the old section have been omitted and the words until disposal of the suit or until further orders have been newly added

2 Injunctions temporary and perpetual

An injunction is a judicial process whereby a party is required to do, or to refrain from doing any particular act¹. It is in the nature of a preventive relief granted to a litigant *quia timet* *i. e.*, because he fears future possible injury². Its main purpose is to preserve the subject matter of the suit in *status quo* for the time being³.

Injunctions are of two kinds temporary and perpetual. A perpetual injunction restrains a party for ever from doing the act specified. It is regulated by Ss 54 to 57 of the Specific Relief Act I of 1877⁴ and can be granted only by a decree passed after the hearing of the suit on the merits. A temporary injunction, on the other hand, endures only until the disposal of the suit in which it is granted or until the further orders of Court. It is regulated by the provision of O 39 of the Code⁵ and can be granted on an interlocutory application at *any stage* of the suit. Although temporary injunctions are regulated by the Code the general principles governing their grant have been held to be the same as those governing the grant of perpetual injunctions,⁶ though in the undermentioned case⁷, the rule was held to be too broadly stated. An injunction whether temporary or perpetual, compelling a party to do a particular act is called a *mandatory* injunction. In a Bombay case⁸ Beaman J. doubted whether a *mofussil* Court in India had power to issue a temporary injunction in a *mandatory* form. Such a power has, however, been recognised in the undermentioned cases⁹.

3 Scope and principle of the Rule

This Rule lays down the circumstances under which a temporary injunction can be granted¹ and unless those circumstances exist, a Court has no jurisdiction to grant it². But the fact that those circumstances exist does not *compel* the Court to grant it in all cases inasmuch as the Rule only says that in the cases mentioned therein the Court *may* grant an injunction. Thus the granting of an injunction under the Rule is purely within the *discretion* of the Court³. This

Order 39 R 1—Note 2

1 [See also (1923) 1923 Lah 48 (50). An order to a defendant to prepare an inventory and to keep accounts is an order under this Rule]

2 Woolffe's Law of Injunction 3rd Edn, p 15

3 (1922) 67 Ind Cas 742 (743) (Lah). It must not therefore go further and create a totally new state of things

4 (1925) 1925 Cal 233 (235)
[See also (1932) 1932 Cal 542 (543 544)]

5 (1925) 1925 Cal 233 (235).

6 (1911) 6 Bom 26 (279)

(1903) 1903 Lah 203 (205) 14 Lah 330.

8 (1914) 1914 Bom 135 (195)

9 (1914) 1914 Bom 135 (195)
(1926) 1926 Sind 201 (202)

Note 3

1 (1925) 1925 Notes 18 (c) 110 Ind Cas 621 (622) (Nag)

(18 0) 13 Sath W R 60 (50)

[See also (1934) 1934 Mad 199 (200 201) 37 Mad 635 Suit for money as due on settlement of accounts—Application for appointment of receiver—Plaintiff cannot compel defendant by injunction to produce accounts not connected with suit so that he may be in better position to realise his decree debt if decree is obtained in suit]

2 (1900) 33 Cal 203 (218) 32 Ind App 155 (P C)
(1906) 18 Mad L Jour 302 (301)

(1916) 1916 1st 17 (18) 1st L Jour 560
Right to work ship—Injunction to restrain plaintiff from preventing defendants entering and working in certain temples

3. (1925) 1925 Sind 317 (319)
(1931) 1931 Cal 64 (67) 61 Cal 814.

the R. of Act are not applicable to temporary injunctions under the R.

7 (1900) 6 Mad 169 (17) Suit for breach of contract

discretion, however, should, like other cases of discretion vested in Courts be exercised in accordance with reason and on sound judicial principles ⁴

What then are the principles which govern the exercise of the discretion conferred by this Rule? They are set out in the undermentioned cases⁵ and are to the effect that a person who seeks a temporary injunction must satisfy the Court —

Firstly that there is a serious question to be tried in the suit and that on the facts before the Court there is a probability of his being entitled to the relief asked for by him

Secondly that the Court's interference is necessary to protect him from that species of injury which the Court calls irreparable before his legal right can be established on trial, and

Thirdly that the comparative mischief or inconvenience which is likely to issue from withholding the injunction will be greater than that which is likely to arise from granting it

The first of the above conditions is what is generally termed a *prima facie* case. In other words the *prima facie* existence of a right and its infringement are the first conditions for the grant of a temporary injunction ⁶. But the existence

⁴ (1903) 26 Mad 168 (174)
(1922) 1922 Lah 356 (1930)
(1933) 1933 All 56 (40)

[See also (1933) 1933 Lah 203 (205)
208] 14 Lah 330 That suit would become infructuous if injunction is not given is no reason in law]

⁵ (1929) 1929 Sind 182 (190)

(1930) 1930 Sind 257 (235)

⁶ (1923) 1923 Pat 209 (211)

(1933) 1933 Lah 621 (623)

(1933) 1933 Sind 214 (216) Demolition of wall likely to endanger plaintiff's building — Temporary injunction should be granted

(1933) 1933 Sind 311 (312 313) Plaintiff showing *prima facie* case — Temporary injunction can be granted

(1935) 7 All 550 (553)

(1904) 1 All LJ 527 (528) Court can put the applicant on terms to abide by the order

(1875 77) 1 Bom 550 (554) Suit in respect

of a tank
(1923) 1923 Lah 227 (228)
(1923) 1923 Lah 239 (241)

(1894) 27 Ch D 497 (506) *Leeson v Dick-Follett* 118 Ind Cas 394 (Cal) *Referred to* 7 Bom LR 319 and 17 Cal W N 963 *Intel* 120 16 Ind Cas 359 (361) (All)

(1925) 1925 Pat 337 (338) On an application for a temporary injunction to restrain a sale in execution of a decree pending a suit the applicant must show a *prima facie* case

(1931) (1931) Nag 101 (107) In a suit by the sons for partition and declaration that the debts incurred by the father were illegal and immoral and so not binding where the sons applied for a temporary injunction to stop the sale threatened by some of the creditors the chief ground for granting or refusing an injunction in such a case was held to be whether the plaintiffs have or have not a *bona fide* claim

(1922) 1922 Pat 34 (36) 1 Pat 356 Suit on basis of compromise decree not binding on minors — Compromise apparently beneficial to minor — Injunction to restrain the decree from being executed cannot be granted

(1911) 9 Ind Cas 227 (228) (Cal) Suit by minor to impeach a decree on ground of fraud — Application for injunction to restrain execution pending suit — Held that the *bona fides* of the suit should be looked into before granting the injunction
(But see (1925) 1925 Mad 896 (896) Order granting injunction without

ment of a tank

(1912) 17 Ind Cas 219 (220) (Mad).

(1921) 1921 Pat 526 (527)

(1926) 1926 Pat 318 (319)

(1925) 1925 Sind 347 (348)

Civil Procedure Code has no application when the defendant is in pos-

1. of a *prima facie* case is not by itself sufficient. The applicant should further satisfy the second condition by showing that *irreparable injury* will accrue to him if the injunction is not granted⁷ and that there is no other remedy open to him by which he could protect himself from the consequences of the apprehended injury.⁸ Irreparable injury however does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a *material* one *i.e.*, one that cannot be adequately compensated for in damages.⁹ The third condition is what is called the principle of the "balance of convenience."¹ In applying this principle, the Court should weigh the amount of substantial mischief that is likely to be done to the applicant if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted.¹⁰ If on such a consideration, the Court thinks that pending the determination of the suit, the subject-matter should be maintained

session and the plaintiff out of possession and a Court will be acting without jurisdiction if it grants an injunction in favour of plaintiff out of possession of the property in dispute.

can be granted even in such a case where the threatened injury will be irreparable.

(1112) 16 Ind Cas 359 (360) (Cal). Pending a suit for the specific performance of an agreement to grant a lease of certain property to the plaintiff the Court should grant a temporary injunction to restrain the defendant from granting the lease of the same property to any other person during the pendency of the litigation.

(1120) 1920 Cal 510 (511). A temporary injunction will not be granted to a plaintiff restraining defendants from selling property to a third person during the pendency of a suit for specific performance of contract for sale where permission necessary to sell the property was obtained owing to certain facts not being brought to the notice of the Court granting it.

(1920) 1926 Lah 553 (550). The rule that before the issue of a temporary injunction the Court must satisfy itself that the plaintiff has a *prima facie* case does not mean that the Court should examine the merits of the case closely and come to a conclusion that the plaintiff has a case in which he is likely to succeed, but only has to see that on the face of it the person applying for injunction has a case which needs consideration and which is not bound to fail by virtue of some apparent defects.

(1123) 1923 Lah 47 (48). No injunction should be granted where its effect would be to virtually decide the suit for plaintiff.

(1127) 1932 Sind 51 (56) 26 Sind L R 51 Trade mark.

(1932) 1932 Bom 166 (167) 56 Bom 251. Suit for declaration that a Bill is *ultra vires* and to restrain the President of the Legislative Assembly from proceeding with the Bill—A Bill has no effect until passed as an Act and the declaration sought for not likely to be granted in suit—Act complained of is no legal wrong against plaintiff—Hence no temporary injunction.

(1111) 10 Ind Cas 256 (257) 35 Cal 791.

(1931) 1931 Cal 694 (697) 61 Cal 814.

(1931) 1931 Cal 713 (714). Object of interim injunction is to preserve *status quo*.

(1933) 1933 Lah 252 (253).

(1933) 1933 Lah 445 (443).

(1933) 1933 Lah 621 (623).

(1904) 8 Cal W N 151 (152). Suit in respect of a trademark.

(1920) 1920 Cal 276 (282) 46 Cal 1001.

(1926) 1926 Lah 435 (436).

(1926) 1926 Mad 132 (132).

(1925) 1925 Sind 317 (345).

(1915) 1915 Cal 61 (663).

(1920) 1920 Lah 97 (95).

4 (1920) 1920 Lah 97 (95).

(1920) 1920 Lah 436 (438).

(1921) 1921 Nag 30 (91).

(1925) 1925 Nag 222 (223). If the object of the application for injunction is to avoid having to sue for possession and having to pay Court fees accordingly, injunction will be refused.

J (1920) 1920 Cal 276 (282) 46 Cal 1001.

(1912) 17 Ind Cas 219 (221) (Mad). It does not mean mere annoyance to a class of people.

(1102) 24 All 439 (500). No injunction will be granted against the exercise of a legitimate right merely because it offends the religious feelings of

in *status quo*, an injunction for that purpose should be issued¹¹ It must however be remembered that a temporary injunction should not be granted on the balance of convenience alone without there also being a *prima facie* case in favour of the applicant¹²

Even where all the above conditions are satisfied a temporary injunction may nevertheless be refused for other reasons Thus it can be refused on the ground of delay¹³ For other circumstances justifying such refusal see the under mentioned cases¹⁴

Where the suit itself is one for a perpetual injunction a temporary injunction ought not to be refused where such refusal would defeat the object of the suit¹⁵ In such a case the mere possibility of a perpetual injunction being refused ultimately will be no ground for refusing a temporary injunction¹ Where however there is no chance at all of a perpetual injunction being granted in the suit a temporary injunction during the pendency of the suit may be refused¹⁷

(1931) 1931 Cal 94 (694) 61 Cal 814

(1904) 1 All I J 27 (52)

(1887) 14 Cal 189 (200)

(1897) 1 Cal W N 429 (431)

(1902) 6 Cal W N 308 (310)

(1906) 10 Cal W N 173 (176)

(1910) 5 Ind Ct 171 (15) (Cal)

(1914) 1914 Cal W N 1963 71 Ind Ct 861

(569) 41 Cal 426

(1909) 19 Cal 276 (284 285) 46 Cal 1001

(1906) 1926 Cal 837 (841)

(1928) 1928 Cal 293 (295)

(1922) 1922 Lah 356 (356)

(1903) 26 Mad 169 (175)

(1924) 1924 Pat 526 (527) If the other party has already invested lots of money on the project which is ought to be restrained but he is a man of means who can easily pay any damages that may ultimately

create a totally new state of things

(1927) 1927 Mad 188 (189) *Stat sq o mein*
status at time of suit and not at some time later or to it

1 (192) 1927 Mad 184 (189)

19 (1910) 1916 Cal "S" (783)

(1933) 1933 Lah 703 (205) 14 Lah 330

(1895) 7 All 550 (553)

(1898) 20 All 345 (349)

(1839) 16 Cal 957 (263)

(1920) 1920 Cal "JS" (78)

(1900) 1920 Cal 276 (50 281) 46 Cal 1001

(1933) 1933 Sind 96 (26) 26 Sind L R 330

Improper delay in asking for injunction against infringement of trade mark

S also cases in R 2 N 2 F N 9 below

14 (1903) 29 Bom 70 (57) A mandatory injunction cannot be granted against a trespasser compelling him to come on the land on which he had trespassed to remove an encroachment made thereon by him

(1920) 1925 Sind 317 (318) Courts of equity will not give an order over the execution of which they cannot watch and which they cannot enforce A contract by which one party is required to do numerous and delicate services for the other the performance of which need a particular amount of skill and fidelity is one which cannot be specifically enforced by threats of penalty

(1919) 1919 Mad 240 (240) An injunction cannot be asked for against a person whose employment whatever its exact nature so long as it continued entitled him to the exercise of the rights proposed to be restrained

15 (1915) 1918 Cal 495 (495)

16 (1905) 1925 Lah 678 (6 9)

(1937) 1937 Cal 303 (356) Withdrawal of the relief for permanent injunction as unnecessary cannot preclude the plaintiff from asking for a temporary injunction—Applicant put on terms

17 (1923) 1923 Pat 133 (133)

(1933) 1933 Lah 703 (205) 14 Lah 330

ing the *stat is quo*. It should not

¹¹ (1900) 6 Cal W N 308 (310) ~ ~ ~ ~ ~

injunction were granted and they

1. The power to grant temporary injunctions under O. 39 extends to an appellate Court in regard to appeals pending before it¹⁸ The provisions of O. 39 apply also to proceedings in liquidation¹⁹

Has a Court *inherent jurisdiction* to grant a temporary injunction? It has been held that the inherent jurisdiction of the High Courts, as Courts of Equity, to grant such injunctions independently of the Civil Procedure Code, is beyond all doubt²⁰ (See also Notes under Note No 22, *infra*) As regards other Courts there is a conflict of opinion for which, see Note 2 to S. 94, *ante* and the under-mentioned cases²¹

4 Applicability of the Rule to probate proceedings

It has been held by the High Court of Bombay that the Rule does not apply to probate proceedings on the ground that the provisions of the Probate and Administration Act 1881, indicate the intention of the Legislature that *that Act itself* should be looked to, for the powers necessary for the proper custody of property pending the proceedings instead of leaving the Court to act under the Civil Procedure Code¹ The High Court of Calcutta has held that, assuming that the provisions of O. 39 apply to such cases, there could be no "property in dispute" in such a proceeding and that, therefore, no injunction can be issued under this Rule, though, in proper cases, the Court could act under R. 7, *infra*²

5 'Any property in dispute in a suit'

The Rule contemplates cases where the property in dispute in a suit is in danger of being wasted, damaged, *etc*¹ "Property in dispute in the suit" means only such property as is the *subject-matter* of the suit² For cases of suits for partition of joint estates see the undermentioned cases³

6 In danger of being wasted damaged or alienated by any party to the suit'

An injunction can be granted under this Rule only if there is a real danger of the subject matter of the suit being wasted, or damaged, *etc*, by a party to the suit¹ Where there is no allegation of danger of such waste or

[See also (1932) 1932 Bom 16, (167) 55 Bom 253]

2 (1925) 1925 Lah 629 (629)

(1902) 5 Oudh Cas 65 (65) A claim for mesne profits is not a claim for specific moveable property, but one for damages. In such a suit defendant cannot be restrained by an money

only is

All 123

the sale of a malikana, the Court

21 (1932) 1932 Mad 180 (181)
(1934) 1934 Mad 199 (201)
(1931) 1931 Lah 79 (80) Order refusing temporary injunction to restrain decree holder purchaser from obtaining possession of property—Order is one under S. 151

Note 4

1 (1900) 2 Bom L R 797 (793)

2 (1915) 1915 Cal 563 (567)

Note 5

1

3 (1830) 17 Cal 614 (618)
(1856) 6 Suth W R 115 1 (2)

Note 6.

1 (1870) 13 Suth W R 60 (60)

(1901) 6 Bom L R 121 (121)

(1906) 33 Cal 203 (218). 32 Ind App 193 (P C).

(1895) 19 Bom 269 (271)

(1920) 1920 Cal 276 (283) 46 Cal 1001

(1923) 1923 Lah 227 (224) When there is a real danger of damage or waste to the suit property which is in defen-

damage, the application should be rejected.² But a mere allegation is not enough. There must be proof of actual or reasonably apprehended danger of such waste or damage, before an injunction can be granted.³ The question as to what constitutes sufficient danger of waste or damage will depend upon the facts and circumstances of each case. In order to show that property is in danger of being alienated, some overt act towards the alienation of the properties such for example as negotiations or offers for sale should be alleged and proved.^{3a} For illustrative cases, see the undermentioned cases.⁴

7 Injunctions in respect of judicial proceedings

An injunction can be granted to restrain a party from proceeding with judicial proceedings (other than execution proceedings) pending in the same or in another Court if such injunction is necessary to prevent multiplicity of proceedings and not otherwise.¹ It can be issued even in respect of proceedings pending in a foreign Court if the party to be so restrained resides within the jurisdiction of the Court issuing the injunction.² In Madras however it has been held that such a power exists only in the High Court under its equity jurisdiction and not in the mofussil Courts.³ Speaking generally, a civil Court in the mofussil, cannot issue

an injunction in order for temporary injunction restraining defendant from doing the property in good

not an alienation or waste of property

(1873) 20 Sath W R 11 (11) Property held not to be in danger of being wasted, etc

(1900) 1900 All W N 109 (160) (Do)

(1926) 1926 Cal 604 (605) (Do)

Note 7

1 (1895) 18 Mad 338 (341) Suit to restrain the defendant from executing or proceeding to execute a decree—Specific Relief Act, 1877, S 56 Cl (a)

[But see (1921) 1921 Pat 92 (93) 6 Pat L Jour 268 In this case one subordinate Court issued an order requesting another Court of co ordinate jurisdiction to prevent the Receiver appointed by the latter Court from interfering with the taking of possession of certain properties. Held, the order was without jurisdiction. The ruling can be supported on the principle that an injunction can be directed only to a party and not to a Court and on the ground that the receiver was not party in the suit. *Woodroffe's Law of Injunctions* 4th Edn p 107 Such injunctions can be granted not only in respect of judicial proceedings pending at the time of the institution of the suit in which the injunctions are prayed for, but

(1925) 1925 Pat 111 (112) (Do)

2 (1903) 19 Mad L Jour 302 (304)

(1905) 1905 Oudh 698 (698)

3 (1870) 14 Sath W R 409 (409)

(1902) 5 Oudh C S Co (69)

(1919) 1919 Mad 157 (155)

(1925) 1925 Mad 896 (896) Order without finding of danger of waste is unsustainable

4a (1934) 1934 Cal 694 (696) 61 Cal 814

4 (1970) 13 Sath W R 90 (96) Suit for specific sum of money. Defendant's admission that he intends to invest in trade is sufficient evidence of its being in danger of being alienated

(1934) 1934 All 772 (774) The enjoyment of property by a person entitled to it is not waste

(1937) 1937 Rang 18 (20) 11 Rang 47

(1860) 12 Sath W R 103 (104) Insolvent's money in Court—Court ordering payment to creditors instead of to Official Assignee—Remedy is temporary injunction

(1925) 1925 Lih 628 (628) Danger to estate by extravagant alienation by the life holder apparent

(1854) 10 Cal 225 (231) Nearest reversioner entering into compromise decree with Hindu widow—Suit by remote reversioner to set it aside

(1877) 2 Bom 252 (255, 256) Suit for redemption of English mortgage—Sale of the property by defendant under his power of sale

(1887) 1887 All W N 42 (42)

(1916)

tion for an injunction to restrain the defendant in a suit from prosecuting an application in a foreign Court must be made at a very early stage of the suit

3 (1928) 1928 Mad 491 (491)

1. an injunction restraining proceedings in a criminal Court,⁴ though the High Courts can do so in proper cases⁵ *Vide also* notes under Note Nos 22, 23 and 24

As regards *proceedings in execution* of a decree, it is clear that the High Courts have the power under their equity jurisdiction to restrain a party by a temporary injunction from executing his decree in another Court of even co-ordinate jurisdiction⁶ But the mofussil Courts have no such power unless the case comes within the terms of O 39, Rr 1 and 2 or unless they could act under their *inherent* powers As to whether and where the Court can restrain a party from taking such proceedings under the provisions of O 39, Rr 1 and 2, see Note 3 above and also the undermentioned cases⁷ As to the inherent powers of the Court to grant temporary injunctions, see Note 2 to S 94, *ante*

Courts cannot be too careful as to the mode in which their machinery is used to delay a decree holder in another suit in obtaining the fruits of his decree⁸ Consequently an injunction in respect of a judicial proceeding should not be issued except in strong cases or unless the facts fall within the express provisions of O 39⁹

A *permanent* injunction can, of course, be granted under the provisions of the Specific Relief Act restraining a party from proceeding with the execution of a decree in another Court¹⁰

7a Injunction in respect of elections

A candidate for election to a Local Board has a right to pursue his legal remedies but save in exceptional circumstances, it is an abuse for a candidate to make his pursuit of his remedies in the civil Courts a weapon for dislocating the electoral machinery and stopping an election¹

8 Right to worship

No person is entitled to enforce his religious views upon another, or to restrain that other from doing any lawful act or from making any lawful use of his property, simply because it would not fit in with the religious tenets of that person so long as the right to worship is not interfered with, the owner of a property can do what he likes with it¹ Where, however, such act or user amounts to an actionable wrong, it can be restrained by an injunction²

9 Religious office

An injunction can be granted restraining obstruction to a person's performing his religious duty¹ But no injunction will be granted which would have the

the services of a priest whom

be granted

) 1922 Bom 385 (386) 46 Bom 939

10 (1891) 14 Mad 167 (168)

(1924) 1924 Nag 413 (415) (1931) 14 Mad 425 (431)

Note 7a

1 (1933) 1933 Mad 103 (103)

Note 8

1 (1923) 1923 Pat 209 (211)

2 (1928) 1928 Sind 82 (84) 21 Sind L R 368 Application for injunction—Use

" "

" "

" "

junction

Note 9

1 (1897) 21 Bom 821 (822)

(1893) 11 Mad 420 (422)

5 (1872) 17 Suth W R Cr 46 (46)

(1836) 23 Cal 610 (613 617)

(1904) 31 Cal 858 (862)

6 (1880) 5 Cal 86 (96) On review from 4 Cal 360

7 (1926) 1926 Mad 1126 (1127) Execution in breach of compromise arrived at—R 2 applies.

(1871) 6 Beng L R 571 (574) A obtaining decree against B for partition and possession and, in execution trying to oust C from possession—C can sue, and pray for temporary injunction

⁸ (1875) 10 All 60 (62)

1 (1874) 22 Suth W R 506 (507)

1 (1914) 1914 Bom 148 (149) Suit under O 21 R. 103—Injunction restraining delivery of possession should not

they are unable to recognise, or forbidding them to employ a priest whose ministration they desire²

The trustee of a temple may be restrained by injunction from making unjustifiable changes which would affect the character of the temple³ Similarly where a new seal sought to be used in connection with a religious office had the effect, of extending rights which, according to the old seal, had been limited the use of such seal was held restrainable by injunction⁴

10 'Wrongfully sold in execution of a decree'

The provisions of this Rule will not apply unless the property is in danger of being *wrongfully* sold in execution of a decree *A* obtains a decree against *B* and in execution thereof proceeds to sell properties belonging to *B* *B* thereupon files a suit for a declaration that the *decree* is not binding on him for various reasons He also prays for a temporary injunction under this Rule Does such an application lie? No The reason is that until the decree is set aside it is binding on the parties thereto, and *A* has every right to execute it There is thus no danger of property being *wrongfully* sold in execution of the decree¹ But suppose *A*, in execution of a decree obtained by him against *B*, attaches or otherwise proceeds against properties which belong to *C*, and the latter, thereupon, files a suit for declaration of his rights thereto and prays for a temporary injunction restraining *A* from executing his decree This is a case of properties being *wrongfully* sold in execution of a decree and the application for injunction is maintainable under this Rule² The words "or wrongfully sold in execution of a decree" were deleted from sub rule (1) by the Allahabad High Court by rules framed under S 122 of the Code with the result that an application under this Rule was held not maintainable in Allahabad on the ground that any property is in danger of being wrongfully sold in execution of a decree³ The said words have, however, now been restored See also the Local Amendments for Rangoon, Nagpur and Oudh

- 2 (1878 79) 3 Bom 232 (234)
- (1927) 1927 Mad 1070 (1070)
- 3 (1907) 90 Mad 159 (162 165, 166)
- 4 (1899) 22 Mad 189 (193)

Note 10

- 1 (1926) 1926 Mad 258 (258)
- (1911) 9 Ind Cas 227 (228) (Cal)
- [See also (1914) 1914 Bom 148 (149)
- Plaintiff defeated under O 21 R. 99
- and suing under R 103—Not entitled to injunction against taking of possession]
- [See also (1933) 1933 Sind 118 (119)
- Where a mortgagee or attaching creditor proceeds to sell the right title and interest of his debtor the balance of convenience is in favour of the creditor and no injunction should issue restraining him from effecting such sale during the pendency of a suit to which he is a party and where his claim is being impugned]
- 2. (1922) 1922 Lah 53 (58) Claim suit
- (1914) 1914 Oudh 206 (207) Sons of judgment debtor suing for declaration that property is joint family property and cannot be proceeded against
- (1931) 1931 Notes 18 (d) 90 Cal W N 910
- (1911) Claim suit—The language of

O 39, R 1, C P C is wide enough to cover the case of a sale in execution of a mortgage decree

- (1925) 1925 Cal 233 (235)
- (1896) 23 Cal 351 (356) Claim suit
- (1888) 10 All 80 (83) Claim suit
- (1910) 7 Ind Cas 189 (184) 33 All 70 (Do) 26
- All 311 must be taken to be over ruled
- (1930) 1930 Lah 108 (109) (Do)
- (1870) 5 Beng L R 254n Suit to set aside a mortgage executed to the defendant and to restrain the sale of the mortgaged property in execution of decree obtained by him on the mortgage—A temporary injunction was granted restraining the defendant from selling the property till disposal of the suit
- (1884) 4 All W N 349 (349) (Do)
- (1885) 7 All 550 (553) Suit by son of judgment debtor that property is not saleable

— 28)

Court need not order Petitioner to furnish security to compensate opposite party.]

- 3 (1929) 1929 All 115 (116)

Where a case comes under this Rule an application for injunction is the proper remedy and not an application to the executing Court for stay of execution.⁴

Where the sale has already taken place no injunction will be granted restraining such sale.⁵ But an injunction can be granted even in such a case restraining the *delivery of possession*.⁶

In granting injunctions restraining sales in execution Courts should exercise their discretion cautiously and wisely, and see that the machinery of the Court is not abused for fraudulent purposes.⁷

A Court is not debarred from restraining a party in cases covered by Rr 1 and 2 from executing his decree in another Court merely by reason of the fact that such Court is of a *superior grade* to that of the Court which issues the injunction inasmuch as the latter Court has jurisdiction over the *suit* and to pass orders on all interlocutory applications.⁸

11 Execution of decree of Revenue Court

The High Court of Allahabad has held that the word *decree* does not include the decree of a Revenue Court, and that an injunction cannot be granted restraining the sale in execution of such a decree.¹ Where, however, the decree of a Revenue Court is being executed by a civil Court, the High Court of Calcutta has held that an injunction restraining its execution can be granted under this Rule on the ground that the decree in such a case should be treated as a decree of a civil Court for purposes of execution.²

12 Disposal of property in fraud of creditors

An injunction can be granted to restrain a threatened disposal of property in fraud of creditors whether the property is moveable or immovable.¹ But in either case the threat or intention to remove or dispose of property to defraud creditors must be proved by definite evidence.²

13 Against whom injunction can be granted

An injunction can be issued only against a *party* to the suit and not against either a *Court*¹ or a *stranger* to the suit.²

7 (1911) 9 Ind Cas 227 (228) (Cal)

8 (1829) 23 Cal 351 (355 356)

(1925) 1925 Cal 233 (235)

(See also (1886) 12 Cal 515 (518 519)

Note 11

1 (1894) 16 All 496 (498)

2 (1909) 1 Ind Cas 933 (935) 36 Cal 252

(1912) 15 Ind Cas 614 (615) (Cal)

Note 12

1 (1894) 16 All 186 (187)

2 (1924) 1924 Loh 718 (718)

(1917) 1917 All 137 (140)

(1925) 1925 Oudh 698 (698)

Note 13

1 (1905) 2 All L J 601 (601) But a Court is bound to carry out an order by another Court for injunction against a party

(1896) 23 Cal 351 (356) District Judge bound to postpone execution sale on an injunction by Subordinate Judge

in claim suit

(See also (1886) 12 Cal 515 (518 519)

Second Sub Judge can order stay

of sale to be held by first Sub Judge

—Obiter]

See also the Local Amendments :

Li 1 for Nagpur and Oudh

[See (1937) 1932 Loh 515 (516) In

junction to another Court not to

confirm an execution sale—That

—

(108)

(1896) 2 Cal W N 521 (523) But in a proceeding under the Guardians and Wards Act an injunction can be issued to a person who is not a party

An injunction *can* be granted against persons within the Court's jurisdiction restraining them from doing acts outside jurisdiction though it will not be granted unless the remedy is likely to be an effective one ^{2a}

An injunction will not also be ordinarily granted against a person residing *outside the jurisdiction* of the Court granting it, and against whom the order cannot be enforced *within that Court's jurisdiction* ⁴ Where, however, the order can be so enforced, ⁴ or, where the person has submitted to the jurisdiction of the Court, ⁵ it can be issued against him. No injunction will ordinarily be issued against Government Officers *lona fide* exercising rights or alleged rights in the course of their duty, ⁶ nor against public bodies under similar circumstances, ⁷ unless it would amount to a manifest injury to refuse to do so ⁸

An injunction does not run with the land and cannot, therefore, avail against property in the hands of a purchaser ⁹ But when it has been issued against a defendant it can, if the defendant dies, be enforced against his legal representatives ¹⁰

An injunction can be granted against a co-owner or a co sharer in possession restraining him from using the property in a manner which will change the nature of the property ¹¹ Great caution should, however, be exercised in such cases ¹²

14 Injunctions will be granted only in any suit

Before an injunction can be granted under this Rule —

(i) A suit must, in the first place, be *pending* Thus no injunction can be granted if the suit has not yet been filed or if the suit has been disposed of ¹

(ii) It must be pending on the file of the Court granting the injunction ²

15 Injunction in suit for declaration only

It would appear that a temporary injunction can be granted even in a suit for mere declaration, ¹ but not where the plaintiff, if successful in the suit, will have to bring another suit for enforcing the right which he seeks to keep undisturbed by the injunction ² It is also not proper, in a suit for mere declaration, to grant an injunction staying another suit pending in another Court ³ It was held in the

2a(1932) 1932 Mrd 705 (706)

3 (1923) 1923 Pat 209 (210)

4 (1925) 1925 Pat 337 (339) If he has property within the jurisdiction which can be proceeded against if he disobeys the Court's order, the Court has jurisdiction to pass an order of

11 (1914) 1914 Cal 362 (364) 11 Cal 436 21 Ind Cis 861 (863)

(1915) 1915 Cal 29 (30)

12 (1928) 1928 Cal 293 (294)

Note 14

1 (1894) 21 Cal 561 (566)

(1924) 1924 Oudh 345 (347) A Court cannot grant a temporary injunction in a suit which has been dismissed for default but for the restoration of which an application is pending

(1910) 7 Ind Cas 168 (189) (All) High Court cannot grant injunction after special leave has been granted for appeal to the Privy Council

(1885) 11 Cal 146 (147) Appellate Court can give injunction but not original Court after its decree

2 (1861 66) 2 Bom H C R 98 (100)

Note 15

1 (1926) 1926 Lah 523 (523), 1922 Lah 356

cutting off pipe water connection from the plaintiff's house is maintainable

n 334
must a
retion

undecided
> amend

- 1, undermentioned case⁴ that an injunction should not be granted in a suit for declaration where there was no claim for consequential relief or permanent injunction

16 Duration of temporary injunction

An order of temporary injunction takes effect only from the time when it is communicated to the party¹ It terminates as soon as the suit in which it is granted terminates² even though it may have been stated to be "until further orders"³

17 Effect of temporary injunction

An alienation made contrary to an order of injunction is not, on that account void¹ But the party guilty of the breach will be liable for contempt of Court or damages² (*Vide also* notes under Note No 18, "Breach of injunction", *infra*)

18 Breach of injunction

An injunction although subsequently discharged must be obeyed while it lasts¹ When the injunction is disobeyed, the party guilty of such disobedience can be proceeded against for contempt under the provisions of R 2, Cl 3² The Court which granted the injunction will be the Court competent to punish disobedience³ but it must be set in motion by the aggrieved party and cannot act *suo*

4 (1934) 1934 Cal 694 (696) 61 Cal 814

Note 16

- 1 (1926) 1926 All 457 (458)
(1920) 1920 Nag 12 (13)
(1903) 26 Mad 260 (262) But the facts

gularity but the sale will not be set aside unless the judgment debtor has sustained substantial injury by reason of such irregularity [See also (1925) 1925 Oudh 424 (425)]

2 (1928) 1928 Lah 639 (639)

Note 18

- 1 (1915) 1915 P C 106 (109) (P C)
(1912) 14 Ind Cas 350 (382) (Cal) But unless the Court has jurisdiction over the subject matter of the controversy disobedience of its injunction is not punishable An injunction in matters beyond the jurisdiction of a Court is void and need not be obeyed

as 619

(620)

(1881) 6 Cal 445 (446)

(1889) 12 Mad 356 (365) But a person not named in the pleading cannot be com

- 3 (1887) 7 All W N 297 (297)
(1924) 1924 Mad 178 (179)
(1930) 1930 All 387 (388) The words until further orders do not extend its duration beyond the date of decree

Note 17

- 1 (1887) 9 All 497 (500)
(1889) 1889 Pun Re No 144
(1903) 25 All 431 (433)
(1914) 1914 Lah 356 (357) 25 Ind Cas 150 (181)

and agents in the order an assistant in the firm not named in the order cannot be punished for contempt of Court but for assisting in a contempt of Court

(1887) 9 All 497 (499 500)

(1916) 1916 Mad 340 (341)

(1930) 1930 All 387 (388) Amendment of

- (1920) 1920 Nag 12 (13) A sale held in ignorance of an order by way of injunction staying the sale is an irre

3 (1914)

transferred to another Court.

motu in the matter ⁴

Apart from the provisions of the Code the High Courts have, under authority conferred by Charters of the Supreme Court and continued by their own Letters Patent, power of enforcing obedience of their orders by committing the delinquent for contempt ⁵

19 Injunction to restrain marriage

An injunction may be granted to prevent the marriage of a bride for a second time to another husband ¹. But if the bride is a Mahomedan of age and has ceased to be the wife of her former husband no injunction to restrain the second marriage will be granted either against herself or against her relations ²

An injunction will not be granted to restrain a Hindu woman from marrying her minor daughter to a third party pending a suit for specific performance of a contract to marry ³. But where the father of the bride files a suit for injunction against his wife restraining her from giving away the bride in marriage, a temporary injunction may be granted inasmuch as the father has the predominant right to give his girl in marriage ⁴

20 Appeal

An appeal lies from an order granting as well as from an order refusing a temporary injunction under this Rule ¹. An appeal will also lie if the order *purports* to be made under this Rule even though the Court had no jurisdiction to pass it ^{1a}

It is for the appellant to show in appeals against orders under this Rule that the lower Court acted wrongly in the exercise of its discretion ². The mere fact that the appellate Court might have come to a different conclusion is not enough ³. No second appeal lies from an order under this Rule ⁴. As has been seen in the Notes to Ss 96 and 104 those sections only apply to appeals from Courts of *inferior* jurisdiction to Courts of *superior* jurisdiction and not to appeals within the High Court, *i e.*, from one or more Judges of the High Court to other Judges of the same Court ⁵. No appeal will, therefore, lie under O 43, R 1 from an order of a single Judge of a High Court, refusing to grant a temporary injunction. Nor will an appeal lie under Cl 15 of the Letters Patent against such an order inasmuch as such an order is not a 'judgment' within the meaning of Cl 15 ⁶. See also Note 2 Pt 40, Cl 15 Letters Patent (Calcutta)

⁴ (1903) 20 Mad 494 (495)

⁵ (1855) 7 Bom 1 (4)

(1852) 7 Bom 5 (12)

See Notes post Woodroffe 71 et seq

^{1a}

(1933) 1933 All 86 (86) 1932 All L J 803

[But see (1933) 1933 Lah 73 (74)]

Injunction granted under inherent powers without irreparable injury—No appeal lies but set aside in revision]

[See (1934) 1934 Lah 79 (80) Order of injunction in a case not coming under this Rule but passed under inherent powers is not appealable—Revision however lies]

1a (1900) 23 Mad 517 (521)

2 (1914) 1914 Cal 531 (532)

(1933) 1933 Nag 153 (154) Discretion judicially exercised—Order granting interim injunction should not be dis

—punished under R 2 sub r (3) below]

Note 20

1 (1922) 1922 All 441 (441)

(1933) 1933 Lah 282 (285) It makes no difference that consequent to the order a notice was issued to show

1.

An order directing the furnishing of security or the submission of accounts passed or directing notice to the opposite party on an application for temporary injunction is not an order under O 39, R 1 and is not, therefore, appealable⁷

21 Revision

An order passed without jurisdiction is liable to revision. But no revision will lie on the mere ground of an error of judgment of the lower Court in the exercise of its jurisdiction¹

Where a Court on appeal renews a temporary injunction dissolved by the first Court a revision may lie against it²

22 Power of High Court—General

Apart from the provisions of the Civil Procedure Code, the High Courts have jurisdiction to grant temporary injunctions in suitable cases¹. The order of injunction will however be directed to a party and not to a Court. But in the undermentioned case³ it has been held that when the High Court deals, as *appellate or revisional* authority with a case coming from a mofussil Court, it can only apply the law as would be applied by that mofussil Court and that consequently it can only grant an injunction in such a case in accordance with the provisions of O 39

23 Power to restrain party from proceeding with suit in another Court

Apart from the provisions of the Code, the High Courts have, by virtue of their equity jurisdiction, power to restrain a party before them from proceeding with a suit in another Court¹. Such power extends to restraining a party from proceeding with a suit in a foreign Court but the power in such cases should be exercised with the greatest caution. An order to the said effect cannot, however, prevent the party from proceeding with the suit in the foreign Court but if he

[But see (1934) 1934 Cal 713 (714)
Order of Judge on the original side
refusing interim injunction—appeal
lies]

- 7 (1912) 17 Ind Cas 361 (367) (Cal)
(1898) 12 Mad 186 (187) No orders passed
before notice—Does not amount to
refusal

Note 21

- 1 (1922) 1922 All 441 (441)
(1933) 1933 All 86 (88 90)
[See also (1933) 1933 Lah 73 (74)
Injunction granted under inherent
powers—No irreparable injury—
Compensation by damages possible—
No jurisdiction to grant injunction—
Revision allowed]

- 2 (1915) 1915 Bom 269 (2 0) 40 Bom 86

Note 22

- 1 (1895) 22 Cal 71 (720) High Court has
power to restrain a person who has
not been duly elected from exercising
the functions of a duly elected Com-
missioner
(1932) 1932 Mad 180 (181)
(1907) 34 Cal 97 (99)
(1907) 34 Cal 101 (103)
(1909) 3 Ind Cas 990 (992) 33 Bom 463
(1925) 1925 Lah 242 (243)
(1926) 1926 Mad 1126 (1127)
(1931) 1931 Cal 279 (281) 57 Cal 1280
(1928) 1928 Mad 491 (497)
(1932) 1932 Mad 180 (181) Appeal from *ex*
parte decree—Execution of decree

restrained

- (1937) 1932 Cal 353 (356)
2 (1915) 1915 Bom 146 (148) 39 Bom 604
Judge sitting on the original side
has no power to stay proceedings

405

But the High Court can restrain a
person from proceeding with a suit
outside its jurisdiction only if he is
within the jurisdiction of the High
Court and not merely where he has
property therein

- 3 (1933) 1933 Mad 500 (501) 56 Mad 563
Dissenting from (1937) 1932 Mad 180

Note 23

- (1931) 1931 Lah 65 (66)
[But See (1903) 27 Bom 357 (361)]

granted]

- 2 (1907) 1927 Bom 135 (137, 138)

comes within the jurisdiction of the Court ordering the injunction he can be committed for contempt³

24 Power to stay proceedings pending in subordinate Court

If sufficient grounds are made out a High Court has also power to stay proceedings in a Court subordinate to it,¹ but there is no such power if the latter Court is not so subordinate to it²

25 Form of temporary injunctions — See App Form No 6

26 Damages for obtaining injunction without reasonable and probable cause — See S 95

The question of reasonable or probable cause is one of fact¹

R. 2. [S 493] (1) In any suit for restraining the defendant

Injunction to restrain repetition or continuance of breach

from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security or otherwise, as the Court thinks fit

(3) In case of disobedience, or of breach of any such terms the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release

(4) No attachment under this Rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto

[1877—Ss 493, 496, 1859—S 93, R S C, O 50 R 12]

3 (1921) 1921 Bom 128 (12J) 45 Bom 440

Note 24

1 (1884) 1884 All W N 352 (353)

(1902) 26 Bom 785 (790) The High Court has power to direct that criminal proceedings in the Court of a Magistrate should be stayed until the disposal of a Civil Suit in which the question at issue in the criminal proceedings shall have been decided

(1892) 16 Bom 22 (23) (Do)

(1894) 18 Bom 581 (584) (Do)

(1904) 30 Mad 26 (27) (Do)

(1908) 31 Mad 510 (511) (Do)

(1925) 1925 Lah 242 (243) But in a suit for a mere declaration it is not proper to grant an injunction staying proceedings in another suit pending in another Court

9 (1931) 1931 All 57 (58) 53 All 180

Note 26

1 (1933) 1933 Lah 263 (264) 14 Lah 46

2,

Synopsis

	Note No		Note No
Legislative changes	1	Disobedience of injunction—Effect	See
Scope and principle of the Rule	2	also Note 18 to R 1	6
Injunctions to restrain breach of contract	3	Power to grant temporary injunction in mandatory form	7
Or other injury of any kind	4	Appeal	8
Grant of injunction on terms	5		

Other Topics

Injunction in election suits See note 2 F N (9) and Pts (11) and (12)

1 Legislative changes

The words of any kind after the words or other injury are new See Note 1 below

2 Scope and principle of the Rule

This Rule deals with the grant of injunctions in a particular class of cases not covered by the provisions of R 1, viz, cases of apprehended *breach of contract or other injury of any kind*. Where therefore, there is no such apprehended breach of contract or other injury of any kind, this Rule will not apply.¹

As has been seen in Note 2 to R 1 above, the general principles governing the grant of temporary injunctions is the same as those governing the grant of *perpetual injunction*^{1aa}. Now S 56 Cl (f), of the Specific Relief Act, 1877, provides that an injunction cannot be granted 'to prevent the breach of a contract the performance of which would not be specifically enforced, and under S 21 Cl (a) of that Act, a contract will not be specifically enforced when the non performance of it can be adequately compensated for, by the award of damages^{1a}. This therefore furnishes an important test to see whether temporary injunction should be granted in cases of breaches of contract. Further the general principles governing the grant of an injunction under R 1, also govern the grant of an injunction under this Rule. Thus —

- (i) Before the granting of an injunction under this Rule the Court should be satisfied that the plaintiff has a *prima facie* case² that the Court's interference is necessary to protect him from irreparable or at least serious injury³ that the balance of convenience is in favour of the applicant^{3a} and that there is no other sufficient

O 39 Rule 2—Note 2		
1 (1930) 1930 Cal 753 (53 Td)	[But see (1933) 1933 Lah 73 (74) Breach of contract already committed—Court can act <i>ex debito justitiae</i> and grant injunction under S 101 on proof of strong <i>prima facie</i> case and irreparable injury or inconvenience]	that the plaintiff has a case in which he is likely to succeed
1aa (1934) 1934 All 86 (876)	If relief sought by plaintiff cannot be granted temporary injunction cannot be sued	(1933) 1933 Lah 203 (00) 14 Lah 330 Fact that suit would be infructuous if no temporary injunction is issued is not sufficient for issuing such injunction
(1933) 1933 Lah 203 (00) 14 Lah 330		(1935) 1935 Sind 128 (129)
1a (1933) 1933 Lah 203 (20) 14 Lah 330	Injunction to prevent breach of contract to employ certain people can not be granted as it cannot be specifically enforced	(1934) 1934 Sind 136 (136)
2 (1906) 1926 Lah 589 (390)	But the Rule does not mean that the Court should examine the merits of the case closely and come to a conclusion	(1932) 1932 Sind 54 (86) 26 Snd L R 51
		3 (1888) 12 Bom 110 (116)
		(1933) 1933 Lah 448 (449) Application for injunction in suit for infringement of copyright—Plaintiff's interests amply protected otherwise—Injunction refused
		(1933) 1933 Lah 1046 (1047)
		(1934) 1934 Sind 136 (136)
		3a (1934) 1934 Sind 150 (181 152) Defendants members of old executive committee of a society managing affairs after expiry of period of office

remedy open to him by which to protect himself⁴ For cases where such injunction was granted, see the undermentioned cases⁵

(ii) Where a perpetual injunction has not been asked for in the suit,⁶ or where the facts show *prima facie*, that there is no chance of a perpetual injunction or specific performance being granted,⁷ a temporary injunction will be refused

(iii) Delay in bringing the suit or applying for the injunction will be a ground for refusing the same⁸

An injunction under this Rule also, can be issued only against the *defendant* in the suit and none else⁹ It is not necessary that the defendant should be living within the Court's jurisdiction¹⁰

Generally speaking, Courts will not issue an injunction restraining a candidate from partaking in an election¹¹ Further a Court holding an enquiry into the validity of an election under the District Municipalities Act, has no jurisdiction to grant an injunction restraining the candidate from taking his seat¹² The rule extends to proceedings under the Guardians and Wards Act¹³

This Rule applies to proceedings under the Chota Nagpur Tenancy Act VI of 1908 See S 265 (3) thereof

3 Injunction to restrain breach of contract

Pending a suit relating to a contract, the Court can, under this Rule, grant an injunction restraining the commission of any act which will involve a breach of the contract¹ Before such injunction is granted, however, the applicant must satisfy the Court that there is a *completed* contract under which he has acquired a right² and that *irreparable injury* will be sustained by him unless the injunction is granted³ Further, as has already been noticed under the previous Note, no injunction will be granted in respect of a contract of *which specific performance will be refused* Thus,

(i) no injunction will be granted to restrain marriage⁴ or adoption⁵ in breach of an agreement to marry or adopt respectively

—Election of new office bearer validity of which is questioned in suit—
Issue of injunction is unjustifiable as causing inconvenience and mischiefs

Improper delay in applying for injunction against infringement of trade mark

See also cases in Rule 1 Note 3 F N (13)

9 (1923) 1923 Lah 47 (48) 79 Ind Cas 233
(1918) 1918 Pat 582 (582) No power to issue injunction against non party to suit

10 (1931) 1931 Cal 279 (280) 57 Cal 1280

11 (1923) 1923 Lah 47 (48)

(1926) 1926 Mad 1147 (1147)

[See also (1933) 1933 Mad 103 (103)

Injunction stopping elections to a District Board—Not to be granted except in exceptional circumstances
1923 Mad 470 Dist

12 (1924) 1924 Mad 797 (799) 47 Mad 700

13 (1914) 1914 Lah 180 (180) 23 Ind Cas 351 (351)

Note 3

1 (1912) 1912 Ind Cas 300 (361) (Cal) The fact of operation of *lis pendens* is no answer to the application

(1926) 1926 Mad 1120 (1127)

2 (1891) 52 6 Bom 5 (7)

(1877) 1 Bom 550 (551)

3 (1920) 1920 Lah 426 (434)

4 (1876) 1 Cal 74 (78)

5 (1859) 18 Bom 56 (57)

another Court under equitable jurisdiction—He would raise plea of want of jurisdiction in that case and therefore injunction should not be granted

5 (1891) 14 Mad 18 (21)

(1903) 26 Mad 108 (175)

6 (1912) 15 Ind Cas 614 (615) (Cal)

7 (1877) 1 Bom 550 (554)

(1882) 6 Bom 5 (7)

(1882) 6 Bom 266 (283)

(1882) 13 Bom 56 (57)

[See also (1934) 1934 All 876 (876)]

8 (1899) 20 All 345 (348)

(1923) 1923 Lah 203 (203) 14 Lah 330

(1935) 1935 All 106 (110)

(1913) 20 Ind Cas 676 (677) 41 Cal 384

Suit to declare the election of the defendant to the Bengal Legislative Council as void

(1933) 1933 Sind 26 (26) 26 Sind L R 330

2

- (ii) no injunction will be granted to restrain breach of a contract in restraint of trade or profession. But a contract to supply goods exclusively to the promisee⁶ and a contract to serve the promisee exclusively for a period⁷ are not contracts in restraint of trade or profession and an injunction can, therefore, be granted to restrain breaches of such contracts,
- (iii) no injunction will be granted which will have the effect of compelling the employment of any person, in matters requiring services of a personal nature,⁸
- (iv) no injunction will be given where the circumstances under which the contract was made are such, as to give the plaintiff an unfair advantage over the defendant⁹
- (v) no injunction will be given where money compensation will afford an adequate relief for the non performance of the contract¹⁰

Where the defendant alleges a breach of contract and refers the matter to arbitration under a provision contained in the contract, and the plaintiff thereupon files a suit attacking the contract and asks for an injunction restraining the arbitration proceedings pending disposal of the suit, the injunction asked for will *not* be granted if the suit is based on a denial of the existence of the contract, but will be granted if the suit is based on an attack of the contract on equitable grounds like fraud or misrepresentation on the part of the other party¹¹

4 Or other injury of any kind

Under the old Code, the words 'of any kind' were absent. It was held by the High Court of Allahabad that the word 'injury' referred only to injuries *akin to breaches of contract* and that, therefore, no injunction could be granted in respect of other kinds of injury such as trespass or nuisance¹. The addition of the words 'of any kind' after the words 'or other injury' in the present section, makes it clear that an injunction can be granted to restrain *any kind* of legal injury. The word 'injury' connotes an act or omission contrary to law, resulting in an infringement of a right vested in a person¹². Thus an infringement of a copyright or of a

6 (1903) 26 Mad 168 (175)

7 (1891) 14 Mad 18 (22)

[See also (1920) 1320 Cal 90, (903)]

(1927) 1927 Sind 182 (186)

Note 4

1 (1900) 22 All 449 (450)

1a (1920) 1920 Lrh 436 (437)

(1933) 1933 All 344 (345) 55 All 399 (Directors of a Company excluded from participation in the management of the company)—Injunction may be issued

(1904) 27 Mad 409 (415 417)

[See also (1933) 1933 Nag 62 (66) 28 Nag L R 332. Injunction against marriage of a minor—Under S 12 of Guardians and Wards Act—Deemed to be under this Rule taken with S 141—Injury is to the person of the minor by a prominent marriage to unsuitable husband]

(1947) 1927 Sind 182 (186) 21 Sind L R 306 Arbitration proceedings null and void and not therefore causing any injury

(1933) 1933 Sind 26 (26) 26 Sind L R 335
[See also (1933) 1933 Lah 73 (75)
Injunction under inherent powers—
No danger of irreparable injury—
Compensation in damages possible—
Injunction not to be granted—Dis-
obedience of prior injunction—No
ground for grant of injunction
(again)]

11 (1919) 1919 Cal 1042 (1048)

(1919) 1919 Cal 89 (90 91)

(1913) 1919 Cal 826 (827, 828) 49 Ind Cas 9-8 (90)

(1920) 1920 Lah 97 (99)

trade mark,³ or an obstruction to a right of easement³ or to the exercise of rights of property⁴ or of a right of public worship⁵ or the commission of a waste or of a nuisance⁶ are all injuries in respect of which an injunction may be granted under this Rule. But the lawful exercise of a right vested in a person cannot furnish a ground for granting an injunction restraining such persons from exercising it.⁷

It is not necessary that the injury should have been *actually suffered* though it is essential that the Court should be satisfied that there is a real or reasonable apprehension of such injury.⁸ An injunction will be refused if the

- 2 (1893) 17 Bom 241 (140) Trade mark
(1901) 25 Bom 433 (41) (Do)
(1913) 21 Ind Cr 25 (162) 40 Cal 570
Trade name
(1922) 1922 Sind 84 (16) 26 Sind L R 51 (Do)
- (1902) 35 Cal 63 (102) C copyright
- 3 (1897) 19 All 223 (260) Obstruction to light and air through a window
(1894) 8 Bom 5 (94) (Do)
(1871) 9 Bom H C R 161 (194) (Do)
(1899) 23 Bom 756 (758) (Do)
(1902) 26 Bom 374 (378) (Do)
(1904) 28 Bom 293 (303)
(1909) 3 Bom 137 (140) (Do) An injunction is not to be given when the remedy in damages is considered adequate.
(1899) 22 Mad 251 (259) (Do)
(1897) 14 Cal 833 (835) (Do)
(1905) 31 Mad 171 (173, 176) Locking up the entrance of a channel
(1905) 28 Mad 15 (16, 17) Obstruction to watercourse or right to flow of water
(1906) 4 Cal L Jour 370 (388) 11 Cal W N 85 Interference with the natural flow of water
(1900) 24 Bom 183 (192) An injunction will be granted to restrain a person from using a way for a purpose different from that for which it was granted
(1901) 31 Cal 944 (950) Trees overhanging neighbour's land
- 4 (1890) 12 All 436 (437) (F B) Joint owner excluding the co-owner from possession
(1914) 1914 Cal 362 (363) 21 L C 661 (663) 41 Cal 436 One co-sharer using property in a manner which will change
(1904) 31 Cal 174 (178) Erection of an indigo factory by tenant on part of land demised rendering it unfit for purpose of tenancy
(1867) 14 Cal 236 (239) Cosharer misused joint property
(1891) 18 Cal 10 (20) 17 Ind App 110 (P C)
(1902) 29 Cal 500 (502) Illegitimate use of the family property or acts amounting to ouster
(1897) 24 Cal 260 (264) Act threatening danger to a person's land
(1893) 9 Cal 75 (79) Defendants using
(1899) 23 Bom 144 (145) One member of the family prevented from taking part in the business of the family firm
(1892) 1 Mad H C R 341 (348) Partner excluding his co-partner from the partnership business
5 (1891) 18 Cal 448 (462) 18 Ind App 59 (P C)
6 (1883) 5 All 363 (371) A plaintiff has no right to the removal of trees planted by the defendant on his own land until the plaintiff's enjoyment of his own land is directly and immediately interfered with by the growth of the trees
(1905) 32 Cal 637 (709) Defendant the owner of a shulite factory discharging into Municipal drain refuse liquid of offensive character interfering with the ordinary comfort of the plaintiff's occupation of property
(1904) 31 Cal 214 (221) Waste by a Hindu widow
7 (1922) 1922 Bom 335 (336) 46 Bom 939 Rightful execution of decree cannot be prevented
(1923) 1923 Lah 47 (48) A suit for a declaration that a certain person is not eligible to stand as a candidate cannot be said to be a suit for restraining him from committing an
(1926) 1926 Mad 132 (132) Injunction to restrain elected candidate from taking
(1904) 31 Cal 174 (178) Erection of an indigo factory by tenant on part of land demised rendering it unfit for purpose of tenancy
(1867) 14 Cal 236 (239) Cosharer misused joint property
(1891) 18 Cal 10 (20) 17 Ind App 110 (P C)
(1902) 29 Cal 500 (502) Illegitimate use of the family property or acts amounting to ouster
(1897) 24 Cal 260 (264) Act threatening danger to a person's land
(1893) 9 Cal 75 (79) Defendants using
(1868) 10 South W R 435 (436) Obstruction to watercourse—Plaintiff bound to make out injury
(1890) 5 Mad H C R 6 (24) Obstruction to watercourse or right to flow of water—Injury must not be trivial
8 (1920) 1920 Lah 436 (438)
(1908) 32 Bom 146 (148, 149)
[See also (1923) 1923 Bom 281 (283)]

- 2, applicant has acquiesced in the act or omission complained of⁹

5 Grant of injunction on terms

Sub rule (2) empowers the Court in granting injunctions to impose such conditions as it deems necessary. Thus it may call for an undertaking from the plaintiff that he will abide by any order which the Court may make as to damage.¹ Or where the plaintiffs are a foreign firm and do not carry on business in British India it is reasonable that they should be put on terms.²

6 Disobedience of injunction Effect—See also Note 18 to Rule 1

A disobedience of an order of injunction is a contempt of Court. Sub rule (3) confers on Courts the power to punish such contempt and further prescribes the punishment to be awarded therefor.¹ While the High Courts as Courts of record have inherent jurisdiction to commit for contempt, the other Courts have no such power apart from the provisions of this Rule.²

The provisions of the sub rule apply not only to disobedience of an order issued under Cls (1) and (2) of R 2 but have a more general application and apply equally to disobedience of all injunctions issued under S 94 of the Code.³

As regards the power conferred by this sub rule for punishing disobedience of injunctions the following points must be noted—

- (1) The Court which ordered the injunction is the Court which can punish its disobedience. Thus where an order of injunction was passed by a particular Court and the suit was thereupon transferred to another Court it was held that the latter Court had no power to punish disobedience of the injunction passed by the former Court.⁴ It has also been held that an interlocutory application to punish for contempt under this sub rule cannot be transferred to another Court and thus give that Court jurisdiction to deal with it.⁵ But a Court to which the business of the Court granting the injunction has been transferred under S 150 of the Code can exercise the power of punishment under this sub rule.⁶ The appellate Court has the same power to order punishment as the original Court.^{6a}

- (2) In taking action under this sub rule the Court cannot act *suo motu* but only on the application of the aggrieved party.⁷

9 (1883) 9 Cal 609 (619) Tenant of an agricultural holding planted his land with mango trees to the knowledge but without the consent of his landlord — Landlord standing by for

ting certain property pending decision of the appeal the Court can punish the party in contempt under O 39 R. 2 (3)

s 615

Note 5

Plaintiff a foreign firm—Security taken for possible loss to defendant by injunction

Note 6

The appointment of a receiver operates as an injunction so far as the parties bound by the order are concerned [See also (1933) 1933 Nag 62 (64 66)]
98 Nag L R 332 Injunction against a minor's marriage under S 12 of Guardians and Wards Act—Deemed as under this Rule taken with

to an appeal disobeys an injunction order restraining him from aliena

As regards the *penalty* for disobedience of an injunction it has been held that the sub rule should be strictly construed and that it cannot be read as providing any penalty other than that *specifically* mentioned in it.⁸ Thus the disobedience will not render any transaction void,⁹ nor can a separate suit be filed for damages for non compliance with an order of injunction.¹⁰ The six months period of detention prescribed in the sub rule cannot even indirectly be added to.¹¹ But the two modes of punishment prescribed are only alternative and it is not necessary that attachment should be effected before imprisonment is ordered.¹² Where an injunction was issued against a person restraining him from bringing about the marriage of a girl, but the marriage took place, the person enjoined not being responsible for it and he was sought to be punished for contempt on the ground that he did not do all in his power to prevent the marriage, it was held, refusing the application that the injunction order contained no direction that he should do all in his power to prevent the marriage.¹³ In another case, where a company had been restrained from holding a meeting but the share holders had not been restrained from voting and, at a meeting held in a private house, some of the shareholders attended and voted, it was held that they were not liable to punishment for disobedience.¹⁴

Although there might be a breach of an injunction in the literal sense yet, if the party acted in *good faith* and without any intention to violate the order, he will not be liable for punishment.¹⁵

Where an injunction has been disobeyed the fact that the injunction has been subsequently dissolved will not exempt the party from punishment.¹⁶ Although an injunction takes effect from the date of the service of the order, yet, if the order had been passed in the presence of the counsel for both sides, it is no excuse to say that the order was not communicated to the party *personally*.¹⁷

A person against whom no injunction has been ordered cannot be punished under this sub rule on the ground that he abetted the disobedience of the order.¹⁸

An undertaking not to alienate, duly recorded in the order of the Court, amounts to an injunction and a breach thereof is liable to be punished under this Rule.¹⁹

7 Power to grant temporary injunction in mandatory form

Courts in England have power to grant temporary mandatory injunction.¹ In a Bombay case, Beaman, J., held that the power to issue such an injunction was not within the scope of O 39 and doubted whether a *mohussil* Court in India had power to issue such an injunction.² The power was, however conceded in has been affirmed beyond all doubt in a
prove it before committing him for

(1914) 1914 Mad 141 (2) (142)

(1917) 1917 Mad 448 (449 451) 39 Mad 907

(1927) 1927 Cal 598 (600) In fact attachment is not a proper punishment

19 (1931) 1931 Bom 509 (510) 33 Bom LR 1109 (1112)

Note 7

1 (1785) 1 Brown Ch Cas 588 Robinson v Lord Byron—*Referred in* 24 Ind Cas 625

(1869) 24 Ch D 1 (10) Bonner v Great Western Ry Co, Ltd—*Referred in* 1918 Mad 588

7 (1914) 1914 Bom 42 (45) 38 Bom 391

3 (1914) 1914 Bom 195 (197)

had no notice of injunction—Court must give him an opportunity to

2 number of other cases⁴

8 Appeal

An appeal lies from an order under this Rule whether the order is one inflicting punishment or one refusing to take action¹. An order refusing to discharge an injunction issued under this Rule is also appealable^{1a}.

No second appeal lies against an order passed on appeal from an order under this Rule².

As to whether revision lies against an order under this Rule see the under mentioned case³.

3 R. 3. [S 494] The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the

Before granting injunction Court to direct notice to opposite party

opposite party

[1877—S 494, 1859—S 95]

Synopsis

Scope of the Rule	Note No	Appeal	Note No
	1		2

1 Scope of the Rule

Courts have jurisdiction to grant an injunction *ex parte*. But it should not be so granted without strong and grave reasons¹. In other words except where the delay involved in the issue of notice will defeat the object of the injunction notice should be ordered to the party before injunction is ordered against him². An injunction granted in violation of this principle is irregular³.

In an appeal from an order granting an *ad interim* injunction the appellate Court under this Rule can pass an order *ex parte* staying the operation of the injunction order⁴.

2 Appeal

No appeal lies from an order directing notice before granting injunction¹.

- | | |
|--|--|
| <p>4 (1918) 1918 Mad 588 (589) Leaman J in 1914 Bom 42 38 Bom 381 not accepted</p> <p>(1927) 1927 Mad 210 (211 212) The power exists under S 101 and not under O 39</p> <p>(1929) 67 Ind Cas 42 (43) (Lah) But an interlocutory injunction of a mandatory nature which does not restore any previously existing state of things but which directs defendant to establish a new state of things</p> | <p>an injunction is one under O 39 R 2 and is appealable under O 43 R 1</p> <p>(1931) 1931 Bom 509 (510) Undertaking</p> |
|--|--|

- 2 (1901) 24 Mad 447 (449)
- 3 (1933) 1933 Lah 1046 (1047) Proceedings for temporary injunction are a case and revision lies
- Order 39 Rule 3—Note 1

Note 8

- 1 (1929) 1329 Nag 273 (279)
- (1916) 1916 Mad 446 (447)

* (1932) 1932 All 223 (224) Stay of injunction restraining nominations in an election

Note 2

- 1 (1889) 12 Mad 186 (187)
- (1924) 1924 Mad 857 (857 858)

Order for injunction may be discharged varied or set aside

R. 4. [S. 496.] Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

[1877—S. 493, 496; 1859—S. 93.]

Synopsis

Note No

1

Appeal

Note No

2

Scope of the Rule

Other Topics

Application for obtaining injunction on insufficient grounds See S 95.

1 Scope of the Rule

This Rule is intended to cover two classes of cases —

(1) Where an urgent order *ex parte* has been made under R 3, and

(2) Where an injunction order already in force, has owing to fresh circumstances become unduly harsh or unnecessary or unworkable¹

This is not intended to set at naught the ordinary Rule that where an injunction has been ordered after granting each side an opportunity of being heard, it is not to be interfered with except on the presentation of new matter not available when the original order was passed²

Where an injunction is dissolved under this Rule, the plaintiff may apply again for an injunction if he can make out a sufficient case³

2 Appeal

An order under this Rule is appealable under O 43, R 1 (i).¹

R. 5. [S. 495.] An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

Injunction to corporation binding on its officers

Synopsis

Injunction against corporations — Note No 1

1 Injunction against Corporations

As to what is a corporation, see the undermentioned case¹

As to the right of an individual to get an injunction against a Corporation, see the undermentioned case,² and vide also Notes under Note No 3 to R 1. *supra*

Order 39, Rule 4—Note 1

1 (1929) 1929 Mid 603 (604)

2 (1929) 1929 Mid 603 (604)

3 (1877) 2 Bom 452 (256)

Note 2

1 (1803) 15 All 6 (9)

(1913) 20 Ind Cas 653 (654) 35 All 425 The appeal is not limited to an affirmative but includes a negative order also

(1929) 1929 Mid 603 (604) An order staying delivery of property in execution under O 39, R 1 was passed after notice. The non applicant without filing an appeal applied for dissolution of the order under O 39, R 4 and the Court appointed a receiver

The non applicant appealed from that order. *Held* that the Lower Court had not really varied its original injunction staying delivery though it purported to do so by appointing a receiver. The original order staying delivery remained in full force and was reiterated in the revised order. Whatever be the scope of O 39, R 4 it cannot be that a party can appeal against a mere reiteration of the original order of injunction when he has failed to appeal against the original order.

Order 39, Rule 5—Note 1

1 (1917) 1917 L B 36 (37) 33 Ind Cas 572 (573).

2 (1876) 1 Lom 132 (142)

INTERLOCUTORY ORDERS

R. 6. [S 498] The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any moveable property, being the subject matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once

[1877—S 498; R S C, O 50, R 2]

Synopsis

Legislative changes

Note No 1 | Scope of the Rule

Note No 2

Other Topics

Any other just and sufficient cause See Note 1

1 Legislative changes

1 The words or attached before judgment in such suit are new

2 The words or which for any other just and sufficient cause it may be desirable to have sold at once are also new and have been added in order to empower the Court to order sale of securities when the state of the market requires such a course

2 Scope of the Rule

This Rule will apply only if the property is either the subject matter of the suit or has been attached before judgment in the suit¹. An order under this Rule can be passed only on an application made therefor and after notice to all the parties concerned². The Rule does not empower the Court to appoint a commissioner to sell any crop on the property attached³.

Detention, preservation, inspection, etc. of subject matter of suit

R. 7. [S 499] (1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit,—

(a) make an order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein,

(b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and

(c) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this Rule

[1877—S 499; R S C, O 50, R 3]

Synopsis

	Note No.		Note No.
Legislative changes.	1	Application for such order to be after	
Scope of the Rule.	2	notice	5
Inspection of subject matter of suit.	3	Power to allow party to draw money	
Inventory	4	paid into Court pending decision	6
		4 Appeal	7

Other Topics

Order against party See Note 2, 14 (1) and Order to produce property See Note 2,
 Note 1 (1)
 Revision See Note 2, F N (1)

1 Legislative changes

The words "as to who has any jurisdiction arise therein" in Sub rule (1) (a) are new

2 Scope of the Rule

The first part of the Rule applies to cases where the articles are in the possession or custody of the party against whom the order is made¹ As to the power of Courts to pass an order under this Rule in Probate Proceedings, see the amendments in cases²

3 Inspection of subject matter of suit

Where in respect of the property of one person a right accrues in favour of another and that right cannot be measured without inspection of the property, such inspection can be ordered under this Rule¹ Thus in a suit for damages alleged to have been caused to the plaintiff by the defendant's construction in his premises the extent of the alleged injury has to be ascertained and the Court has jurisdiction under this Rule to order an inspection for the purpose² Similarly where the question to be decided is whether certain structures are old or new, the proper procedure is to issue a commission under this Rule and not under O 26 Rr 4 or 9 ante^{3a} In ordering such inspection, the Court should take care to impose as little inconvenience as possible on those against whom the order is made³

4 Inventory

The power to order inspection implies a power to order the preparation of an inventory if such inventory is essential for a proper decision of the case¹ If such an inventory is not so essential, it should not be ordered²

5 Application for such order to be after notice

An application for an order under this Rule can only be made after reasonable notice to the parties concerned¹

Order 39 Rule 7—Note 2

1 (1919) 1919 Cal 312 (314) Where certain ornaments are pledged with the defendant who has again pledged them along with other ornaments of his own with a third party and is in a position to redeem them from his pledge a Court had jurisdiction to order their production by the defendant before it within a certain time—High Court confirmed the lower Court's order in revision

2 (1905) 1905 All W N 127 (128)

(1915) 1915 Cal 563 (567)

(1929) 1929 Cal 496 (496)

Note 3

1 (1896) 24 Cal 117 (121 122)

(1910) 6 Ind Cas 574 (575) (Cal)

2 (1847) 21 Cal 117 (121 122)

3 (1937) 1937 Cal 475 (476)

3 (1910) 6 Ind Cas 574 (575) (Cal)

(1908) 2 Sm L R 22 (24) An order by a Sub Judge to open up a particular passage by the defendant to allow a Receiver to enter upon the premises

Note 4

1 (1910) 6 Ind Cas 574 (575) (Cal)

2 (1919) 1919 Cal 429 (430)

Note 5

1 (1883) 7 Mad 241 (242)

6 Power to allow party to draw money paid into Court pending decision

Where money paid into Court is claimed both by the plaintiff and by the defendant, the Court cannot allow one of them alone to draw the amount pending the decision of the case even on his furnishing security for restitution ¹

7 Appeal

No appeal lies from an order under this Rule ¹ But if an order applied for under this Rule is wrongly refused, the proper course is to apply for review if any new matter is forthcoming ²

Application for such orders to be after notice

R. 8. [S. 500] (1) An application by the plaintiff for an order *under Rule 6 or Rule 7* may be made after notice to the defendant at any time after *institution* of the suit.

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after *appearance*.
[1859—S 91]

Synopsis

Notice Note No 1

1 Notice

An application under this Rule also can be made only after reasonable notice to the opposite party ¹

R. 9. [S 501] *Where* land paying revenue to Government, or a tenure liable to sale, is the subject-matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure;

and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

[1877—S. 501; 1859—S. 91.]

Synopsis.

"Adjustment of accounts" Note No 1

Other Topics

Payment by one co sharer to save sale.—Whether entitled to charge See Note 1, Pt (2)

Note 6

2 (1892) 16 Bom 511 (513)

1 (1913) 19 Ind Cas 219 (219) (Mad)

Order 39, Rule 8—Note 1

Note 7

1 (1893) 24 Cal 725 (733) (F B)

1 (1834) 7 Mad 241 (242)

1 Adjustment of accounts

An adjustment of account under this Rule need not be sought in a separate suit, even if the decree in the first suit is silent about it. It can be worked out in execution of the decree if it could be shown from the nature of the decree, that it could and ought to have contained such an order and is imperfect without it.¹

The party paying the revenue under this Rule is entitled to a *charge* on the property for the amount.²

R. 10. [S 502] *Where the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party with or without security, subject to the further direction of the Court*

Deposits of money
etc. in Court

order the same to be deposited in Court or delivered to such last-named party with or without security, subject to the further direction of the Court

[1877—S 502 1859—Ss 95 and 243]

Synopsis

Scope of the Rule

Note No

1 Appeal

Note No

2

Other Topics

Holds. See Note 1 Pt (2)

Refusal to deposit money—Liability to pay interest. See Note 1 Pt (3)

1 Scope of the Rule

The Rule does not apply unless—

(i) the admission of the party is an admission sufficient under O 12, R 6¹ and

(ii) the party making the admission “holds” the property or other thing capable of delivery.²

A refusal to pay as ordered, under this Rule, will render the party refusing liable for interest from the date of the order.³

The Rule applies to proceedings under the Guardians and Wards Act.⁴

2 Appeal

An appeal lies from an order under this Rule under O 43, R 1 (b)

ORDER XL.**APPOINTMENT OF RECEIVERS**

Appointment of receivers

R. 1. [S 503] (1) *Where it appears to the Court to be just and convenient,¹⁴ the Court may by order—*

Order 39, Rule 9—Note 1

1 (1902) 6 Cal W N 710 (712)

2 (1903) 26 Mad Gas 692 (692) (F B)

Order 39 Rule 10—Note 1

1 (1927) 1927 Sind 25 (27)

2 (1904) 27 Mad 168 (173) The Rule would not cover a case where the money was held by another Court to the credit of another suit. Subramania Aiyar J dissenting.

3 (1871) 16 Suth W R 297 (298)

4 (1911) 11 Ind Cas 551 (556) 36 Bom 20

(a) appoint a receiver of *any* property, *whether before or after decree*;²⁰

(b) remove *any* person from the possession or custody of the property;⁴⁹

(c) commit the same to the possession, custody or management of *the* receiver; and

(d) confer upon *the* receiver all such powers, as to bringing and defending suits and for the realization,²⁴ management, protection, preservation and improvement of the property, the collection of the rents and profits²⁵ thereof, the application and disposal of such rents and profits, and the execution of documents²⁶ as the owner himself has,²³ or such of those powers as the Court thinks fit.

(2) Nothing in this *Rule* shall authorize the Court to remove from the possession or custody of property any person whom *any* party to the suit has not a present right so to remove.

[1877—S. 503; 1859—S. 243. See Ss. 51 and 94.]

Synopsis

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Other Topics

Whether a party—Whether can be appointed receiver See Note 11 Pt (1)	Solely receiver—Parties whether can impugn See Note 22 Pt (15)
Temporary injunctions and appointment of receivers—Distinction between See Note 13 Pt (4)	Two Courts appointing receivers in respect of the same properties—Whether expedient See Note 12 Pt (8)
Appeal to the Privy Council See Note 1 Pt (4)	

1 Legislative changes

Section 503 dealing with receiver's remuneration and receiver's duties have been modified by Rules 2 and 3 of this Order. Apart from this the present Rule contains the following changes—

- (1) S. 503 provided for the appointment of a receiver whenever it appeared "to be necessary for the realisation, preservation or better custody or management of any property." Under the present Rule the Court may appoint a receiver where it appears to be just and convenient to do so.
 - (2) S. 503 applied only to property which was the subject of the suit or attachment.¹ This restriction has been removed now.
 - (3) The words, "whether before or after the decree" in the present Rule are new. Thus the present Rule is much wider in its scope than S. 503.
- As to S. 243 of the Code of 1859 see the undermentioned cases.²

2 Scope and object of the Rule

This Rule authorises a Court to appoint a receiver whenever it appears to it to be just and convenient to do so. The matter is thus left to the discretion of the Court.¹ Such discretion must, however, be exercised, not arbitrarily but judicially and according to legal principles. (See Note 14, *infra*.) The object and purpose of the appointment of a receiver may generally be stated to be the preservation of the subject matter of the litigation pending a judicial determination of the rights of the parties thereto.^{1a} The Court does not, at the time of appointment of a receiver, arrive at any final decision on the merits of the case, its aim being merely to preserve the *status quo ante* during the litigation.² Where a receiver is appointed under this Rule in respect of any property, such property is in *custodia legis* for the benefit of the several parties according to their titles (see Notes 27 and 28, *infra*). When the Court appoints a person as the manager of the suit property, it really appoints a receiver, the term 'manager' being only another name for a

Order 40 Rule 1—Note 1

- 1 (1884) 9 W.L.R. 231 (337)
- 2 (1874) 18*4 Pann Re No 53 Page 191
- (1882) 17 South W.R. 101 (101)
- (1873) 1 Ind App 63 (102) (P.C.)
- (1871) 10 South W.R. 273 (274)
- (1886) 6 South W.R. 215 (12)

Note 2

- 1 (1912) 21 Ind. Cas 283 (287) 10 Oudh Cas 238

(1883) 1883 Rang 94 (90)

- [See (1921) 61 Ind. Cas 112 (112)]
 (11) Costs in the application also discretionary.]
- 1a (1913) 21 Ind. Cas 283 (286) 10 Oudh Cas 238
 - (1907) 34 Cal 300 (316)
 - 2 (1915) 1915 Cal 35 (36)
 - (1924) 1924 Cal 456 (458)
 - (1884) 10 Cal 225 (230 231)
 - (1900) 32 Cal 741 (745)

1, receiver³ A *sapudhar* to whom moveable property attached in execution is handed over for safe custody is not a receiver⁴

3 Receiver if can be appointed in proceedings other than suits

The omission in R 1 of the words subject matter of *suit* which occurred in S 503 of the old Code makes it clear that a receiver can be appointed in proceedings other than suits¹ Thus, a receiver may now be appointed in proceedings for the appointment of a guardian under the Guardians and Wards Act,² or in a suit for rent and ejectment under Bengal Act VIII of 1869³ or under S 32 of the Bengal Settled Estates Act III of 1904 for the purpose of recovering the amount of any decree against a tenant for life of a settled Estate But a Court has no jurisdiction to appoint a receiver in proceedings under the Succession Certificate Act⁴ or in proceedings for the removal of a trustee under S 74 of the Trusts Act⁵ or to manage any occupancy holding under the Central Provinces Tenancy Act⁶

4 Receiver if and when may be appointed in mortgage suits

The High Courts of Allahabad and Patna have held that O 40 has no application to mortgage suits inasmuch as O 34 provides in itself a complete machinery for such suits¹ But the general trend of opinion of the other High Courts is that O 40 is not inapplicable to mortgage suits and that a receiver can be appointed even if the mortgage is a simple one² The test to be applied in this class of suits is, as in the case of other suits, to consider whether it will be *just and convenient* to appoint a receiver^{2a} A receiver cannot be appointed merely because it is convenient to the *mortgagees* to do so³ or because a private sale by the receiver will fetch a higher price than the Court sale,⁴ or because the mortgagors reversioners support the appointment of a receiver⁵ The High Court of

3 (1924) 1924 Mad 614 (614)

(1934) 1934 Lah 38 (38)

(1932) 1932 Cal 275 (282) Position and duties of common manager of estate and of receiver of property are analogous

(1934) 1934 Rang 321 (322) 12 Rang 437
A case in which the mortgage was in the form of an English mortgage

4 (1924) 1924 Lah 667 (668)

Note 3

1 (1916) 1916 Cal 427 (427) 43 Cal 986
[See also (1933) 1933 Lah 437 (439)
14 Lah 68 Court has power under O 40 read with R 95 of the Lahore High Court made under Companies Act to pass interim order for preservation of the subject matter in dispute in proceedings under the

(1932) 1932 Lah 82 (83) Equitable mortgage is entitled to appointment of Receiver

(1925) 1925 Lah 590 (591 592)

(1928) 1928 Rang 176 (176) 6 Rang 261

(1927) 1927 Sind 230 (230 231)

[But see (1877 78) 3 Cal 330 (330) S 243 of Act VIII of 1869 not applicable to mortgage decree for sale—Receiver cannot be appointed]
[But see (1932) 1932 Pat 360 (362)]
[But see (1933) 1933 Lah 637 (638) 14 Lah 457 Court refused to appoint Receiver in execution to sell mortgaged property]

5 (1927) 1927 Sind 237 (238)

6 See S 12 (2) O P Tenancy Act I of 1920

Note 4

21 (1932) 1932 Cal 194 (195)
[See (1932) 1932 Pat 360 (362)
See observations of Fazl Ali J]

3 (1913) 21 Ind Cas 283 (284 285) 16 Oudh Cas 238

4 (1896) 23 Cal 517 (521)

5 (1916) 1916 Cal 515 (516)

implies, that receiver could be appointed

Dis-
aid ap

Madras has held that a receiver can be appointed even when the right to a personal decree is not subsisting.⁶ But it has been held that a receiver cannot be appointed if the other properties of the mortgagor where there is no likelihood of a personal decree being paid against the mortgagor in case the proceeds of the sale of the mortgaged property is found insufficient to satisfy the mortgage.⁷ It has been held in the unmentioned cases⁸ that where a receiver is appointed at the instance of a mortgagee the rents and profits of the property realized by the receiver may be treated as additional security for the amount found due to the mortgagee under the mortgage and that therefore the mortgagee is entitled to be paid out of the rents and profits so received in priority to other personal creditors of the mortgagor.

Where the mortgage is *vol ab initio* and the mortgagee obtains a simple personal decree in respect of the mortgage amount it has been held by the High Court of Bombay that he cannot apply for the appointment of a receiver of the properties of the mortgagor.⁹ It has been held by the High Court of Madras that the Court has no power to appoint a receiver pending a suit for the specific performance of a contract to execute mortgage.¹⁰

In the circumstances of the following cases, it has been held that a receiver may properly be appointed—

- (1) Where the interest due on the mortgage is in arrears or the sale proceeds of the property are likely to be insufficient to satisfy the mortgage.¹¹
- (2) Where the mortgage is by the *karta* of a joint Hindu family and it is found that such a mortgage is binding on the family.¹²
- (3) Where the suit is to enforce a floating charge on the good will and the stock in trade of a business under a mortgage containing a proviso could not permit the stock in trade to fall below

“ . . . ”
(Week & Cases) 12 where it was held that a Receiver could be appointed for the mortgaged properties even if there is no personal remedy.]

7 (1906) 1973 Mad 570 (576 581 582) 56 Mad 315, Reversing 1933 Mad 447 (451) (1926) 1926 Mad 757 (757 758)

8 (1931) 1931 Mad 626 (627) 54 Mad 565
(1936) 1975 Mad 410 (411) Receiver is appointed for the benefit of the mortgage—All proceeds realized to go to the credit of the mortgage debt—A purchaser of equity of redemption is not in a better position than the mortgagor

(1932) 1932 Sind 82 (84)

(1929) 1929 Sind 114 (114 115) 23 Sind L R 200

(1920) 1920 Cal 545 47 Cal 418

(1912) 17 Ind Cas 849 (851) (Cal) Court cannot order Receiver to pay out of the moneys in his hands any sums to the mortgagor to prosecute his appeal against the decree in the mortgage suit

[See also (1933) 1933 Mad 293 (294)

141 Ind Cas 372 (373 375 377) Receiver in mortgage suit—Subsequent

Court auction purchaser in execution of money decree—Such purchaser is not entitled to rents and profits though Receiver was impleaded therein and though both suits were in the same Court]

[See also (1934) 1934 Rang 321 (323) 12 Rang 437 A case of English mortgage]

[But see (1935) 1935 Mad 146 (149) Getting Receiver appointed does not amount to charge—Nor does such person get priority over another who attaches the properties]

9 (1930) 1930 Rang 271 (272)]

[But see (1870) 13 Suth W R 453 (454) Receiver may be appointed though the mortgagee has taken only a money decree]

10 (1926) 1926 Mad 155 (156)

11 (1920) 1920 Cal 545 (547) 47 Cal 418

(1935) 1935 Lah 17 (20) 16 Lah 360

(1934) 1934 Lah 38 (38)

a certain value¹³

- (4) Where the mortgagor who is in possession on behalf of the mortgagee becomes insolvent¹⁴
- (5) Where the mortgagee is entitled to enter into possession on default of payment of the mortgage moneys¹⁵
- (6) Where the mortgagor transfers his properties with the mortgagee's consent, to trustees who undertake to liquidate his debts by periodical payments but the arrangement fails¹⁶

A receiver can be appointed in a mortgage suit for sale even though a receiver has already been appointed in a prior partition suit comprising such property¹⁷. Such appointment can be made even *after the final decree* in the mortgage suit is passed and at any time before the mortgage is fully satisfied¹⁸. A receiver may thus be appointed after the sale under the mortgage decree and pending in application to set aside such sale¹⁹.

Where a receiver is appointed in a mortgage suit the mortgagee if in possession must give up such possession to the receiver even though he has been in possession under an arrangement that he should apply the income of the property to the discharge of the debt²⁰.

S 69 A of the Transfer of Property Act which was introduced newly by Act XX of 1929 now makes provision for the appointment of a receiver of the mortgaged property by the mortgagee himself in cases where he is entitled to sell the property without recourse to a suit for sale. Hence the undermentioned decision²¹ passed prior to Act XX of 1929 wherein this right was not recognized is no longer good law.

5 Receiver of future earnings of judgment debtor if can be appointed

Apart from any charge given by the debtor the Court has no power to appoint a receiver in aid of a judgment of the future earnings of the judgment debtor inasmuch as such earnings are not *property* in respect of which the judgment creditor could proceed in equity or at law¹. A receiver cannot therefore be appointed to receive the maintenance allowance² or the pension payable to the judgment debtor³. But where the latter has been given certain lands for his maintenance a receiver can be appointed to collect the rents and profits of the lands and pay out of the same, a sufficient sum for the maintenance of the judgment debtor and his family applying the balance if any, to the liquidation of the judgment creditor's debt⁴. See also the undermentioned cases⁵.

6 Testamentary suit

A receiver can be appointed in a testamentary suit¹. See Note 3 *supra*.

- 13 (1919) 1919 Cal 860 (861)
- 14 (1916) 1916 Mad 1123 (1129)

- 17 (1917) 17 Ind Cas 284 (289) (Cal)
- (1917) 1917 Mad 79 (8) 40 Mad 302
- 2 (1909) 4 Ind Cas 145 (148) 17 Oudh Cas 3
- 3 (1912) 11 P C I 101 (101) 17 All 352 3

- (1906) 1926 Cal 1006 (1008)
- 19 (1911) 9 Ind Cas 1027 (103) (Cal)
- 20 (1911) 1921 ILJ 43 (44) 61 at L Jour 37
- 21 (1918) 1918 Cal 557 (569) (70)

Note 5

- 1 1 Q B D 501 (501) C A Holmes v Milroy
- (1844) 3 Ch D 335 (341) C A Cadogan v IRC Theatre
- (1844) 2 IR 501 Re Joluso

- n v be assigned
- (1911) 6 Ind Cas 86 (89) 38 Cal 13
- Decree for maintenance may be assigned

Note 6

- 1 (1893) 17 Bom 38 (311)

7 Suits under S 92 of the Code

The Court can appoint a receiver in a suit under S 92 of the Code¹ But a receiver is not in a suit under the Religious Endowments Act except under S 14 of that Act² See also the undermentioned cases³

8 Partnership suits

Where a dissolution of the partnership is inevitable and the partners are embroiled, the usual way of guarding their interests is by appointing a receiver to carry out the good will of the business and the stock in trade to be sold by the partners being at liberty to bid at the sale¹ But no receiver can be appointed to manage a partnership business where all the partners are not parties to the suit² It is not necessary that on the death of a co partner the Court must in every case appoint a receiver The Court should look at the whole of the circumstances of each case³

9 Maintenance suits

Where a decree for maintenance a charge is created on the defendant's property for the payment of maintenance it is desirable in order to facilitate execution and to avoid further litigation that the decree itself should appoint a receiver with directions to take possession of the property, in case of default of payment, and to sell the same and to pay out of the proceeds of the sale the amount due to the plaintiff¹

10 Receiver if can be appointed where one has been appointed by a Magistrate under S 146 of the Criminal P C

Before the amendment of the Code of Criminal Procedure in 1923 it was held that a civil Court cannot appoint a receiver in respect of properties for which a criminal Court has already appointed a receiver under S 116 of the Criminal Procedure Code¹ These rulings referred to above are not good law after the amendment of S 146 of the Code of Criminal Procedure The mere fact that there exists with reference to any property an order under S 145 of the Criminal Procedure Code is no bar to a civil Court appointing a receiver in respect of such property² Nor can a Magistrate acting under S 145 of the Criminal Procedure Code interfere with the possession of a receiver appointed by a civil Court without the permission of that Court³

Note 7

- 1 (1913) 20 Ind Cas 767 (767) (Mad)
- (1910) 7 Ind Cas 69 (600) (Mad)
- (1921) 221 (224) Court can supersede existing trustee by Receiver
- (1909) 1920 Pat 175 (176) Settlor and a trust different bodies created by him should concur in the administration of the trust—Concurrence becoming impossible—Receiver can be appointed
- (1913) 1925 Mad 620 (622) Internecine quarrels between the trustees
- 2 (1907) 8 Cal W N 401 (407)
- 3 (1909) 4 Ind Cis 1063 (10 0) (Mad) Suit by some members of a community against other members—Joint property of community—Prayer for appointment of Receiver refused
- (1917) 21 Ind Cas 106 (108) (Mad) Suit for scheme and removal of Landarvan nadhu for misconduct — Death of Landarvan nadhu — Abatement —In an appeal from order of abatement,

application for appointment of receiver refused

Note 8

- 1 (1914) 1914 L B 209 (210) S L B R 332
- (1934) 1934 Cal 444 (446)
- (1925) 1925 Rang 287 (287) 3 Rang 196
- (1918) 1918 Sind Gl (f2) 11 Sind L R 115
- 2 (1934) 1934 Cal 444 (446) Order appointing receiver for proper management of a partnership business is wrong
- 3 (1920) 1920 Lah 125 (127)

Note 9

- 1 (1909) 96 Cal 441 (448 449)
- [See also (1938) 1933 Lah 840 (827)
- In this case an application was made in execution proceedings]

Note 10

- 1 (1918) 20 Ind Cas 269 (271) 40 Cal 562
- (1926) 1926 Oudh 504 (506) Property already in Receiver's hands by Criminal

1. 11 Who may be appointed receiver

A party to the litigation should not be appointed a receiver except under very special circumstances or with the consent of the other parties,¹ because, as a general rule, absolute disinterestedness is an indispensable qualification for a receiver.² Subject to the above general rule however in the case of partnership and partition suits, a party is more readily appointed a receiver than in other cases.³ There is nothing to prevent a Hindu from being appointed receiver of the properties of a *Muhammadian wakf* where his duties do not include the performance of religious ceremonies.⁴ Similarly the appointment of the guardian of a minor as receiver of his properties is not illegal.⁵ But the attorney of a party to the litigation cannot be appointed receiver, as such appointment will interfere with the arrangement made by such party for the conduct of his case.⁶

The fact that the receiver lives far away from the properties is a disqualification, which though not absolute, should be taken into consideration in making the appointment.⁷

12 What Court may appoint or remove a receiver

Under S 505 of the Code of 1882 a receiver could be appointed only by the High Courts and the District Courts and not by Courts subordinate to the District Court.¹ Under the present Code, a receiver can be appointed by all Courts. The appointment can be made only by the Court before which the suit wherein the receiver is sought to be appointed is pending, or where the decree has been appealed against, by the appellate Court.² Hence a District Court cannot appoint a receiver in a suit pending in a Court subordinate to it.³ Now that the words "property, the subject of a suit or attachment" which occurred in S 503 of the old Code have been omitted in the present Rule, a Court can appoint a receiver even of property situated beyond its local jurisdiction⁴ and even before deciding the question of jurisdiction, where such a question is raised.⁵ (A Court of Small Causes cannot appoint a receiver of immoveable property. See Ss 7 and 94 of the Code⁶) A civil Court in the Punjab can appoint a receiver to

Note 11

- 1 (1926) 1926 Sind 37 (38)
 (1934) 1934 Cal 444 (446 447) Partnership at will—Plaintiff's title to share admitted—Suit operating as dissolution—One party should not be appointed receiver without consent of other
 (1914) 1914 Cal 439 (441)
 (1925) 1925 Pat 293 (294) 3 Pat 964
 (1915) 1915 Mad 336 (336)
 (1920) 1920 Cal 724 (724)
 (1913) 19 Ind Cas 873 (874) (Cal)
 (1929) 1929 Lah 760 (761) No absolute prohibition against party being

(447)

Partner should not be appointed receiver when *prima facie* case of suspicion of dishonesty has been made against him

- 2 (1925) 1925 Pat 293 (294) 3 Pat 964

Note 12

- 1 (1883) 7 Cal 713 (721)
 (1900) 1 Ind Cas 657 (657) 33 Bom 104
 (1896) 18 All 453 (454)
 (1885) 1885 Pun Re No 102 page 233

[But see (1930) 1380 Cal 610 (612) Simple contract creditor without a lien on the property not entitled to ask for receiver]

[But see (1912) 17 Ind Cas 16 (16) (Mad) Property not subject matter of suit—Receiver cannot be appointed]

[But see (1933) 1933 Sind 231 (232) Court cannot appoint receiver in respect of property not subject matter of suit or of execution application]

[See also (1874) 21 Suth W R 303 (305) Case under Code of 1853—Question was left open]

- 5 (1925) 1925 Rang 287 (288) 3 Rang 196
 6 (1878) 2 Bom 553 (560) Case under Code of

collect the rent of agricultural land."

Where a receiver of a certain property has already been appointed by a Court it is sufficient that another Court should appoint another receiver for the same property.⁸ It is only the Court that appointed the receiver that can remove him⁹ or give him any directions in the matter.¹⁰

13 When a receiver may be appointed See also Note 6 to S. 51

As has been seen in Note 2 *ante*, the appointment of a receiver is in the judicial discretion of the Court. Where the property is *in medio litæ* in the possession of one party a receiver can readily be appointed. But where any one is in possession under a legal claim strong reasons are necessary for interfering with his possession. See Notes 14 and 18 *infra* where the general principles are discussed. See also sub rule (2).

A plaintiff applying for the appointment of a receiver must show *prima facie* that he has a strong case and good title to the property¹ or a special equity in his favour² that the property in the hands of the defendant is in danger of being wasted.³ The distinction between the appointment of a receiver and temporary injunction is this. While in either case it must be shown that the property should be preserved from waste or alienation it is enough to show in an application for injunction that the plaintiff has a *fair question* to raise as to the existence of the right alleged but this is not enough for the appointment of a receiver—a good *prima facie* title has to be made out.⁴ The mere fact that the plaintiff in his plea made violent and wholesale charges of malversation against the defendant in possession is no ground for the appointment of a receiver.⁵ Nor is a mere future apprehension of misappropriation or mismanagement sufficient ground for the appointment.⁶ Vague charges against the person in possession are not enough; the charges must be specific.⁷ Persons in possession under a legal claim must not be removed on the strength of mere suspicion.⁸ In a suit for possession and mesne profits against a defendant who claims to hold the property as trustee, the mere fact that the defendant is a poor man from whom it would be impossible to realise any mesne profits which might be decreed, is no ground for appointing a receiver.

1884—Heinzel Court of Small Causes had power to appoint a receiver.

1911—113 Cal 623 (C.)

10

Note 13

- 1 (1924) 1923 Mad 813 (814)
- (1927) 1922 Pat 433 (434)
- (1923) 1923 Lah 48 (41-43)
- (1900) 1903 Upp Bur R 2nd quarter, Civil Procedure 17
- (1894) 5 Cal W N 567 (867)
- (1975) 1922 Cal 370 (371-372) Receiver will not ordinarily be appointed at instance of a plaintiff who has merely a shadowy claim
- [See (1900) 27 Cal 279 (282) "I thought if fair *prima facie* case is made out"]
- 2 (1922) 1922 Pat 318 (319, 320) 6 Pat L Jour 266
- [See also (1933) 1933 Sind 364 (365) Suit for possession of property—No prayer for mesne profits—Appoint

ment of receiver to safeguard mesne profits should not be made except in exceptional circumstances.]

- 3 (1940) 1936 Sind 37 (38)
- (1933) 1933 Nag 234 (235)
- (1926) 1926 Sind 63 (84)
- (1920) 1920 Iom 321 (321)
- (1911) 12 Ind Cas 198 (198-199) (L, B)
- (1931) 1931 Lah 688 (688) Some peril to the property must be shown
- (1889) 1889 Bom P J 184 (184) Redemption suit

- (1919) 1919 Mad 157 (158)
- (1890) 22 Cal 459 (460)
- 5 (1883) 5 All Eng 561 (561)
- (1909) 4 Ind Cas 694 (690) 1908 Pun Re No 107 page 494 Proof of such charges is necessary

where there is no allegation of misappropriation or waste.⁹ But in the undermentioned cases the *insolvency* of the person in possession of the disputed property was held to be good ground for the appointment of a receiver.¹⁰

A receiver cannot be appointed for the purpose of ascertaining the real income of a property so that the Court may have correct *data* for fixing the rate of maintenance payable to a widow.¹¹ The allegation against a defendant a trustee that since his acceptance of office, he has not paid allowances to the beneficiaries, without any allegation of waste or mismanagement *etc.*, is no ground for appointing a receiver in his place.¹² Nor should a receiver be appointed merely because the relations between the parties are strained¹³ or because the manager of the estate of the defendant produces his accounts and documents late.¹⁴ But where the defendant removes under suspicious circumstances a large extent of property during the pendency of a suit in which the title to the property is to be determined¹⁵ or where a Hindu widow in possession of her husband's estate is found to be wasting the property¹⁶ or where a life tenant intends to transfer the estate to a stranger thus constituting a danger to the reversionary interests,¹⁷ a receiver may be properly appointed. In a suit for possession where it is clearly proved that the estate is grossly mismanaged and wasted a receiver should be appointed.¹⁸ It is not necessarily improper that a receiver should be appointed to deal with the rents and profits of land assigned to a Hindu widow for her maintenance, even if she has no other source of income.¹⁹ The mere fact that the party in possession is a Mahomedan widow claiming a lien for her dower debt is no bar to the appointment of a receiver if there are good grounds for such appointment.²⁰ See also the undermentioned cases.²¹

A receiver may be appointed in a suit for a declaration²² or in a mere suit for money.²³ But in such cases the creditor must establish a special equity in his favour.²⁴ The High Court of Calcutta has however held that a simple creditor

- | | |
|--|--|
| 9 (1921) 1971 All 91 (92) 43 All 311 | denying plaintiffs rights as co-owners to share in rents and profits |
| (1915) 1915 Mid 926 (928 929) | —Receiver appointed |
| (1931) 1931 Lah 688 (689) | |
| 10 (1918) 1918 L B 23 (30) Insolvency of administrator is sufficient ground for appointing receiver though the administrator has been managing the estate carefully and has kept proper accounts | (1910) 7 Ind Cas 344 (345) (All) Suit to set aside trust—Profits from the property large—Expenses of the trust small—Trustees not paying due regard to any method of accounting—Receiver may be appointed |
| (1916) 1916 Mad 1128 (1129) Mortgagor in possession on mortgagee's behalf—Mortgagor becoming insolvent—Receiver can be appointed | (1926) 1926 Oudh 504 (505) Receiver appointed on order Criminal Procedure Code S 146—Title of one of the parties declared by Lord of Revenue—Held that Receiver's custody should be continued till disposal of civil suit |
| 11 (1975) 1975 Mid 1245 (1246) | |
| 12 (1916) 1916 Cal 582 (582) | |
| 13 (1923) 1923 Lah 48 (51 53) | |
| 14 (1912) 17 Ind Cas 261 (263) (Mad) | |
| 15 (1900) 27 Cal 279 (282) | |
| (1901) 5 Cal W N 365 (367) | |
| 16 (1910) 7 Ind Cas 534 (537) (Mal) | |
| (1863) 1 Beng L R (N C) 27 (27 28) | |
| 17 (1920) 1920 Bom 145 (146) 44 Bom 727 | |
| [See (1930) 1930 Bom 545 (552 554) 54 Bom 837] | |
| 18 (1915) 1915 Cal 35 (36) | |
| 19 (1915) 1915 Nag 93 (100) 11 Nag L R 113 | |
| 20 (1973) 1973 Nag 21 (21 22) | |
| 21 See (1895) 21 Mid 310 (323) Co-owner—One co-owner entitled to manage at minor—His mother a Goshai and acting through stranger | 22 (1923) 1923 Lah 623 (674 625) (1922) 1922 Lah 444 (446) (1927) 1927 Lah 65 (65) [But see (1909) 4 Ind Cas 603 (603) 3 Sind L R 118] |
| | 23 (1923) 1923 Mad 184 (186) 52 Mad 937 (1915) 1915 Nag 98 (100) 11 Nag L R 113 (1907) 30 Mid 255 (264) [But see (1912) 17 Ind Cas 16 (16) (Mal) Receiver cannot be appointed for property which cannot be dealt with in any way by the Court in the suit] |
| | 24 (1922) 1922 Pat 313 (319 320) 6 Pat L J 909 306 |

1. manner but cautiously, judicially and according to legal principles⁷ after a consideration of the whole of the circumstances of the case⁸. A receiver cannot be appointed merely because it is expedient or convenient to the mortgagee to do so⁹ or because it will do no harm to do so¹⁰. The *bona fide* possessor of the property in dispute should not be disturbed by the appointment of a receiver unless there is some substantial ground for such interference,¹¹ such as a well founded fear that the property in question will be dissipated or that other irreparable mischief may be done unless the Court gives its protection¹². As has been said already in Note 13 *ante* the Court will refuse to interfere unless the applicant establishes some special equity in his favour¹³.

15 Partition suits

O 40 R 1 sub rule (2) applies only to the dispossession of *third parties* (See Note 19 *infra*). Hence it is no bar to the appointment of a receiver in a suit for partition¹. But a receiver will not be appointed in such a suit in the absence of special circumstances necessitating interference by the Court². The mere fact that there is a dispute as to the share to which the plaintiff is entitled³ or that the relations between the parties are strained⁴ is no ground for appointing a receiver. Nor is a mere apprehension of future waste sufficient for that purpose⁵. There should be some specific act of misappropriation, malversation, or mismanagement shown and this principle is practically to be applied in the case of partition of Hindu joint family property in the hands of the eldest brother who is the manager of the property⁶. But this Rule does not apply when one co owner occupies the whole property and *excludes* the other co owners from their shares of the ten

may be appointed

- (1918)
(1911)
7 (1923) 1923 Lah 239 (241)
(1926) 1926 Cal 1092 (1092) 1093 1096)
(1916) 1916 Cal 832 (852)
(1928) 1928 P C 49 (50) 55 Ind App 131
55 Cal 720 (1 C)
(1879) 5 Cal 259 (265)
(1931) 1931 Lah 688 (688)
8 (1922) 1922 Lah 313 (351 352) 6 Lah 74
(1920) 1920 Lah 125 (127)
(1910) 6 Ind Cas 659 (660) 1910 Pun Re
No 36
(1910) 5 Ind Cas 36 (97) (Cal)
(1917) 17 Ind Cas 202 (203 204) (Cal)
(1913) 19 Ind Cas 873 (874) (Cal)
(1911) 11 Ind Cas 870 (871) (Mid)
(1911) 9 Ind Cas 985 (986) (Cal)
(1924) 1924 Cal 456 (4 9)
(1926) 1926 Sud 93 (54)
(1883) 5 All 556 (561)
(1870) 13 Suth W R 60 (60)
(1895) 27 Cal 459 (464 465)
(1898) 15 Cal 418 (422)
(1855) 1855 Pun Re No 102 page 232
(1890) 19 Mad 390 (394)
(1900) 4 Ind Cas 614 (625) 1900 Pun Re
No 107 page 494
(1937) 1937 Lah 82 (83)
9 (1916) 1916 Cal 892 (892)
(1924) 1924 Cal 456 (456)
(1925) 1925 Lah 349 (351) 6 Lah 74
(1930) 1930 Cal 610 (611)
(1890) 1890 Pun Re No 126 page 437
(1913) 21 Ind Cas 283 (285) 16 Oudh Cas
234
(1924) 1924 Mad 482 (483)
11 (1927) 1927 Rang 179 (179) 5 Rang 70
(1924) 1924 Cal 456 (459)
52)
(1924) 1924 Mad 482 (483)
(1927) 1927 Rang 179 (179) 5 Rang 70
(1924) 1924 Cal 456 (459)
(1910) 8 Ind Cas 1191 (1194) (L L)
(1910) 5 Ind Cas 27 (28) (Cal)
(1902) 1902 Pun Re No 73 page 26
(1890) 1890 Pun Re No 136 page 437
12 (1928) 1928 P C 49 (50) 55 Ind App 131
55 Cal 720 (P C)
13 (1922) 1922 Pat 318 (319 320) 6 Pat L
Jour 366
Note 15
1 (1929) 1929 Rang 283 (284)
(1926) 1926 Smd 37 (34)
(1890) 17 Cal 614 (618 619)
(1932) 1932 Mad 542 (544)
2 (1920) 1920 Bom 321 (321)
(1935) 1935 Mad 402 (404)
3 (1927) 1927 Rang 179 (179) 5 Rang 70
4 (1923) 1923 Lah 48 (48)
properties—No finding that manager

although no waste or malversation by the co owner in possession is proved ⁶ The Court may also allow the party in sole occupation to elect to pay to the other co owner an occupation rent or may require him to furnish security for the shares of the rents and profits of the other parties ⁷

A receiver may be appointed in a partition suit at the instance of the creditors of the co parceners ⁸ A receiver in a partition suit is entitled to require payment of rent from the party who is in possession of an important item of the family property in suit ⁹

16 Executor in possession

In England the rule is that the Court will not interfere with the possession of an executor of a will by appointing a receiver except where a case of gross misconduct is established against the executor ¹ In India also very strong reasons are necessary to appoint a receiver in such a case ² (See the undermentioned cases ³ for instances in which a receiver was appointed) But in the case of Muhammadan will the executor is not entitled to the same degree of protection from interference as is given by the English Law and a receiver can more readily be appointed in displacement of such an executor than in the case of the executor of a will made by other persons ⁴ This is because a Muhammadan can dispose of by his will only a *third* of his property and the reason for the English rule, viz that the executor is a person enjoying in a marked degree the testator's confidence and as such his possession should not be lightly interfered with, does not apply with the same force to the executor of a Muhammadan will

17 Receiver if can be appointed for a company

A Court cannot appoint a receiver of a company except in a debenture holder's action when the business and assets of the company are charged with payment of the claims of the debenture holders If it is necessary to protect the assets of a company, the appropriate action must be taken under the provisions of the Companies Act ¹

18 Appointment if can be made after reference to arbitration

A receiver can be appointed after a suit has been referred to arbitration unless the Court finds that the reference included also the question of interim management ¹ He can be appointed even in the interval between the submission of an award and the final acceptance or rejection of it ²

is guilty of waste or mismanagement—Receiver should not be appointed

- (1913) 18 Mad 23 (24)
- 6 (1910) 5 Ind Cas 96 (96, 97) (Cal)
- (1929) 1929 Lah 497 (497)
- (1914) 1914 Cal 430 (441)
- 7 (1914) 1914 Cal 430 (441)
- 8 (1929) 1929 Nag 283 (284)
- 9 (1920) 1920 Cal 310 (319)

Note 16

- (1933) 1933 Bom 342 (346) Appointment of executor questioned and his title in dispute—Receiver appointed
- (1927) 1927 Rang 135 (135) Executor failing to file inventory required by law—Four years income not accounted for—Receiver should be appointed

- 4 (1927) 1927 Rang 135 (135)
- (1895) 13 Bom 83 (83)

Note 17

- 1 (1925) 1925 Cal 817 (819) 52 Cal 513

Note 18

- 1 (1928) 1928 Cal 256 (258, 259)
- (1925) 1925 Sind 102 (102) 18 Sind L R 303
- 2 (1925) 1925 Sind 102 (103) 18 Sind L R 303

is also executrix under will executed by deceased—Mere claim to such property by alleged daughter is no ground for appointment of Receiver

- 3 (1928) 1928 Cal 256 (259) 55 Cal 249

Executor directed to act in consul

C P C 321 & 322

19 Receiver in Execution proceedings

The appointment of a receiver is prescribed by S 51 of the Code as one of the modes of executing a decree. This Rule prescribes the *conditions and limitations* under which such appointment is to be made. Reading S 51 with this Rule, as it ought to be, it is clear that the Court can appoint a receiver in execution proceedings only when it considers *just and convenient* to do so.¹ The decree holder's consent is, however, not necessary for such appointment.² Nor can he *as of right* and *as a matter of course* apply for execution by the appointment of a receiver.^{3a}

Although in India where there is no distinction between law and equity it is not always necessary that legal execution should be exhausted before equitable execution by the appointment of a receiver is made, such appointment is not to be resorted to when there is no impediment to execution being levied in the ordinary way as provided by the Code, the person seeking equitable execution must show that he was met by difficulties arising from the nature of the property which prevented his obtaining relief by the usual modes of execution and that it is necessary and advantageous to appoint a receiver.³ The mere fact that the defendants belong to an old family and that, unless the Court steps in and saves them from the consequences of their debts they may be ruined, is not, in itself, a sufficient ground for such appointment.⁴

A receiver should not be appointed where it would unduly delay the realisation of the decree debt.⁵ In execution of a decree against a legal representative of a judgment debtor a receiver cannot be appointed of properties which do not form part of the assets of the deceased.⁶ nor can he be appointed where such appointment has the effect of depriving one of the legal representatives of the *entire* profits from the portion of the estate in his hands without anything being left even for the maintenance of himself and his family while the other legal representatives who are in enjoyment of substantial portion of the deceased's

Note 19

- 1 (1931) 1931 Oudh 307 (303)
- (1933) 1933 All 227 (229) Decree for sale of mortgaged property—Application for stay of execution by judgment debtor and application for appointment of receiver by decree holder—Execution stayed and receiver appointed—Appointment of receiver is just and fair
- (1933) 1933 Sind 231 (232) Reasonable grounds must be made for appointment of receiver—There must be danger of waste or destruction of property
- (1919) 1919 Oudh 326 (323) 22 Oudh Cas 194
- (1932) 1932 Cal 194 (195)
[See also (1923) 75 Ind Cas 417 (419) (Cal) Impartible Zemindari with valuable forests and mines—Receiver should be appointed]
- 2 (1863) 1863 Muz 261
- 2a (1932) 1932 Cal 163 (192) 59 Cal 205
(1929) 1929 Mad 20 (21)
[See also (1933) 1933 Sind 231 (232) Decree capable of execution in the ordinary manner—Receiver will not be appointed]
- 3 (1910) 1910 Cal 502 (504, 506) 57 Cal 364

- 4 (1895) 23 Cal 517 (520)
(1916) 1916 Cal 540 (540) Fact that judgment debtor will be reduced to poverty if his properties were allowed to be sold is not sufficient
- (1931) 1931 Oudh 307 (303) The fact that the appointment of a receiver is the only way of saving the judgment debtor's ownership of the hypotheated villages is not sufficient
[See also (1878) 2 Cal 53 (73) Simply to carry on judgment debtor's business pending execution proceedings receiver cannot be appointed]
[But see (1869) 12 Suth W R 56 (67) Receiver should be appointed when judgment debtor offers to place all his properties under Court's management]
- 5 (1869) 70 5 Mad H C R 272 (273)
(1871) 15 Suth W R 322 (323)
(1876) 23 Suth W R 33 (34)
(1874) 22 Suth W R 220 (220)
[See also (1845) 2 Cal L Rep 185 (186)]
- (1875) 23 Suth W R 287 (285) Application for appointment of receiver—Simply to put off payment—Application should be refused
- 6 (1937) 19 All 235 (237)

estate were left scot free ⁷

Where the decretal debt will be equilly and as surely satisfied by the appointment of a receiver as in any other way and at the same time the judgment debtor will be saved from great prospective loss the Court can appoint a receiver ⁸ Such an appointment can also be made where the interests of both the decree holder and the judgment debtor can be safeguarded and where such appointment appears to be the only way in which the decree holder can hope to realise any appreciable part of his dues ⁹ Thus where a decree has been obtained against trust property and such property cannot be sold in execution of the decree ¹⁰ or where the debts and rents due to the judgment debtor are sought to be attached in execution of the decree and the person owing the same denies his liability to the judgment debtor ¹¹ or where a decree in favour of the judgment debtor is attached in execution of the decree in favour of his decree holder ¹² a receiver can properly be appointed See also the under mentioned case ¹³ where a receiver was appointed to sell a colliery directed to be sold by the decree so as to safeguard the interests of all parties

A receiver can be appointed for the preservation of a property after its sale in execution and before its confirmation ¹⁴

The appointment of a receiver in execution does not operate as a stay of execution so as to disentitle the decree holder from executing his decree in respect of the same debt in any manner provided by the Code The mere fact that the decree holder consented to the appointment does not estop him from subsequently seeking to enforce his decree by execution ¹⁵

20 Receiver after decree

The words whether before or after decree are new and make it clear that a receiver can be appointed even after a decree has been passed in the suit ¹ These words have given effect to the undermentioned case ² under the former Code A receiver can be appointed even after execution sale and before its confirmation ³ or after the grant of leave to appeal to the Privy Council ⁴ But the Court has no jurisdiction to appoint a receiver when there is no litigation pending before it, in which such appointment can be made Thus no receiver can be appointed after a suit has been dismissed ⁵ or compromised ⁶ or after the decree has been satisfied ⁷

- s 285
- proper remedy
11 (1887) 11 Bom 448 (453)
(1925) 1925 Rang 318 (319) 3 Rang 235
12 (1903) 30 All 393 (394)
13 (1930) 1930 Cal 503 (504 505 506 507)
57 Cal 961
[See however (1933) 1933 Lah 687
(688) 14 Lah 457 Receiver cannot
be appointed in execution to sell
of

(1932) 1932 Cal 163 (193) 59 Cal 205
Principle is whether in view of the
assets the decree amount is likely
to be realised within a reasonable
time from the profits of attached
property
[See also (1933) 1933 Nag 266 (267)
Jagir of defendant not attachable—
Receiver can be appointed on suit
debtor]
49, 54

[See also (1907) 9 Bom L R 540 (541)
Judgment debtor a partner in a
firm—Partnership property not at-
tachable—Appointment of receiver is

Note 20

- 1 (1926) 1926 Cal 1006 (1008)
(1926) 1926 Cal 978 (979)
2 (1883) 8 Mad 279 (233)
3 (1910) 5 Ind Cas 758 (758) (Mad)
4 (1911) 12 Ind Cas 196 (198 199) (U B)
5 (1870) 14 Suth W R 351 (384)
6 (1920) 19 Pat 501 (502) 5 Pat L Jour
513
7 (1926) 1926 Cal 918 (919)

1. 21 Receiver of property in the hands of a common manager

Under this Rule a receiver can be appointed for property in the hand of a common manager under S 95 of the Bengal Tenancy Act¹. A receiver can also be appointed pending proceedings for the appointment of a common manager. A Civil Court can appoint a receiver of property in respect of which proceedings for the appointment of a common manager are pending before the District Judge³.

22 Powers of receiver

A receiver has no powers except what have been conferred on him expressly or impliedly by the Court¹. His powers are therefore conditioned by the terms of his appointment subject to any subsequent modification by the Court². In the absence therefore of any provision express or implied as to the powers conferred on him there is no presumption that all the powers mentioned in Cl (d) of the Rule are conferred on him³ and he cannot deal with the property of which he is the receiver in any way without the consent of the Court⁴. Thus he has no power to lease out *debutter* property without the sanction of the Court⁵. Even if full powers are conferred on the receiver he should take the directions of the Court in all important matters if he wishes to have complete protection for himself⁶.

A receiver who has been given all the powers mentioned in Cl (d) will have impliedly a discretionary power of sale⁷. The authority will also include a power to give notice to quit or to sue for compensation for use and occupation without the special leave of the Court⁸. A general power of management will include a power to exercise the powers of a proprietor under Madras Act II of 1894⁹. A *bona fide* acknowledgment of a debt by the receiver is an acknowledgment by an authorized person which will extend the period of limitation under S 19 of the Limitation Act¹⁰. But a receiver can have at the most only such powers and rights over the property as the parties to the suit are found to possess when their rights are finally determined¹¹. Any misrepresentation or concealment of material facts from the Court in connexion with a proposed transaction by the receiver would vitiate the authority conferred on the receiver¹². Nor can a clause be added to a lease granted by the receiver subsequent to the grant of the sanction if it was not mentioned in the

Note 21

- 1 (1911) 9 Ind Cas 1027 (1029 1030) (Cal)
- 2 (1916) 1916 Cal 477 (427) 43 Cal J86
- (1917) 1917 Cal 815 (815) Evidence of necessity for such appointment should be produced
- 3 (1913) 18 Ind Cas 393 (399) (Cal)

Note 22

- 1 (1925) 1925 Mad 318 (319)
- 2 (1917) 1917 Mad 746 (744)
- 3 (1915) 1915 L B 139 (140)
- (1926) 1926 Mad 357 (358)

[See also S 10 of the Provincial Insolvency Act V of 1920 for the powers of an interim receiver and S 16 of the Punjab Sikh Gurdwaras and Shrines Act VI of 1922 for the powers of the Board of Management under the said Act]

But see (1921) 1921 Nag 136 (137) Civil as expressly reserved every receiver has all the powers men-

tioned in Rule 1]

- 4 (1925) 1925 Cal 407 (405)
- 5 (1929) 1929 Cal 823 (828 829)
- 6 (1911) 12 Ind Cas 780 (786) (Cal)
- (1894) 19 Bom 660 (662)
- 7 (1924) 1924 P C 202 (204) (P C)
- 8 (1917) 1917 L L 9 (9)

[See also (1891) 19 Cal 477 (470) Where the receiver was held entitled to sue for the ejectment of the tenant]
[But see (1887) 14 Cal 323 (340 341) Held on construction of the order]

Receiver is not agent of parties as to his duty in his acknowledgment.

- 11 (1913) 19 South W R 37 (39)
- 12 (1929) 1929 Cal 523 (529 530)

terms proposed in the application for sanction¹³ When property is sold by a receiver in auction under the directions of the Court, the sale is as much a Court sale as an execution in the usual course, and is therefore not complete till it is confirmed by the Court¹⁴ Nor can it be attacked by the parties *collaterally*¹⁵ In the case of a *private* sale by the receiver, a right of pre-emption can be exercised to the same extent as if the sale was by the owner himself¹⁶

A Court has no power to confer on the receiver any fresh power such as a liberty to sell *after the suit has been dismissed*¹⁷ It is also irregular for the Court to order payment of the debts of any party from the estate before the ascertainment of the estate In exceptional cases, as where a plaintiff applies for payment to the creditors from out of the estate in the hands of the receiver, payments might be ordered out of the share of the plaintiff, where such share is admitted and it is more than enough to satisfy the debts of the creditors, subject to the plaintiff later on proving that they are liabilities of the estate and as such must come out of the whole estate¹⁸ No Court other than that by which the receiver was appointed can make or give any directions to the receiver as supplementary to those given by the appointing Court¹⁹ A mortgage by the receiver under the Court's order directing that it should be entitled to priority over the pre-existing charges, takes precedence over such mortgages as a salvage lien²⁰ See also Note 42 below

23 All such powers as to bringing or defending of suits as the owner himself has

A right to sue is not necessarily incidental to the general powers of a receiver¹ and does not exist unless it has been conferred on him expressly or by necessary implication² It depends solely on the order of the Court and not on the wishes of the parties³ A Court can expressly authorise the receiver to sue in his own name⁴ But such an authority may also be given *impliedly* Thus a receiver who is given the same powers of suing and defending suits as the owner himself has, is entitled to sue in his own name though not *expressly* authorised to do so⁵ Similarly, a receiver appointed to collect outstandings can sue in his name⁶ On the appointment of a receiver with the requisite powers he is the only person competent to bring suits and obtain decrees Hence, after such a receiver has been appointed for an estate the landlord cannot sue for rent⁷

Though ordinarily a suit for possession can only be instituted by a person having a *present title* to such possession, and though by his appointment no pro-

[See however (1910) 6 Ind Cas 300 (301) (Cal) Where a distinction was drawn between sale by the Court and a sale under the orders of a Court]

15 (1907) 6 Cal L Jour 404 (408)

16 (1905) 27 All 670 (677)

17 (1907) 34 Cal 336 (333)

18 (1892) 16 Bom 511 (512, 513)

(1863) 1863 Marsh 261 2 May 112 Manx
Act under S 243 of Code of 1859—
Court has no power to order him to
pay claims of persons other than
decree holders

19 (1905) 4 Mad L Tim 263 (263)

20 (1907) 34 Cal 427 (442)

Note 23

1 (1912) 17 I C 751 (751) 1913 Pun Re No 56

4 (1898) 25 Cal 642 (646)

[See also (1904) 6 Bom L R 995 (999)
30 Bom 250 A decree in such suit
will be for the benefit of the true
owner

5 (1884) 10 Cal 713 (733)

(1923) 1929 Cal 110 (111) 55 Cal 1216

(1907) 34 Cal 305 (313)

(1903) 26 Cal 715 (720)

[But see (1869) 12 Suth W R 117
(118) Receiver obtaining permission
to sue on behalf of parties interested

1. Court all the requisite powers⁸ In a suit brought by the receiver within his authority, the defendant cannot question the validity of his appointment as receiver⁹ Where however, after the appointment of the receiver, the property is sold in Court auction to a third person, and a sale certificate issued to him, the authority to sue for possession of that property must be taken to be withdrawn from the receiver and he cannot therefore sue for possession of that property The only person who could sue therefor is the auction purchaser¹⁰ A receiver's discretion to spend money in litigation ought not to be interfered with by the appellate Court the Court of first instance will, if necessary take security from him for restitution of such expenses in certain events¹⁰

It was held in the undermentioned case¹¹ that a receiver of a Zemindari was entitled to sue for sums spent by the Zemindar at the defendant's request before the appointment of the receiver as it was found that the claim arising out of such expenditure was one annexed to the estate

24 Realization of property

A receiver appointed to get in and realise the estate of a deceased person and to pay debts has a power of sale also¹ Similarly, a receiver of mortgaged properties in respect of which mortgage decrees have been passed, who has been given powers of realisation, management protection and preservation of the property has a discretionary power of sale² But a receiver empowered to collect *outstandings* and do all things necessary for the realisation and preservation of the assets of a firm has no power to mortgage the property of the firm³ A receiver of debts due to a judgment debtor can take legal proceedings by way of suit or execution proceedings to collect the outstandings⁴ A receiver however, cannot recover property sold away by the judgment debtor, on the ground of the sale being voidable under S 53 of the Transfer of Property Act⁵ Rent accrued due to the estate prior to the appointment of the receiver is not part of the estate in his hands and therefore a payment to the proprietor on account of such liability is a sufficient discharge of the debt⁶ For further information, see Notes 22 and 23, *supra*

25 'Collection of the rents and profits thereof'

A receiver appointed to collect the rents of land cannot raise the rent¹ A receiver appointed in respect of property under attachment, has the powers of the owner as they existed at the time the property was brought under the orders of the Court by attachment provided they have not ceased by operation of law Hence, where subsequent to the attachment but before the appointment of the receiver, the landlord had reduced the rate of rent payable by the tenant, the receiver was held entitled to recover rent at the original rate²

Where a receiver is appointed in execution of a decree to collect the rents and profits of the estate of the judgment debtor, but the lessee pays the rent to the mortgagee of the judgment debtor, the receiver is entitled to follow the rent

- (1911) 11 Ind Cas 162 (103) (Cal)
8 (1916) 1916 Cal 51 (53 54)
9 (1919) 1919 Cal 533 (534) 46 Cal 70
9a (1932) 1932 Rang 11 (12) 9 Rang 565
10 (1915) 1915 Mad 355 (355)
11 (1886) 9 Mad 334 (337 338 340)
N. C. 71

[See also (1873) 10 South W R 37 (39)
Case under Code of 1859—Receiver's
power confined to realisation of debts
due to judgment debtor

- 4 (1871) 22 South W R 76 (77)
(1874) 21 South W R 419 (419)
5 (1912) 17 I C 233 (234 235) 35 Mad 578.
6 (1918) 1918 I at 133 (133)

Note 25

- 1 (1882) 8 Cal 719 (7 0)
2 (1885) 8 Mad 418 (420)

in the hands of the mortgagee³

26 Power as to the execution of documents as the owner himself has

When a receiver sells a property under the orders of the Court, he should be a party to the deed of conveyance¹ A receiver in an administration suit cannot sell in satisfaction of a mortgage executed by one of the claimants of the estate before the administration is complete² A conveyance of the property by a receiver acting within his authority binds all the persons entitled to share in the estate including minors³

27 Delegation of duty by receiver

A receiver being an officer of the Court, is responsible to the Court for the due discharge of his duties He is not entitled to delegate to another any of the duties entrusted to him by the Court,¹ or assign to another for valuable consideration any of his rights as receiver^{1a} Not having any proprietary interest in the estate under his control, he cannot assign his rights to another so as to enable the latter to enforce them as such assignee² As to whether and under what circumstances a receiver is entitled to have clerks and agents to assist him, see Notes 35 and 42 below

28 The receiver is an officer of the Court

A receiver is an officer of the Court He is also "a public officer within the meaning of S 2 Cl 17"¹ He is nothing more than the hand of the Court for the purpose of holding the property of the litigants whenever it is necessary that it should be kept in the grasp of the Court, in order to preserve the subject matter of the suit *pendente lite*^{1a} He is a representative of the Court and not of any of the parties to the suit, though he holds the property for the benefit of those ultimately found to be rightful owners² Thus, a receiver in execution proceedings is not the agent of the judgment creditor and moneys realised by the receiver do not become *ipso facto* moneys belonging to the judgment creditor³ (See Note 33, *infra*) A receiver's possession being that of the Court, no one is entitled to interfere with it⁴ A sale of property by the receiver has the same effect as a sale by the Court and the purchaser is entitled to the assistance of the Court in obtaining possession of the property so purchased⁵ A receiver, though an officer of the Court is not a *judicial* officer Hence, a Court has no power to delegate to a receiver the duty of enquiring into the claims of rival claimants to the property⁶

A receiver should not be allowed to purchase the property of which he is the receiver⁷ and such a sale if made would be voidable and can be avoided by an

³ (1941) 1934 Rang 84 (84), Reversing 193 3 Rang 35"

Note 26

1 (1871) 6 Beng L R 492 Note

2 (1901) 5 Cal W N 409 (409)

3 (1916) 1916 Cal 819 (320) 43 Cal 124

(1894) 41 Cal 479 (481)

Note 27

1 (1895) 19 Bom 660 (662)

1a (1910) 8 Ind Cas 976 (978) 5 L B R 213

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Note 28

1 (1931) 1931 Cal 503 (503) 58 Cal 800

1a (1871) 6 Beng L R 486 (487)

(1903) 30 Cal 593 (593)

(1895) 22 Cal 1011 (1015) 22 Ind App 203

(P C)

2 (1928) 1928 Cal 402 (403 405)

(1921) 1921 Cal 516 (516)

(1903) 40 Cal 721 (724) He cannot be fined as representing the owner

(1910) 6 Ind Cas 416 (418) 37 Cal 754

(1929) 1929 Cal 609 (660) Receiver cannot pledge credit of any party to the proceeding

3 (1930) 1930 Mad 4 (8)

4 (1923) 1929 Mad 181 (186) 52 Mad 938

5 (1894) 41 Cal 479 (483)

[See (1905) 33 Cal 1175 (1177) When Court orders transfer of property it is entitled to priority over subsequent attachment though the transfer may be actually executed subsequent to attachment]

6 (1929) 1929 Bom 478 (479) Order directing Receiver to hold inquiry as to heirs in contested succession proceedings—Order held illegal

(1921) 1921 Cal 298 (299) Claims of third parties—Court cannot delegate duty of enquiry to Receiver

7 (1901) 5 Cal W N 91 (104)

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(1911) 11 Ind Cas 102 (103)

8 (1916) 1916 Cal 1 (53 54)

9 (1919) 1919 Cal 533 (534)

10 (1932) 1932 Rang 11 (12) 9 Rang 565

11 (1915) 1915 Mad 355 (355)

11 (18-6) 9 Mad 334 (337 339 340)

1

2

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due to judgment debtor

4 (1874) 22 South W R 76 (37)

(1874) 21 South W R 119 (119)

5 (1912) 17 I C 233 (234 235) 35 Mad 578

6 (1918) 1918 Pat 153 (153)

Note 25

1 (1882) 8 Cal 719 (720)

2 (1885) 8 Mad 418 (420)

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A receiver should not be allowed to purchase the property of which he is the receiver⁷ and such a sale if made would be voidable and can be avoided by an

3 (1934) 1934 Rang 84 (84) Reversing 193 3

Rang 307

Note 26

1 (1871) 6 Beng L R 492 Note

2 (1901) 5 Cal W N 408 (409)

3 (1916) 1916 Cal 319 (320) 43 Cal 124

(1894) 21 Cal 479 (481)

Note 27

(1910) 6 Ind Cas 416 (418) 37 Cal 754

(1929) 1929 Cal 659 (660) Receiver cannot pledge credit of any party to the proceeding

3 (1930) 1930 Mad 4 (8)

4 (1929) 1929 Mad 184 (186) 52 Mad 938

5 (1894) 21 Cal 479 (483)

[See (1905) 33 Cal 1175 (1177) When Court orders transfer of property it is entitled to priority over subsequent attachment though the transfer may be actually executed subsequent to attachment]

6 (1929) 1929 Bom 478 (479) Order directing Receiver to hold inquiry as to heirs in contested succession proceedings

Note 28

1 (1931) 1931 Cal 503 (508) 58 Cal 850

1a (1871) 6 Beng L R 496 (497)

(1903) 30 Cal 593 (598)

(1895) 22 Cal 1011 (1015) 22 Ind App 203

(P C)

2 (1928) 1928 Cal 402 (403 405)

(1921) 1921 Cal 516 (516)

(1903) 30 Cal 721 (724) He cannot be fined as representing the owner

application made under S 47 of the Code⁸

29 Possession of the receiver enures for the benefit of the true owner

The possession of the receiver is the possession of the Court,^{1a} and the possession of the Court by the receiver is the possession of all the parties to the action according to their titles. The property passes into legal custody (*custodia legis*) and such custody is for the benefit of the true owner. The receiver thus holds the property for the benefit of those ultimately found to be the true owners.¹ By the appointment of a receiver the Court takes upon itself the management of the property during the continuance of the litigation. But the proprietary right or interest in the property is not transferred from the rightful owner either to the Court or to the receiver appointed by it.² The receiver's possession being possession on behalf of all the parties to the action according to their titles none of them can claim to be in adverse possession during the continuance of the receiver's possession against the party ultimately found entitled to the property.³ Nor is it open to the receiver during the continuance of the receivership to set up a title in himself adverse to that of the parties. Even if the receiver is discharged he would still hold the property on behalf of the rightful owner.⁴ Thus the title of the real owner is in no way affected either in theory or principle, by the appointment of a receiver. A payment made by a receiver out of the funds of an estate is equivalent to a payment made by the owner of the estate and where he would be entitled to get reimbursement from a third person if he had made the payment himself he would be equally entitled to such reimbursement if the payment is made by the receiver.⁵ If despite the appointment of the receiver the defendant continues in possession he can be sued by the true owner for the profits misappropriated by him.⁶

The appointment of a receiver does not supersede a prior attachment of the property.⁷

When the owner of a property is himself appointed receiver he does not lose his rights as a proprietor of dealing with the property during the receivership except that he cannot impair the value of the property in his hands or cause interference with his possession of the property as receiver.⁸

30 Attachment of properties in the hands of receiver

Property in the hands

[See also (1932) 132 Cal 59 Cal 956 Decree holding purchasing in Court auction with out leave of Court void]

8 (1932) 1932 Cal 672 (673) 59 Cal 956

Note 29

1a (1935) 1935 Md 591 (596)

(1933) 1933 Loh 671 (673) 11 Loh 779
Receiver appointed by one Court to take charge of properties—Another

rt

ted and defendant becoming solvent—Official Receiver is not entitled to the money in preference to the plaintiff]

2 (1929) 1929 Cal 110 (112) 55 Cal 1216

(1926) 1926 Cal 385 (392) 52 Cal 914

(1916) 1916 Loh 78 (50) 1317 Pam Re No 31

(1913) 13 Suth W R 37 (39)

(1925) 1925 All 72 (72) 46 All 924

3 (1916) 1916 Cal 751 (752) When Receiver is appointed there is no disposition of true owner within Art 112

(1928) 1928 Cal 402 (403 405)

(1907) 31 Cal 305 (316 317)

(1909) 28 Cal 625 (623 630)

(1899) 22 Md 448 (452)

[See also (1933) 1933 Cal 625 (627)

Application for appointment of receiver in partnership suit—Order

that defendant should pay Rs 1000

of the Court, it is as a general rule, exempt from judicial process except to the extent permitted by the Court appointing such receiver. In other words the possession of the Court is not to be interfered with by taking any judicial proceedings against the property in the receiver's hands without the permission of the Court.¹ Hence leave of Court is necessary for execution of a decree by attachment and sale of property in the hands of the receiver.²

Such leave is necessary even where the property is sought to be proceeded against in execution of a mortgage decree, although no attachment is necessary for sale in such a case.³ The High Court of Calcutta is, however, of opinion that as no attachment is necessary in the case of a sale under a mortgage decree the permission of the Court is not necessary for such a sale.⁴ Even where an attachment was levied on property *before* the appointment of the receiver it is within the discretion of the appointing Court, to refuse to permit a sale of property under such attachment. A purchaser in Court auction at a sale held without the previous permission of the Court, buys at his peril, as the sale may be cancelled.⁵ Permission is necessary even for an application for rateable distribution against the receiver.^{6a}

A sale of property in the hands of a receiver without the leave of the Court, is however, not void but is only *voidable*, i.e., it is valid until set aside by appropriate proceedings. If the persons interested do not impeach the sale it is not open to others to do so.⁶ It has even been held that the sale cannot be set aside if the person seeking to have it set aside has in no way been prejudiced by the sale.⁷

But where a decree obtained by a receiver is attached without the Court's permission and is then transferred by the receiver to a third person who takes the assignment in good faith and without knowledge of the attachment the attachment being irregular does not affect the title of the assignee.⁸

Though a receiver of a property may have been appointed yet until he actually takes possession of the property a stranger decree holder is not precluded from executing his decree against the property without obtaining the leave of the Court.⁹

Note 30

- 1 (1925) 1925 Mad 51 (51)
(1910) 5 Ind Cas 390 (392) (Cal)
- 2 (1923) 1923 Mad 144 (146) 47 Mad 47
(1898) 26 Cal 127 (129)
(1892) 18 Bom 577 (579 580)
(1834) 21 Cal 85 (91) Such attachment will not be recognised
(18 6) 1 Cal 403 (406)
(1911) 11 Ind Cas 187 (188 189) (Cal)
[See (1905) 25 All W N 110 (111) On discharge of receiver no bar to execution of decree against property of which he was appointed receiver]
[See (1935) 1935 Mad 697 (699) Sale

(1935) 1935 Mad 624 (625) Mortgage decree holder party to partition suit in which receiver was appointed—Receiver took possession before auction sale in favour of mortgagee—Mortgagee not having leave of Court—After disposal of suit party from whom possession was taken by Receiver is entitled to possession in preference to mortgage purchaser who got only symbolical possession

- 1 (1899) 6 Cal 127 (128 129)
- 5 (1925) 1925 Mad 51 (51)

47

order applying for adjournment so that he may pay decree debt—Sale subsequently held held valid even though not held with previous leave of Court and though receiver was not implicated in execution proceedings]

- 3 (1923) 1923 Mad 144 (2) (146) 47 Mad 47

- 8 (1923) 1923 Cal 191 (129 130)
(1935) 1935 Mad 624 (624) Persons with paramount rights not parties to suit but in possession of property are not prejudiced
(1919) 1919 Cal 269 (270)

The proper Court to permit the attachment of property in the hands of a receiver is the Court by which the receiver has been appointed⁹

As to the effect of subsequent grant of leave, see Note 31 *infra*

31 Suits by or against receiver—Leave of Court—See also Note 43 *infra*

A receiver can neither sue nor be sued without the leave of the Court¹ He is merely an officer of the Court and not the representative of the owner of the estate Hence, no cause of action vests in him and he has no *locus standi* to sue except with the leave of the Court² "There is no statutory provision which requires a party to take the leave of the Court to sue a receiver The rule has come down to us as a part of the rules of equity, binding upon all English Courts of Justice in this country It is a rule based upon public policy which requires that when the Court has assumed possession of a property in the interests of the litigants before it, the authority of that Court is not to be obstructed by suits designed to disturb the possession of the Court The institution of such suits is in the eye of the law a contempt of the authority of the Court and therefore the party contemplating such a suit is required to take the leave of the Court so as to absolve himself from that charge The grant of such leave is made not in the exercise of any power conferred by statute, but in the exercise of the inherent power, which every Court possesses to prevent acts which constitute or are akin to an abuse of its authority"³

A Court will, however, readily grant leave to sue the receiver if it is satisfied that there is a case to be tried so that the claim of the third party may be tried in the presence of the receiver⁴

The omission to obtain the sanction of the Court prior to the institution of the suit can be rectified by leave granted subsequent to the institution of the suit⁵ In the undermentioned cases⁶ however, it was held that the Court's sanction was a condition precedent to institution of the suit and the defect due to the want of such sanction could not be rectified by leave obtained subsequently A suit against

9 (1929) 1929 Lah 147 (148)

Note 31

1 (1902) 6 Cal W N 829 (829) 29 Cal 509

(1881) 10 Cal 1014 (1017)

(1927) 1927 Pat 397 (398)

(1903) 30 Cal 593 (598)

(1903) 30 Cal 721 (724)

(1925) 1925 Rang 175 (175) 6 Rang 268

(1923) 1923 Rang 203 (203) 1 Rang 133

(1925) 1925 Cal 681 (683)

(1921) 1921 All 40 (43) 46 All 16 I state

does not vest in Receiver as in the case of Official Receiver in insolvency proceedings

(1903) 26 Mad 432 (493)

(1910) 6 Ind Cas 214 (216) (Cal) Suit against Receiver

[See also (1932) 1932 Bom 622 (624) 625 No leave of Court is necessary for making an application for rateable distribution]

2 (1912) 17 Ind Cas 751 (751) 1913 Pun Re

No 56

(1894) 10 Cal 1014 (1017)

(1871) 1 Cal Eng L R 456 (456)

3 (1911) 1911 Pat 100 (101) 4 Pat L Jour 20

11 1927 Mad 310 (311) In the case of a

receiver O 21 R 63 the suit is a

continuation of the claim case and

therefore no leave is necessary

(1921) 1921 Bom 427 (428) 45 Bom 99 Receiver is an officer of the Court and any action taken against him without leave of the Court is contempt

(1914) 1914 Cal 597 (598) Suit against Receiver without leave of Court is contempt of Court

4 (1924) 1924 Pat 491 (495) 3 Pat 367

(1927) 1927 Pat 397 (398)

(1918) 1918 Pat 100 (101) 4 Pat L Jour 20

5 (1921) 1921 Mad 624 (626)

(1923) 1923 Mad 567 (567)

(1920) 1920 Bom 11 (11)

(1920) 1920 Mad 793 (710) 43 Mad 793

(1911) 10 Ind Cas 527 (529) (Cal)

(1910) 3 Ind Cas 1 (2) (Cal)

(1911) 11 Ind Cas 187 (183) 189) (Cal)

(1926) 1926 Cal 1040 (1041)

(1907) 34 Cal 305 (312)

(1919) 1919 Cal 426 (429) 46 Cal 252 Suit by Receiver

(1929) 1929 Cal 110 (112) 56 Cal 1216 (Do)

(1920) 1920 Cal 778 (778)

(1921) 61 Ind Cas 553 (559) (Ill) But if there is laches in obtaining leave, suit liable to be dismissed

6 (1905) 32 Cal 270 (271) 272)

(1914) 1914 Mad 60 (66)

a receiver without the leave of the Court is liable to be dismissed.⁷ If a decree is passed in such a suit it can be set aside.⁸ The absence of an objection by the receiver, that no leave was obtained will not entitle the Court to pass a decree against a receiver.⁹ But where the receiver has been discharged¹⁰ or has ceased to exist and has been replaced by the heirs of one of the parties who were on the record¹⁰ the objection that the suit against the receiver was instituted without the leave of the Court will not stand. The leave of the Court is not necessary for a suit against a receiver, under S 95 of the Madras Act VIII of 1865.¹¹

It is the Court appointing the receiver that can grant leave for the institution of a suit by or against the receiver. The Court trying the suit cannot grant it.¹² A Court does not by granting leave to sue the receiver relinquish its possession of the property to the Court in which the suit against the receiver is instituted.¹³ The Court trying such suit cannot issue an injunction against the receiver restraining him from dealing with the property as it would lead to a conflict of jurisdictions.¹⁴ Nor can a Court other than the appointing Court issue a *rubkar* to the latter Court requesting it to restrain the receiver from taking possession of a part of the property in respect of which the receiver has been appointed.¹⁵ The proper course for a person who has obtained a decree against the receiver is to apply to the Court by which he has been appointed, to direct the receiver to act according to the decree.¹⁶

A receiver is not a necessary party to a suit for declaration of title and possession in respect of the property in the receiver's hands. The decree passed in such a suit can always be carried out against the property in the hands of the receiver with the leave of the Court appointing him, although he has not been made a party to the suit.¹ (See also Note 44, *infra*)

A receiver appointed by a Civil Court is not a necessary party to proceedings in respect of the property under S 145 of the Criminal Procedure Code.¹⁸ A Criminal Court has no jurisdiction in such proceedings to interfere with the possession of a receiver appointed by a Civil Court, without the permission of such Court.¹⁹

An owner of an estate cannot sue for accounts a *Jahaidar* appointed by the receiver. There is no fiduciary relation between the receiver and the owner, which is essential for such an action.²⁰ Similarly, a present receiver cannot sue a former receiver of the estate for recovery of money alleged to be due by the latter to the estate for breach of duty committed by him as receiver.²¹

32 Debts incurred by receiver in the course of business

in respect of debts incurred or contracts

- 14 (1928) 1928 Pat 321 (323) 7 Pat 684
(1925) 1925 Cal 1174 (1175)

ers
appointed in respect of different portions of same property—One of the Receivers suing another without leave of Court—Held that it is contempt of Court but not so grave as to make it obligatory on the Court to

[See also (1933) 1933 Bom 51 (52 53 and 57) Order against Receiver in another suit to make payments to plaintiffs in the trial suit—Effectually out of income of assets not mortgaged parties in the two suits not being the same]

- 15 (1921) 1921 Pat 92 (93) 6 Pat L Joir 263

- 16 (1925) 1925 Pat 321 (323) 7 Pat 684
(1925) 1925 Cal 1174 (1175)

- 17 (1900) 5 Cal W N 27 (29)
(1911) 10 Ind Cas 673 (674) (Mad)

- 18 (1903) 30 Cal 593 (595)

- 19 (1903) 30 Cal 593 (595)

- 20 (1921) 1921 Cal 516 (516)

- 21 (1914) 1914 Cal 744 (745) 41 Cal 92.

(626)
1

entered into by him in the course of his management of the estate, but he is entitled to indemnity from the estate for such debts.¹ The creditors can also proceed against the estate for the recovery of such debts in priority to other creditors of the estate the principle being that as the acts of the receiver acting within his authority are the acts of the Court, the estate cannot be permitted to enjoy the benefits of those acts without being held liable for the obligation arising therefrom. The ordinary rule that the creditors who have advanced money to a receiver for the management of the estate can proceed against him personally does not apply where the advance has been expressly made on the condition that the estate alone should be liable.³

33 Loss caused by receiver's default

The receiver is not the agent or representative of any party to the suit. If therefore loss arises from the default of the receiver, such loss, subject to the receiver's liability for his default, must be borne by the estate, and not by the party at whose instance he was appointed receiver.¹ But in the undermentioned case a Full Bench of the Oudh Chief Court has held that where a receiver in execution misappropriates the moneys paid by the judgment debtor, the loss should be borne by the decree holder and not the judgment debtor, the reason given being that the payment to the receiver absolves the judgment debtor from all further responsibility.

34 Agreement with receiver—Contempt of Court

It is only the Court that can control the powers of the receiver. As an officer of the Court, he has only such powers as the Court chooses to give him. It is a contempt of Court for anyone else to enter into an agreement with the receiver restricting and controlling his powers.¹ Similarly, a promise by a party to pay remuneration to a receiver is against law and not enforceable.²

A receiver also can apply for process for contempt of Court against any one interfering with his possession.³

35 Remuneration of receiver

Under Rule 2, *infra* the Court has the power of fixing the receiver's remuneration. Such remuneration is generally by way of *percentage* or *commission* but there is no absolute rule that he should be so remunerated. The Court has a discretion if it thinks fit to allow him remuneration at a *fixed rate*.¹ The receiver is also entitled to all reasonable expenses of management² including the fees of counsel whom he may have to employ.³ (See Note 12, *infra*, for further information.) An agreement by a party to pay remuneration to the receiver is as has been

Note 32

- 1 (1925) 1225 P. 116 (04) (05)
- (1911) 1341 Cal 431 (192) 58 Cal 174
- (1903) 0 Cal 337 (344)
- 2 (1903) 70 Cal 337 (344)
- 3 (1925) 1225 P. 116 (04) 605

Note 33

- 1 (1891) 17 Mid 501 (04)
- (1897) 20 Mid 221 (126, 223) (E 1) Defiler
 ti s by Receiver in execution pro
 ceedings Is judgment debt satisfied
 or final? No answer St. pherd J
 and Yes answer Davis J

Note 34

- 1 (189) 22 Cal 648 (651)
- 2 (1903) 70 Cal 696 (698)
- 3 (1901) 23 Cal 750 (753)

Note 35

..

which is invariably deducted before arriving at sale price. But Receiver entitled to include freight and packing in the sale proceeds for purposes of commission.

- 1 (1895) 13 Bom 660 (662)
- 2 (1911) 12 Ind Cas 750 (197) (Cal)

observed in Note 34, *ante* against law and cannot be enforced.¹ The receiver's remuneration must come out of the estate and the parties are not personally liable for it.² The managing partner of a firm by consenting to act without remuneration as receiver during the dissolution of the partnership, does not forfeit his rights to such remuneration as he would be entitled to as managing partner.³

The receiver of mortgaged property is entitled to priority over the mortgagee in respect of his remuneration and the expenses properly incurred by him in the course of his management.⁴ But the priority does not extend to the wages that became due to a servant of the estate before the appointment of the receiver.⁵

36 Liability of receiver See R 3 *infra*

The receiver is liable to duly account for the income and the properties that come into his hands. He is responsible for any loss occasioned to the property by his wilful default and gross negligence. See Note 32 *supra* for the receiver's liability for debts incurred by him in the course of the management of the estate. A receiver disregarding the Court's orders is liable to be removed¹ or committed for contempt in case he is appointed by a High Court.² (For further information, see next note)

37 Liability to account

In *Yohani Mohan Patra v Baroda Kanta Sarkar*¹ Their Lordships of the Calcutta High Court expressed themselves as follows —

The receiver is but an officer of the Court appointing him and is therefore bound to account to that Court for all property which he has received. It is his duty to keep his accounts and vouchers in such condition that they will be ready for examination at any time and as a general proposition whenever property or funds come into the hands of a receiver pending litigation the Court may require him to report his acts and doings and to render an account in order to ascertain the condition of the property and to enable the Court to settle the rights of and do justice to all the litigant parties. When the accounts of the receiver come up for adjustment he is a party in interest entitled to be heard and it is the duty of the Court to see that his rights are protected. But so also all other interested parties are entitled to notice and an opportunity to attend and be heard. All persons having an interest in the estate which the receiver represents have the right to be present and be examined on any subject pertinent to the inquiry which springs out of the proceedings itself and to take exception to the receiver's accounts. Courts are disposed to hold receivers to great strictness in rendering their accounts and a thorough investigation of the accounts and vouchers is proper where as here the rights of infants are involved. A receiver is bound to exercise the same degree of diligence in keeping down expenses and in caring for the estate in his possession as a prudent man would observe in connection with his own property under similar circumstances. A receiver therefore will not ordinarily be permitted without the sanction and authority of the Court to incur any expenditure which will seriously diminish the funds entrusted to his charge and it is his duty if he wishes to protect himself to apply to the Court

for receipts and
which the receiver
the fund in his
possession he will be denied reimbursement. Where a receiver has laid out money without a previous order of Court and the transaction is proved by him to have been beneficial to the parties in interest he is entitled to be allowed credit in his accounts for the amount thus expended.

A receiver must produce vouchers for all payments other than petty sums,² but when produced they will be evidence of the payment of the sums therein specified and credit will be given for such sums to the accounting party.

3 (1903) 30 Cal 696 (698)

4 (1923) 1923 Cal 516 (517)

5 (1906) 1926 Cal 380 (380)

6 (1925) 1925 Mad 571 (572, 573)
(1883) 6 Mad 133 (139)

7 (1882) 6 Mad 133 (139)

Note 36

1 (1925) 1925 Lah 309 (310, 311)

2 (1932) 1932 Bom 639 (642) Failure to comply with order to pay money

Note 37

1 (1911) 12 Ind Cas 740 (745) (Cal)

2 (1894) 19 Bom 660 (662)

in the account unless it is shown that there are reasonable grounds for impeaching the vouchers³. A receiver can be required to submit his accounts for scrutiny even after the suit has been dismissed⁴ and even after his discharge⁵. He is responsible not only for sums *actually* received by him but also for all such sums which he might have received but for his default or negligence⁶. A *party* appointed receiver is liable to account in the same way as a stranger so appointed⁷.

It is not right, when considering the accounts submitted by the receiver, to go into the question of the liability to account for periods other than the period covered by the account itself⁸. Nor does the question of bad management by the receiver arise when he submits his accounts for being passed⁹.

The accounts of the receiver can be examined only by *the Court appointing him*¹⁰. And where it has overruled the objections of a party impugning the accounts and passed them, a suit will not lie against the receiver for damages for negligence, etc., based on allegations which have already been considered and overruled by the Court¹¹.

See also Note 3 to R. 3, *infra*

38 Liability of receiver and that of an executor or trustee

A trustee or executor is not personally liable for debts incurred by him in the course of the management of the estate, but a receiver is personally liable for such debts¹.

39 Liability to criminal prosecution

A receiver of property cannot be prosecuted for criminal breach of trust in respect of the property without the sanction of the Court appointing him¹. The same rule applies to any other offence committed by the receiver in his capacity of receiver². But where the offence committed by the receiver has nothing to do with the office held by him the Court's sanction is not necessary for his prosecution³.

40 When appointment takes effect

Where the order appointing a person as receiver requires him to give security so that the order is conditional on the security being given, the appointment is not complete till such security is given¹. But the Nagpur Judicial Commissioner's Court has held in the undermentioned case² that the appointment of the receiver is complete on the passing of the *order* of appointment although he may not be able to take actual possession of the property until security is approved.

Where there is *no direction* as to security and the order appointing the receiver is *unconditional*, it takes effect immediately it is made³. But the *transfer of the property* to the receiver's possession, actual or constructive, and the conferment of *special powers* on him require specific orders under Cls (b), (c) and (d).

Note 38

- 1 (1903) 30 Cal 937 (943 944)

Note 39

- 1 (1919) 1919 Cal 647 (649) 46 Cal 432
2 (1913) 15 Ind Cas 489 (490, 491) (Lab)
Defamation
3 (1912) 15 Ind Cas 491 (492) (Cal)

Note 40

- 1 (1911) 12 Ind Cas 745 (750) (Cal)

(P C)

- 5 (1921) 1321 Cal 516 (516)
(1911) 12 Ind Cas 780 (790) (Cal)
6 (1901) 5 Cal W N 223 (223)
7 (1925) 1325 P C 257 (259) (P C)
8 (1920) 1920 Pat 703 (701) 5 Pat L Jour 97
9 (1924) 1924 Cal 1063 (1064)
10 (1920) 1920 Pat 220 (222) 4 Pat L Jour 636
11 (1921) 1921 Lom 427 (428) 59 L C 421
(429) 45 Bom 99

41 Security to be given by receiver

Rule 3, *infra*, requires a receiver, *inter alia*, to furnish such security as the Court thinks fit. As to whether the appointment of a receiver is complete before the payment of security, see Note 40

42 Receiver's lien

A receiver has a lien on the estate for all his just claims and allowances¹ "On this principle it follows that a Court will not compel a receiver who has been discharged, to make over the property in his possession until his lien has been satisfied or provided for by a sufficient indemnity"²

43 Remedy of third party aggrieved by receiver's action

A third person feeling aggrieved by the receiver's conduct has ordinarily two remedies —

(1) He may apply to the Court in the very suit in which the receiver has been appointed for a summary order against the receiver,

(2) He may, with the leave of such Court, sue the receiver

The more proper and usual mode is by applying to the Court for summary relief. This is done by the aggrieved person applying to the Court for permission to come in and be examined *pro interesse suo* (for his own interest). If no question of title is involved and if the applicant has shown diligence, the Court will decide the matter on such an application. But otherwise, it will refer the third person to a separate suit against the receiver¹. Where debatable questions, not easy to be dealt with at the passing of the receiver's accounts, are involved, the Court will decline to go into them in summary proceedings in the suit itself².

44 Receiver if and when a necessary party to a suit

In a suit for money against the representatives of a deceased person, the receiver holding possession of the deceased's estate is not a necessary party¹. Nor is he a necessary party in every suit concerning the property of which he is the receiver². Thus he is not a necessary party to a suit between third parties for declaration of title to, and possession of, the property in his charge³. In such cases, if the plaintiff obtains a decree he can go to the executing Court, obtain the leave of that Court to execute the decree against the property in his hands and then enforce the decree⁴. Where, however, the property, in the hands of the

Note 42

1 (1876) 2 Cal 58 (70)

(1890) 22 Cal 900 (973)

[See also (1930) 1935 Mad 594 (596) Right to indemnity of receiver is not created by contract—Suit by him to recover amount spent by him is governed by Art 61 of Limitation Act]

2 (1925) 22 Cal 900 (973)

Note 43

1 (1925) 22 Cal 900 (973)

2 (1925) 22 Cal 900 (973)

3 (1925) 22 Cal 900 (973)

4 (1925) 22 Cal 900 (973)

5 (1925) 22 Cal 900 (973)

6 (1925) 22 Cal 900 (973)

7 (1925) 22 Cal 900 (973)

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96 (1925) 22 Cal 900 (973)

97 (1925) 22 Cal 900 (973)

98 (1925) 22 Cal 900 (973)

99 (1925) 22 Cal 900 (973)

100 (1925) 22 Cal 900 (973)

case that the declaration asked for could not be granted in summary proceedings]

[But see (1871) 15 Suth W R 347 (348) Acts of Collector done by him in his capacity of Receiver, in seizing and retaining certain property under his care cannot be disputed by way of motion to discharge or to get rid of the attachment]

2 (1926) 1926 Cal 385 (394) 52 Cal 914

Note 44

1 (1925) 1925 Bom 523 (523, 524)

2 (1911) 10 Ind Cas 673 (674) (Mad)

(1893 1900) L B R 432 Attachment—Mortgage decree — Attachment before judgment in suits for money decrees in Subordinate Court—Lien upon crop by labourers—Joinder of Receiver as defendant

3 (1902) 6 Cal W N 829 (829)

(1901) 5 Cal W N 27 (25)

(1923) 1923 Pat 26 (57)

4 (1911) 10 Ind Cas 673 (674) (Mad)

of the Calcutta High Court, persons not parties to the suit may establish their rights by motion

[See also (1925) 1925 Cal 750 (752)

Held, in the circumstances of the

receiver is intended to be affected by the result of the suit and the possession the receiver or the jurisdiction of the Court is intended to be interfered with leave of the Court must be obtained and the receiver made a party.⁵ Thus the receiver is a proper party to proceedings for the sale of property in the receiver's hands in execution of a decree for sale on a mortgage.⁶

A receiver cannot be added as a party to proceedings under the Criminal Procedure Code.⁷

45 Notice to opposite party if necessary before appointment

Notice to the other side is not indispensable in every case before a receiver is appointed. The very object of appointing a receiver may be defeated in many cases if notice were insisted on.¹ Hence in emergent cases a receiver may be appointed without notice to the opposite side.² But except for very special reasons notice should not be excused before an order is made for such appointment.³

46 Appointment of new receiver in place of old receiver

Where a receiver ceases to hold the office of receiver pending a suit filed by him the suit does not abate but may be continued by his successor in office.¹ See Note 31 *supra* as to a present receiver's power to sue a former receiver for act done by the latter during his tenure of office as receiver.

47 Joint receivers

It is competent to a Court under this Rule to appoint two or more persons as joint receivers of the same property. In such a case the retirement or resignation of one of the receivers does not put an end to the order appointing receivers.¹ In a partition suit where the Court ordered the plaintiff to be in charge of one portion of the suit properties and the defendant to be in charge of the remaining portion it was held that the order was not *ultra vires*.² Ordinarily it is not open to a Court to appoint a receiver when a receiver has already been appointed in respect of the same property by another Court.³ But a receiver can be appointed in a mortgage suit where the decree is for sale although a receiver has already been appointed in respect of the same property in a prior partition suit.

48 Duration of office of receivership

A Court appointing a receiver may order that the office should continue permanently or for such period as is deemed necessary.¹ It can also cancel the order of appointment at any time if it considers it necessary.² Even if such appointment has been made with the consent of parties,³ it has an inherent power to discharge or remove the receiver appointed by it.³ But until otherwise

(1922) 1922 Bom 523 (523-524)

(1902) 6 Cal W N 829 (829)

(1901) 5 Cal W N 27 (28)

5 (1910) 6 Ind Crs 214 (215) (Cal)

(1910) 8 Ind Crs 1 (2) (Cal)

(1910) 7 Ind Cas 75 (76) (Cal)

6 (1923) 1923 Mad 144 (146) 47 Mad 47

(1923) 1923 I L R 86 (87)

7 (1903) 30 Cal 593 (593)

Note 45

1 (1923) 1923 Lah 239 (241)

2 (1916) 1916 Cal 427 (427) 43 Cal 986

3 (1903) 1904 2 L B R 222 (223)

(1883) 1883 Bom P J 160 (160)

Note 46

respected — Person aggrieved must take proper steps to question its validity

4 (1911) 12 Ind Crs 165 (166-166) (Cal)

Note 48

1 (1896) 19 Mad 120 (127) 23 Ind App 23 (P C)

2 (1907) 1908 4 L B R 306 (358)

21 (1921) 1921 Mad 234 (234) May be discharged before termination of proceedings if no injury to the estate would result by this course

3 (1912) 17 Ind Cas 583 (584) (Mad)

ordered by the Court the receiver will continue in office⁴ though the suit in which he has been appointed has come to an end, but the purpose of his appointment has not been achieved⁵. *A fortiori* a receiver in a partition suit is not discharged merely by the passing of a preliminary decree in the suit⁶. A receiver in an administration suit cannot ordinarily be discharged before the completion of the administration^{6a}.

A consent order of appointment of a receiver does not prevent a party from impugning the *administration thereunder* which is of such a character as to amount to a malfeasance or to be, in substance so protracted and imperfect as to be futile.

The removal of a receiver is a matter of discretion to be exercised by the Court with care after due and proper enquiry. A receiver should not be dismissed summarily merely at the instance of one of the parties⁸. The burden of proving the circumstances justifying the removal is on the party applying for such removal⁹. Where incapacity on the part of the receiver is alleged it should be clearly proved¹⁰. A receiver may be removed for partiality¹¹.

A Court which appoints a receiver has authority to pass orders necessary to wind up his charge even after the suit has been disposed of¹². It can also examine the receiver's accounts and pass all necessary orders¹³.

Where the receivership is put an end to pending a suit filed by the receiver the party ascertained to be the true owner can continue the suit¹⁴.

Where a claim for restitution is made on the cancellation of an order of appointment of a receiver the Court will not, in ordering restitution, consider the fact that the receiver's appointment was to the applicant's advantage¹⁵.

Where any property in the receiver's possession is duly sold away to another the receiver cannot be allowed to continue in possession¹⁶.

49 Court may remove any person from the possession or custody of property

The Rule empowers the Court to remove any person from the possession of property in respect of which a receiver has been appointed. The only case in which the receiver's possession can be resisted is that provided for by sub rule (2) according to which the Court has no power to deprive a *third* person of the possession of any property when no party to the suit has a present right to do so¹. When therefore a third person in possession of property in respect of which a receiver has been appointed objects to deliver possession to the receiver, the Court

442	Al	12	(1924)	1924 Lih 583 (584)	
	rendered			[But compare (1834) 21 Cal 561 (565) Suit dismissed—In the interval before filing of appeal Court has no power to make order restraining Receiver from parting with the funds in his hands pending an appeal]	
442					
967		13	(1895)	92 Cal 1011 (1015 1016) 32 Ind App 203 (P C)	
	and dis			(1901) 28 Cal 790 (794)	
	think 1—	14	(1906)	30 Lem 250 (254)	
		15	(1924)	1374 Ring 181 (181)	1 Ring 700
442		16	(1915)	1915 Mad 924 (925)	
				Note 49	
		1	(1912)	17 Ind Ca 253 (234 235) 3, Mad 578	
			(1933)	1933 All 227 (228)	A party to the suit cannot rely upon this sub rule
			(1925)	1925 Pit 837 (840)	
			(1920)	1920 Mad 950 (953)	

1, must hold an enquiry into his claim with a view to ascertain if he was under a present liability to be removed from the possession of the property²

It has been held by the High Court of Calcutta that the person in possession of the property though he may have a right to continue in possession cannot interfere with the receiver but should apply to the Court for redress and that otherwise he will be guilty of contempt of Court³. According to the High Court of Patna on the other hand the third party in possession is not bound to deliver possession to the receiver pending the enquiry into his claim⁴.

Sub rule (2) applies only to *third* persons in possession of the property and is no bar to the removal of any *party* to the suit, from possession⁵. Thus a mortgagee decree holder who is in possession of the mortgaged property under an arrangement with the judgment debtor for the liquidation of the mortgage debt is not entitled to possession as against a receiver who is subsequently appointed⁶.

The Rule does not empower a Court to authorise a receiver to enter upon immovable property in the possession of another person without his consent, in order to take an inventory of such property as the plaintiff may indicate as the property in dispute⁷. The Court, instead of actually evicting the party in possession, may order him to pay the receiver a certain occupation rent⁸.

Sub rule (1) (b) refers to the removal of persons *other than the receiver*. Hence an order removing a receiver does not fall under Cl (b)⁹.

50 Summary jurisdiction

A Court has power to enforce summarily a contract made by the receiver¹. But where a lease has been granted by the receiver and the lessee has been put in possession the lease cannot be set aside in summary proceedings². Where a judgment debtor took a sum of money from the receiver and refused to pay it back, it was held that the Court could order repayment and that such order could be enforced as a decree³. Although, ordinarily, proceedings for contempt are started at the instance of the parties and not of the receiver, there is nothing in law to prevent the receiver from applying for process for contempt⁴.

51 Appeal

Under O 43, R 1 (s) an appeal lies from an order under O 40, R 1 or R 4. An order under R. 1 may be one either *appointing* a receiver or may be one *refusing to appoint* a receiver. In either case the order will be appealable¹. The

2 (1907 1908) 4 L B R 356 (358)
(1909) 1 Ind Cas 356 (358) 36 Cal 713
(1921) 1921 Cal 298 (299)
(1923) 1923 Mad 129 (130)

3 (1914) 1914 Cal 500 (553)

4 (1918) 1918 Pat 364 (365)

(1918) 1918 Pat 668 (671)

(1927) 1927 Pat 397 (398)

5 (1913) 20 Ind Cas 767 (767) (Mad)

(1915) 1915 Cal 35 (36)

(1922) 1922 Lah 444 (446)

(1925) 1925 Lah 590 (591)

(1927) 1927 Sind 230 (231)

(1929) 1929 Nag 283 (284)

(1932) 1932 Mad 193 (195)

[See however 1920 Mad 986 (989)]

Any person 'in Sub rule (2) is not

confined to non parties—*Per Open*

cer J]

(But see contra (1918) 1918 All 240

(240)]

6 (1924) 1924 P C 206 (207) (P C)

(1921) 1921 Pat 43 (44) 6 Pat L Jour 37

7 (1831) 1891 Pun Re No 69 Page 331

8 (1868) 10 South W R 430 (431)

9 (1926) 1926 Cal 593 (594) 33 Cal 319

(1924) 1924 Mad 614 (614)

Note 50

1 (1888) 15 Cal 253 (258 259)

2 (1909) 1 Ind Cas 470 (471) 36 Cal 52

to one of the parties by practice of fraud on Court—Summarily set aside 36 Cal 52 Dist, 1929 Cal 493 Apr.]

3 (1911) 10 Ind Cas 898 (899) (Cal)

4 (1901) 28 Cal 790 (793)

Note 51

1. (1898) 1 Oudh Cas 168 (169) Appointing a

receiver

(1932) 1932 Pat 360 (361) (Do)

(1925) 1925 Lah 489 (489) Appointing

receiver in proceedings under Guar-

High Court of Calcutta has, in *Sripati Datta v Bibhuti Bhusan Datta*² held that the power to appoint includes a power to remove and that therefore an order removing the receiver is an order under O 40, R 1 and is therefore appealable. The same High Court has held however in earlier cases³ that a refusal to remove a receiver is not an order either under R 1 or R 4 and is not appealable. The same view has been held by the High Court of Madras⁴. The High Court of Allahabad has dissented from the Calcutta view in *Sripati Datta's* case and has held that an order removing a receiver from office is not appealable^{4a}.

O 40, R 1 is a general provision and even an order appointing or refusing to appoint a receiver in *execution proceedings* falls under O 40, R 1, and therefore is appealable as an *appealable order* and not as a *decree*⁵. The reason is that the definition of a 'decree' in S 2, Sub S (2) does not include an appealable order though it may fall within the terms of S 47. It has been held by the High Court of Bombay that an order in execution proceedings *refusing to remove* a receiver comes within S 47 of the Code and is appealable as a decree⁶.

It is only a *final* order of appointment or refusal that is appealable. Where an *ex parte* order is confirmed by a second order, an appeal lies only from the latter order⁷. An order appointing a receiver subject to his furnishing security is then⁸ order

des an
adras,⁹

Lahore¹⁰ and Patna¹¹. No, according to the High Courts of Allahabad,¹² Calcutta,¹³ Bombay¹⁴ and the Judicial Commissioners' Court of Nagpur^{14a} and Sind¹⁵. An order merely expressing an intention of appointing a receiver and calling upon the parties to suggest names is not appealable¹⁶.

Where the effect of an order of appointment of a receiver and the directions given to him, is to remove any third person from the possession or custody of any property, it is an order under Cl (b) of this Rule and is open to appeal by such third party¹⁷. But a third party who is not in possession or custody of any property has no right of appeal against an order dismissing his objection to the

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|---|---|
| dians and Wards Act | (1911) 12 Ind Cas 745 (750) (Cal) |
| (1929) 1929 Nag 119 (113, 120) Appointing receiver in proceedings under the Guardians and Wards Act | (1932) 1932 Cal 189 (193) |
| (1900) 21 Bom 38 (40) 1 Bom L R 502 Refusing to appoint | 6 (1881) 5 Bom 40 (45) |
| (1890) 17 Cal 680 (682) (Do) | 7 (1913) 20 Ind Cas 269 (271) 40 Cal 862 |
| (1886) 10 Mad 179 (184) (Do) Overruling 6 Mad 355 (358) | 8 (1927) 1927 Cal 253 (255) |
| (1880) 6 Cal L Rep 467 (468) (Do) | (1911) 12 Ind Cas 745 (751) (Cal) |
| (1904) 31 Cal 435 (498) (Do) | 9 (1918) 1918 Mad 1146 (1150) 40 Mad 18 |
| (1910) 6 Ind Cas 659 (653, 660) 1910 Pun Ro No 36 (Do) | 10 (1923) 1923 Lah 48 (50) |
| (1913) 20 Ind Cas 653 (654) 35 All 425 (Do) | (1934) 1934 Lah 129 (130) |
| (1915) 1915 Bom 137 (137) (Do) | 11 (1922) 1922 Pat 577 (579) 1 Pat 625 |
| (1916) 1916 All 338 (339) (Do) | (1932) 1932 Pat 260 (260) |
| (1926) 1926 Cal 1006 (1008) (Do) | 12 (1915) 1915 All 129 (129) |
| 2 (1926) 1926 Cal 533 (534) 53 Cal 319 [But see (1903) 23 All W N 67 (68)]. | [See (1924) 1924 All 376 (377). 46 All 872] |
| 3 (1916) 1916 Cal 821 (824) (1914) 1914 Cal 766 (766, 787) | 13 (1911) 9 Ind Cas 563 (1) (582) (Cal) |
| 4 (1924) 1924 Mad 614 (614) | (1903) 3 Ind Cas 430 (1) (432) (Cal) |
| 4a (1931) 1931 All 72 (73) | 14 (1915) 1915 Bom 41 (41) 23 Ind Cas 501 (504) |
| 5 (1927) 1927 Lah 190 (190). | |
| (1929) 1929 Mad 20 (21) Dissenting from 1929 Mad W N 300. | |

1. appointment of a receiver inasmuch as there is no question of removing him from any possession of any property.¹⁸

An order under Cl (d) of the Rule giving directions as to the disposal of the income of the property, is appealable under O 43, R 1 (s)¹⁹. But an order giving certain directions to the receiver in *passing his accounts*, does not fall under this Rule but under R 3 and hence is not appealable.²⁰ There is no right of appeal in the following cases —

- (a) An order that the receiver is liable to account for only one year.²¹
- (b) An order for the examination of the receiver's accounts.²²
- (c) An order granting leave to sue the receiver.²³ and
- (d) An order raising the receiver's remuneration.²⁴

But an order *passing the receiver's accounts*²⁵ or an order that the receiver should pay into Court a sum of money for loss caused by his neglect and directing the security furnished by him to be proceeded against in default²⁶ will be one falling under R 4 and will thus be appealable.

The High Court of Madras has held that an appeal lies under Clause 10 of the Letters Patent against the judgment of a single Judge of the High Court passed on an appeal preferred to it under O 43 R 1.²⁷

There is no right of appeal to the Privy Council from an order refusing to appoint a receiver.²⁸

In an appeal from an order appointing or refusing to appoint a receiver the appellate Court will not lightly interfere with the discretion of the lower Court²⁹ except on the ground of some overwhelming objection in point of propriety or principle³⁰ or on the ground that the Court was proceeding on a wrong view of the facts³¹ or has failed to exercise its discretion according to legal principles.³² The

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|---|---|
| 18 (1926) 1928 Oudh 79, (93C) | is not a final order within the meaning of S 109 but merely an interlocutory order |
| 19 (1910) 5 Ind Cas 69 (69) (Cal) Directions as to disposal of rent | 27 (1927) 1927 Rang 135 (135) |
| (1912) 17 Ind Cas 849 (851) (Cal) Order to receiver to pay certain sum of money to mortgagee to enable latter to appeal—Order is appealable | (1933) 1333 Rang 94 (94 J5) |
| (1912) 14 Ind Cas 277 (278) (Mad) Order to receiver to pay maintenance to appellant is appealable | (1922) 1922 Lah 444 (446) |
| [But see (1929) 1923 Lah 239 (240) 71 Ind Cas 743 Point conceded] | (1923) 1923 Lah 623 (625) |
| [Also (1895) 1895 Pun Re No 107 p 500] | (1927) 1927 Lah 65 (65) |
| [See (1933) 1933 Lah 216 (216 217) Order giving directions to receiver as regards persons to whom the properties were to be restored on the termination of receivership does not fall under Clause (d) and is not appealable] | (1910) 6 Ind Cas 659 (660) 1910 Pun Re No 36, page 99 |
| 20 (1911) 12 Ind Cas 760 (762) (Cal) (1903) 3 Cal 508 (570) | (1920) 1920 Lah 125 (127) |
| 21 (1920) 1920 Pat 709 (701) Pat L Jour 97 | (1913) 19 Ind Cas 873 (873) (Cal) |
| 22 (1911) 6 Ind Cas 323 (324) (Cal) (1921) 1921 Bom 427 (423) 45 Bom 99 | (1915) 1915 Mad 355 (355) Appeal from order of lower Court refusing to direct receiver not to spend money for certain litigation — Appellate Court not to interfere |
| | (1905) 32 Cal 741 (745) |
| | (1984) 10 Cal 713 (737) |
| | (1904) 18 Bom 474 (473) |
| | 28 (1924) 1924 Lah 421 (422) |
| | (1913) 18 Ind Cas 398 (400) (Cal) |
| | (1929) 1929 Pat 114 (114 115) 115 Ind Cas 880 But the principle applies only to cases where a receiver is appointed for the first time but not to cases in which a receiver is appointed in succession of an old receiver |
| | 29 (1915) 1915 Mad 926 (927) |
| | 30 (1917) 1917 Mad 1001 (1010) 3 Ind Cas 939 |
| | (1914) 1914 Sind 61 (63) 11 Sind L R 115 |
| | (1913) 1913 P C 41 (40) 55 Ind App 131 |
| | 55 Cal 720 (P C) |
- d 915
- (I B)
- 2r (1852) 22 Cal 929 (970)
- (1913) 1933 Pat 213 (213) 12 Pat 723 It

burden of showing that interference is necessary is on the appellant³¹ Pending an appeal from an order appointing a receiver the appellate Court can direct the receiver through the lower Court not to take any steps in pursuance of his appointment³²

Only those persons who are materially prejudiced by the appointment of the receiver need be made parties to the appeal Third persons not in possession of the property are not necessary parties thereto³³

A party who suggests names for the receivership is not thereby estopped from objecting to the appointment of a receiver in appeal³⁴

The unmentioned cases³⁵ under S 503 of the old Code regarding the right to appeal against an order under that section are no longer of any practical importance under the present Code as that section has been repealed

52 Letters Patent Appeal

An order appointing a receiver under R 1 is a judgment and is appealable under the Letters Patent¹ But an order directing a receiver to advance money to a guardian *ad litem* to conduct the defence on behalf of a minor defendant is not a judgment within the meaning of the Letters Patent and no appeal lies from the order²

As to whether appeal lies against Judgment of a single Judge of the High Court passed in an appeal under O 43 R 1 see note *ante*

53 Revision

An order appointing a receiver in a case in which the Court has no jurisdiction to appoint a receiver as for instance, in a proceeding under the Succession Certificate Act, can be set aside in revision by the High Court¹ Where an objection of a third party in possession of the property, to the appointment of a receiver was dismissed it was held by the Patna High Court that the third party had no right of appeal but could apply for revision of the order dismissing the objection² In the undermentioned case, it was held by the Madras High Court that the refusal of a Court to join a receiver as a party to proceedings for the sale of property in his hands in execution of a decree for sale on a mortgage was a material irregularity in the exercise of jurisdiction by the lower Court and that a revision lay³

54 Practice

Applications for the appointment of receivers should be made in the ordinary way by notice of motion in open Court and not in chambers¹

R. 2. [S 503, Cl (d)] *The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver*

Remuneration

[1877—S 503]

- | | |
|-------------------------|---|
| (1937) 1932 Lah 82 (63) | 34 (1921) 1J21 All 91 (92) 60 Ind Cts 301 |
| (1937) | (1907) 43 All 311 |
| | 35 (1903) 1 Ind Cts 657 (1) 33 Bom 104 |
| | (1910) 5 Ind Cts 931 (991) (Vil) |
| | (1910) 6 Ind Cts 653 (653) 1310 1 un Ro |
| | No 36 146 99 |
| | Note 52 |
| | 1 (1974) 1321 Rm 133 (133) 5 Rm 99 |
| | 2 (1901) 24 Mad 311 (118) |
| | Note 53 |
| | 1 (1974) 1924 All 3 6 (374) 46 All 372 |
| | 2 (1918) 1318 Pat 364 (65) |
| | 3 (1923) 1323 Mad 144 (2) (144) |
| | Note 54 |
| | 1 (1977) 1371 Bom 256 (256) |
| | (1901) 75 Cal 250 (251) |
- leave in a mortgage suit and not upon circumstances existing at the time of its passing cannot be allowed to stand
- 31 (1910) 7 Ind Cts 344 (345) (All)
- (1830) 12 All 496 (135)
- (1901) 26 All 238 (243) 31 Ind App 67 7
- Orh Cts 233 (P C)
- 32 (1920) 1320 1 at 567 (65) 4 Pat L Jour 642
- 33 (1974) 1374 Cal 4 6 (456) 28 Cal W N 96
- 77 Ind Cts 763

R 2, RANGOON

Local Amendment

Substitute the following namely —

- 2 The fees to be paid as remuneration for the services of the receiver shall be in accordance with the following scale —
- (a) On rents or outstandings recovered or on the proceeds of the sale of moveable or immoveable property—unless for special reasons to be recorded the Court orders the remuneration to be at some other rate—5 per cent
 - (b) For taking charge of money or of moveable or immoveable property which is not sold unless for special reasons it is otherwise ordered by the Court on the estimated value—1 per cent
 - (c) For any special work not provided for above such remuneration as the Court on the application of the receiver shall order to be paid

Synopsis

1 Remuneration of receiver	Note No 1	(b) Receiver's costs	Note No 3
(a) Receiver's lien	2	II Appeal	4

Other Topics

Inherent jurisdiction—Refund of receiver's charges and commission to successful party See Note 1, Pt (4)

1 Remuneration of receiver —See also Note 35 to R 1 ante

A receiver being an officer of the Court, it is for the Court to determine his remuneration an agreement without leave of the Court by a party to pay remuneration to the receiver is contrary to law and is not enforceable¹ Where the managing partner of a partnership business consents to act as a receiver without remuneration and is appointed as receiver for the purpose of keeping the assets and profits and accounts of the partnership and for submitting proper accounts thereof he does not by such consent, forego his right to such remuneration as he would be entitled to for managing and carrying on the business² A receiver is entitled to a commission on the collections made by him and cannot claim any commission where certain Government securities in deposit with a bank are converted under the authority of the Court, by the bank itself, into other securities issued by the Government³ Similarly where in a condiment business the receiver is ordered to retain 5 per cent of the gross sale proceeds he cannot take such commission on trade discounts inasmuch as proceeds do not include trade discounts^{3a} When a party is dismissed from an action as having been wrongly impleaded and the receivership of his property is cancelled, the Court has inherent jurisdiction to order restitution to be made to such party by ordering the plaintiff to refund to such party the commission and charges paid by him to the receiver⁴

As to the remuneration of the receiver appointed under S 145 of the Criminal Procedure Code see the undermentioned case⁶

2 Receiver's lien

A receiver has a lien on the estate for all his just claims and allowances¹ Where a receiver is sued for acts done by him as receiver for the benefit of the estate he is entitled to indemnity from the estate for the loss caused to him thereby²

Order 40 R 2—Note 1

- 1 (1903) 30 Cal 696 (698)
[See also (1895) 22 Cal 648 (656)
Agreement restricting Receiver's powers is contempt of Court]
2 (1926) 126 Cal 380 (380 381)
3 (1931) 1931 Mad 36 (36)

- 3a (1931) 1931 Mad 500 (501)
4 (1924) 1924 Rang 181 (181) 1 Rang 770
5 (1925) 1925 Nag 462 (462 463)
Note 2
1 (1895) 22 Cal 960 (973)
(1892) 15 Mad 233 (234)
2 (1903) 30 Cal 937 (944)

3 Receiver's costs

A receiver is entitled to the costs charges and expenses properly incurred by him in the discharge of his duties¹

4 Appeal

An order increasing the receiver's remuneration is one falling under R. 2 and not under R. 1 and is not appealable¹

Duties

R. 3. [S. 503, Cls. (e) to (h).] Every receiver so appointed shall—

(a) *furnish* such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property;

(b) *submit* his accounts at such periods and in such form as the Court directs;

(c) pay the *amount* due from him as the Court directs; and

(d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

[1877—S. 503, Cls. (e) to (h); 1859—S. 243.]

Synopsis

	Note No		Note No.
Security necessary—Clause (a)	1	Responsibility for loss—Clause (d)	4
Liability of the surety	2	Appeal	5
Submission of accounts—Clause (b)	3		

Other Topics

Form of bond by receiver See App F Form No 10

1 Security necessary—Clause (a)

This Rule provides for the duties of the receiver¹ Though under the Code the Court has discretion to appoint a receiver without security, it should obviously be done only in the most exceptional circumstances² Where the appellate Court directs the lower Court to appoint a receiver and take security from him but the lower Court appoints a receiver without taking any such security the appointment cannot be said to be without jurisdiction³

2 Liability of surety

A surety for a receiver is liable to the payment of interest on balances *improperly* retained by him, as also for the costs of proceedings in Court necessarily or properly incurred in consequence of the receiver's default, such as the costs of a proceeding to take accounts of an attachment for failure to account, of an application for his discharge and for the appointment of another person in his place, and of any proceedings taken to enforce the recognizance The liability of a surety upon the bond of a receiver conditioned for the due discharge of his duties is, however, limited to cases of a violation of those duties which may properly be said to be within the scope of his appointment as receiver, in other

Note 3

1 (1895) 19 Bom 660 (662)

Note 4

1 (1915) 1915 Cal 74 (75, 76)

Order 40 Rule 3—Note 1

1 (1931) 1931 Mad 760 (762)

2. (1932) 1932 P C 191 (193) 59 Ind App 311
(P C) Parties females and minors—
Security essential

3 (1919) 1919 Cal 533 (534) 46 Cal 70

3 words the surety is responsible only in respect of liability incurred by the receiver in his capacity as receiver. To determine whether a particular liability has been incurred by the receiver in his capacity as receiver the test to be applied is 'could the receiver be made accountable in that respect in the account proceedings?' If he could not the surety is not liable; if he could be held liable in that proceeding as receiver the surety is also liable. But a surety who has satisfied the claim against the receiver is entitled to stand in the place of the receiver and to reimburse himself from the sums ordered to be paid to the receiver.¹

3 Submission of accounts—Clause (b) —See Note 37 to R 1 *supra*

The sanction of the Court is necessary for all expenditure of special nature incurred by the receiver.¹ A receiver is liable for all unauthorised expenditure incurred by him such as salaries of unnecessary servants appointed without the leave of the Court, bribe to the Police for obtaining the release of a minor of whose estate he is the receiver and sums advanced to the minor owner of the estate in excess of the limit sanctioned by the Court.² Where litigation expenses are incurred by the receiver the latter must show not merely that he paid the expenses but the details of such expenditure.³

The liability of a receiver not appearing on the face of the accounts, such as for imprudent management for wilful default or neglect for the mal practices of his servants etc cannot be properly gone into on the receiver's application for the passing of his accounts. A separate suit is the more appropriate procedure for the investigation of such matters.⁴

Before passing an order for the attachment of the receiver's property under R 4 the Court should examine the accounts under this Rule and give him an opportunity to pay the amount found due by him.⁵

If on an application to discharge a receiver the latter puts forward a claim to a larger amount than what is due to him and such amount is deposited in Court he is liable if such amount is found to be in excess of that actually due, to interest on the excess amount but if the receiver's action has compelled the owner of the estate to borrow money at a higher rate than usual the question of the receiver's liability in consequence of that fact should form the subject of a separate suit.⁶

No order can be passed against the receiver to make good the loss to the estate due to his gross negligence till the passing of the accounts.⁷

4 Responsibility for loss —Clause (d)

A receiver appointed to collect the rents due to an estate must make good the loss caused to it by a breach of his duties. Thus if he delegates his duties to another (which he is not competent to do) and the latter misappropriates the funds collected by him¹ or if he fails to realise rents by taking proper proceedings he will be liable for the loss. Mistaken proceedings though taken in good faith will not absolve the receiver from liability. A decree holder is not bound to accept promissory notes obtained by the Receiver from the tenants for the rents due and the receiver must make good the amounts of the rent not collected. Any loss

Note 2

1 (1915) 191 Cal 391 (394)

Note 3

1 [See also (189) 1 Cal W N 303 (304). In all applications for payment of money receiver should appear and give full particulars and information to the Court.]

(1910) 6 Ind Cas 323 (326) (Cal)

2 (1915) 1915 Cal 146 (147, 149)

3 (1924) 1921 Cal 1063 (1064)

(1915) 1915 Cal 146 (148)

4 (1901) 5 Cal W N 223 (228)

5 (1923) 1923 Mad 95 (86)

6 (1915) 1915 Cal 146 (151)

7 (1909) 1 Ind Cas 470 (472) 33 Cal 37

Note 4

1 (1895) 19 Bom 660 (662)

arising from the default of the receiver will, as between the parties, devolve on the estate to which the appointment relates and not on the decree holder at whose instance he may have been appointed¹. A receiver is not entitled to recover the costs of proceedings initiated by him through mistake². A succeeding receiver cannot sue a former Receiver for funds which he should have realized and accounted for³. Ordinarily creditors advancing money to a receiver for the purposes of management can proceed both against the estate and the receiver personally. But the receiver's personal liability may be expressly excluded by the terms of a particular loan⁴. A receiver's liability on account of his wilful default or neglect, can more appropriately be investigated in a separate suit against him than in an application in the suit wherein he was appointed as receiver⁵. See Notes 31 to 33 to R 1.

5 Appeal

An order under this Rule is not one that is appealable under O 43, R 1 (s). Thus an order holding a receiver of an estate liable for a certain sum of money is not appealable. But where such an order is followed by another one under R 4 for coercive action against the receiver, an appeal lies and in the appeal the prior order under R 3 can be attacked¹. An order directing the receiver to pay a certain sum of money as damages² or an order of the Court giving directions to the receiver in passing his accounts is not open to appeal³. No appeal lies against an order construing an order of appointment of receiver under R 1⁴. Where a receiver is appointed subject to his furnishing security the appointment is not complete till security is given and till then there is no right of appeal⁵. See also Note 51 to R 1.

An order under this Rule is open to revision⁶.

Enforcement of receiver's duties

R. 4. [New.] Where a receiver—

(a) fails to submit his accounts at such periods and in such form as the Court directs, or

(b) fails to pay the amount due from him as the Court directs, or

(c) occasions loss to the property by his wilful default or gross negligence,

the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

[Cf. R. S. C., O. 50, R. 18.]

Local Amendment

MADRAS

Substitute the following —

(1) If a receiver fails to submit his accounts at such periods and in such form as the

1a (1834) 17 Mad 501 (504) The liability of

(1923) 1923 Mad 80 (86)

(1924) 1924 Smd 30 (36, 37) 19 Smd L.R 395

Note 5

I. (1920) 1920 Pat 220 (221) 4 Pat L Jour 633.

G. (1924) 1924 Smd 35 (36)

4,

Court directs the Court may order his property to be attached until he duly submits his accounts in the form ordered

(2)

or proceeding in which a
y time make an enquiry as
shown by his accounts or

otherwise or whether any loss to the property has been occasioned by his wilful default or gross negligence and may order the amount found due or amount of the loss so occasioned to be paid by the receiver into Court or otherwise within a period to be fixed by the Court All parties to the suit or proceeding and the receiver shall be made parties to any such enquiry Notice of the enquiry shall be given by registered post to the surety if any for the receiver but the cost of his appearance shall be borne by the surety himself unless the Court otherwise directs

Provided that the Court may where the account is disputed by the parties and is of
signed to the
the parties
sons for the
reference

- (3) If the receiver fails to pay any amount which he has been ordered to pay under sub rule (2) of this Rule within the period fixed in the order the Court may direct such amount to be recovered either from the security (if any) furnished by him under R 3 or by attachment and sale of his property or if his property has been attached under sub rule (1) of this Rule by sale of the property so attached and may apply the proceeds of the sale to make good any amount found due from him or any loss occasioned by him and shall pay the balance (if any) of the sale proceeds to the receiver

Synopsis

Scope and applicability of the Rule	Note No 1	Court may direct his property to be attached	Note No 3
Loss to property by wilful default or gross neglect	2	Removal of a receiver	4
		Appeal	5

Other Topics

Property in Cl (c) includes income See Note 2 Pt (1) Property of receiver in the hands of his legal representatives See Note 3 Pt (1)

1 Scope and applicability of the Rule

The Rule provides for coercive steps against the receiver who fails to carry out his duties as laid down in R 3 The Court has got a discretion in deciding whether to take action or not under this Rule as against the receiver^{1a} When the receiver is guilty of a wilful default or gross negligence the only provision for taking action against him apart from proceeding against the security, is that his property can be attached arrest and imprisonment are not to be the methods of enforcement¹

2 Loss to property by wilful default or gross neglect

Property includes not only *corpus* of the property entrusted to the receiver but also the *income* derived from it¹ The Rule is a residuary provision and covers a case of misappropriation also³ Even a partner who is appointed receiver of partnership assets will be guilty of gross misconduct if he appropriates to his own use any of the partnership assets³

A separate suit is the proper procedure for proceeding against a receiver on

(1) - . . .

1 (1931) 1931 Mad 60 (763)

Note 2

1 (1916) 1916 Mad 521 (522) 39 Mad 584

2 (1916) 1916 Mad 521 (522) 39 Mad 584

3 (1925) 1925 P C 257 (259) (PC)

discretion

the basis of a wilful default and neglect⁴. Such a suit may be filed even after his discharge if it transpires that he has in his hands moneys belonging to the estate⁵. Similarly his accounts may be re opened on discovery of errors, even where he has been discharged after the passing of his accounts. The proper procedure however, in such a case is to hold an enquiry to find out whether any loss has been occasioned by his wilful default or gross negligence and to pass an order under this Rule or if desired to proceed against him under S 145 of the Code. A separate suit against him is not necessary in such circumstances⁶.

If money paid by a receiver does not reach the proper destination he must make good the loss unless he can show that he acted with perfect regularity and has used such a degree of prudence as would be expected from an ordinary individual in his own affairs.

Where at the time of appointing a receiver, there was a decree in favour of the estate about 11 years old and after his appointment the receiver applied for the arrest of the debtor but not for attachment of his properties on the ground that it was very much encumbered it cannot be said that the receiver is guilty of any negligence at all. It must be shown by the party wishing to establish gross negligence on the part of the receiver that it would have been profitable to the estate if the debtor's property had been attached⁷.

3 Court may direct his property to be attached

Where a receiver dies his property in the hands of his legal representatives may be attached¹. But before directing the attachment of property under this Rule the Court must first determine the exact amount for which he is liable after due enquiry under R 3, and give him an opportunity to pay the same².

4 Removal of a receiver—See Note 43 to R 1 *supra*

The Court has an inherent power in the exercise of its discretion to remove a receiver appointed by it¹. A receiver who has not complied with the Court's orders to keep proper accounts should be removed from office². A receiver can be removed only by the Court appointing him³.

5 Appeal—See also Note 51 to R 1 *ante*

An order under this Rule is appealable under O 43, R 1 (s)¹.

No appeal lies from the following orders—

- (1) An order which merely declares that the receiver is liable to the estate for a certain sum of money and which is not accompanied by any order for the attachment of his property^{1a}.
- (2) An order fixing the period for which an account is to be filed².
- (3) An order removing a receiver from office³.
- (4) An order for refund of losses to the estate due to the receiver's neglect⁴.

the Receiver was held to have exercised the requisite degree of care
7a (1931) 1931 Mad 760 (764 765)

Note 3

- 1 (1916) 1916 Mad 521 (522) 39 Mad 584
- 2 (1923) 1923 Mad 85 (86)

Note 4

- 1 (1912) 17 Ind Cas 583 (584) (Mad)
- (1931) 1931 All 72 (73)
- (1930) 13 Mad 390 (394) (P C)
- (See however (1916) 1916 Mad 924

(1925))

- 2 (1925) 1925 Lah 303 (312)
- 3 (1925) 1925 Lah 303 (310)

Note 5

- 1 (1920) 1920 Pat 220 (220) 4 Pat L Jour 636
- 1a (1931) 1931 Mad 760 (763 768) Order of realisation out of Receiver's security—Appeal lies
- 2 (1920) 1920 Pat 703 (704) 5 Pat L Jour 97
- 3 (1931) 1931 All 72 (73)
- (1932) 1932 Cal 52 (54) The Receiver cannot appeal—But parties may
- 4 (1922) 1922 Lah 224 (1) (224)

- (5) An order directing the receiver to pay a certain sum of money into Court without any order for the attachment of his property⁵
- (6) An order directing the receiver to pay a certain sum of money by way of damages⁶

But in an appeal from an order for attachment under R 4 the propriety of an order under R 3 requiring the receiver to pay a certain sum of money to the estate can be attacked⁷

It has been held by the High Court of Bombay that an order passing a receiver's account is appealable inasmuch as it is really an order refusing relief against the receiver under this Rule⁸

R. 5. [S 504] Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property

[1877—S 504, 1859—S 92]

Synopsis

Property seized by collector as receiver Note No 1

1 Property seized by Collector as receiver

When attached property is seized and returned by a Collector acting as a receiver his acts cannot be disputed by way of motion to discharge the attachment¹

ORDER XLI

APPEALS FROM ORIGINAL DECREES

R. 1. [S 541] (1) *Every* appeal shall be *preferred* in the form of a memorandum *signed* by the appellant or his pleader¹ and *presented*² to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment⁴ on which it is founded

(2) *The* memorandum shall set forth, concisely and under distinct heads, the grounds of objection¹¹ to the decree appealed from without any argument or narrative, and such grounds shall be numbered consecutively.

[1877—S 541, 1859—Ss 333, 335 See S 96]

(1924) 1924 Sind 35 (30) 18 Sind LR 335
 8 (1921) 19 1 Bom 427 (428) 45 Bom JJ
 Order 40 Rule 5—Note 1
 1 (1871) 15 South W R 347 (348)

Local Amendments

LAHORE.

Add the following proviso to Sub rule (1) —

- ' Provided that when two or more cases are tried together and decided by the same judgment and two or more appeals are filed against the decrees whether by the same or different appellants the officer appointed in this behalf may if satisfied that the questions for decisions are analogous in each appeal dispense with the production of more than one copy of the judgment

MADRAS

Add the following sentence and proviso to Sub rule (1) —

- ' The copy of the judgment shall be a printed copy in every case in which the High Court has prescribed that the judgment shall be printed when a copy is applied for, for the purpose of appeal'

- ' Provided that in appeals from decrees or orders under any special or local Act to which the provisions of Parts II and III of the Limitation Act IX of 1908 do not apply and in which certified copies of such decrees or orders have not been granted within the time prescribed for preferring an appeal the appellate Court may admit the memorandum of appeal subject to the production of the copy of the decree or order appealed from within such time as may be fixed by the Court

Add the following sentence to Sub-rule (2) —

- The memorandum shall also contain a statement of the valuation of the appeal for the purposes of the Court fees Act

Add the following as a new Sub rule (3) to R 1 —

- ' (3) When an appeal is presented after the period of limitation prescribed therefor, it shall be accompanied by a petition supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period and the Court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it either under Rule 11 of this Order or on the ground that it is not satisfied as to the sufficiency of the reasons for extending the period of limitation) until notice has been given to the respondent and his objections if any to the Court acting under the provisions of S 3 of Act IX of 1908 have been heard

RANGOON

The following shall be substituted for Sub rule (2) —

- ' (2) The memorandum shall set forth concisely and under distinct heads the grounds of objection to the decree appealed from without any argument or narrative, and such grounds shall be numbered consecutively. When Burmese dates are given the corresponding English dates shall be added. The memorandum shall also contain—

- (i) the full names and addresses of all parties,
- (ii) particulars (class number year and Court) of the original proceedings, and
- (iii) the value of the appeal (a) for Court fees, and (b) for jurisdiction

Material corrections or alterations shall be authenticated by the initials of the person

copies on

Synopsis

	Note No		Note No
Memorandum of appeal to be signed by appellant or by his pleader	1	Misdescription in the memorandum of appeal	10
Presentation of memorandum of appeal	2	Grounds of objection	11
Presentation with defective vakalat nama	3	Grounds that may be taken in the memorandum of appeal for first time	12
Memorandum must be accompanied by copies of judgment and decree	4	When appellate Court may not interfere with findings of fact	13
Date of presentation for purpose of limitation	5	Competency of appeal	14
Omission to file copy of decree in rival appeal	6	Consolidation of appeals	15
Two decrees in two cross appeals	7	Stamp on memorandum of appeal	16
Limitation for appeal	8	Refund where memorandum is over stamped	17
Exclusion of time in seeking review of judgment	9	Applicability of the Order to other proceedings	18

1, decree has not yet been prepared³ or the appellant is under an erroneous impression that it has not yet been prepared⁴ It has been held that the Court may in such cases give time for getting a copy of decree prepared and filing the same^{4a} But *see* the criticism of this view in S 2 (2) Note 8 The Court may however, where the copy of the decree is filed after the expiry of the period of limitation, excuse the delay under S 5 of the Limitation Act^{4b} The fact that a copy of the decree has already been filed in another proceeding is not sufficient⁵ In an appeal in a land acquisition case a copy of the award which is the decree in the case should be filed along with the memorandum of appeal⁶ Similarly in a probate case, a copy of the decree should accompany the memorandum of appeal⁷

A memorandum of appeal should also be accompanied by a copy of judgment appealed from Only the *final* judgment need however be filed It is not necessary to file *interim* orders and judgments disposing of preliminary issues in the case⁸ This Rule makes a distinction between the filing of a copy of the decree and the filing of a copy of the judgment The Court has no power to dispense with a copy of the *decree*,⁹ but it can dispense with a copy of the judgment But unless dispensed with, a memorandum of appeal unaccompanied by a copy of the judgment is not valid¹⁰ Where, however an appeal is admitted without a copy of the judgment the order admitting the appeal may be taken to amount to an order dispensing with such copy¹¹ The power to dispense with the copy of the judgment should ordinarily be exercised at the first hearing¹² The fact that a copy of the judgment has been filed in another proceeding is not a sufficient ground for dispensing with the copy¹³ By force of O 43, R 2

(1915) 1915 Cal 693 (694)

(1917) 17 Ind Cas 99 (100) (Cal)

(1912) 14 Ind Cas 1006 (1007) (Cal)

(1911) 11 Ind Cas 8 (8) (Cal)

(1922) 1922 Lah 93 (93)

(1927) 1927 Lah 629 (630)

(1927) 1927 Lah 640 (641)

(See however (1927) 1927 Lah 905 (905 906) No longer good law since the Full Bench decision referred to

from mortgage decree—Copy of preliminary judgment and final decree filed Held appeal not in order and appellant cannot impugn preliminary decree

3 (1922) 1922 Lah 191 (192)

(1922) 1922 Lah 170 (171)

4 (1912) 12 Ind Cas 99 (100) (Cal)

(1912) 12 Ind Cas 119 (120) (Cal)

(1914) 14 Ind Cas 265 (265)

4 (1894) 4 Ind Cas 221 (224)

(1893) 5 All 520 (522)

(1919) 1919 Lah 191 (191)

(1924) 1924 Lah 191 (191)

41 (1923) 1923 Lah 191 (191)

(1927) 1927 Lah 191 (191)

(1928) 1928 Lah 191 (191)

(1927) 1927 Lah 191 (191)

(1928) 1928 Lah 191 (191)

(1927) 1927 Lah 191 (191)

(1928) 1928 Lah 191 (191)

(1927) 1927 Lah 191 (191)

L R 67

(1922) 1922 Lah 433 (438) 6 Lah 218

(1903) 1903 Lun Re No 22 p 67

10 (1917) 1917 Lah 430 (437) 1917 Lun Re No 67 (L R)

(1911) 1911 Lah 433 (434)

(1928) 1928 Lah 171 (132)

(1921) 1921 Lah 440 (441) Copy dispensed

order should be accompanied by a copy of the Order appealed from^{13a}. In cases, however, where a formal order is not drawn up^{13b} or where the formal order is an exact copy of the concluding portion of the judgment^{13c} the failure to file a copy of such order has been held not to invalidate the appeal.

An appeal from a decree which has been amended must be accompanied by a copy of the amended decree and not a copy of the original decree¹⁴. Where the decree is amended after the filing of the appeal the appellate Court may permit a copy of the amended decree to be attached to the memorandum of appeal, and the appeal becomes from that moment an appeal against the amended decree¹⁵. Where the amendment of the decree is only for the purpose of making the meaning of the decree clear there is no such alteration as to make it a new decree and no copy of the amended decree need be filed in order to make the appeal, already filed, competent¹⁶.

The word 'copy' in the Rule means a certified copy¹⁷. A copy of the translation of the decree is not enough¹⁸. Nor does the Rule require a printed copy of the judgment to be filed¹⁹. It is also not necessary that the copy should be one obtained by the *appellant* himself²⁰. See also the case cited below¹.

As to whether in second appeal a copy of the trial Court's judgment should be filed, see O 42, R 1, and the cases cited in Note 2 thereof. A copy of the trial Court's *decree* need not, under this Rule, be filed along with a memorandum of second appeal^{21a}. The Rule does not apply to appeals under the Madras Rent Recovery Act²² or under the Oudh Rent Act²³.

5 Date of presentation for purpose of limitation

An appeal will be deemed to be validly presented for the purposes of limitation only when it is accompanied by a copy of the decree appealed from and of the judgment on which it is founded. Hence though the memorandum of appeal may be filed within the period of limitation, it will be barred if the copies of the decree and judgment are not filed till after the expiry of the period of limitation¹. Where an appeal is filed against a minor respondent

13a (1914) 1319 All 394 (3 JJ) 40 All 12 Appeal from order under S 47—Judgment and decree must be filed

(1907) 6 Cal WN 283 (284) Appeal from order under S 47—Order must be

14 (1910) 11 Ind LR 58 (S) (Cal)

[See also (1916) 1916 All 110 (S) (1069)]

15 (1918) 1918 Cal 30 (31)

16 (1926) 1926 Cal 116 (1167)

17 (1922) 1922 Lah 771 (772)

[But see (1926) 1926 Lah 404 (404) Where it was held that an unattested copy was enough where the report was that the record could not be traced]

was only technical and the defect was cured

13b (1914) 1924 All 162 (162 163)

(1933) 1933 All 762 (763, 764) 26 All 27

Presentation of appeal with copy of only order on record containing grounds of decision and formal decree is substituted compliance with Ch 7 R 2 of Allahabad High Court Rules

(1912) 11 ILJ 100, (1006 1007) (Cal)

13c (1923) 1923 All 37 (37)

C P C. 325 & 326

Second appeal—Copy of decree of lower Court not containing grounds of appeal is not enough

21a (1908) 32 Bom 14 (24) But under the Rules of the appellate side it should be filed

Note 5

1 (1908) 32 Bom 14 (22 23)

1.

Court directs the Court may order his property to be attached until he duly submits his accounts in the form ordered

- (2) The Court may at the instance of any party to any suit or proceeding in which a
 at any time make an enquiry as
 er is shown by his accounts or
 as been occasioned by his wilful
 default or gross negligence and may order the amount found due or amount of the
 loss so occasioned to be paid by the receiver into Court or otherwise within a
 period to be fixed by the Court All parties to the suit or proceeding and the
 receiver shall be made parties to any such enquiry Notice of the enquiry shall be
 given by registered post to the surety if any for the receiver but the cost of his
 appearance shall be borne by the surety himself unless the Court otherwise
 directs

Provided that the Court may where the account is disputed by the parties and is of
 a complicat _____ ioned to the
 property by _____ the parties
 to a suit _____ ons for the
 reference

- (3) If the receiver fails to pay any amount which he has been ordered to pay under
 sub rule (2) of this Rule within the period fixed in the order the Court may direct
 such amount to be recovered either from the security (if any) furnished by him
 under R 3 or by attachment and sale of his property or if his property has been
 attached under sub rule (1) of this Rule by sale of the property so attached and
 may apply the proceeds of the sale to make good any amount found due from
 him or any loss occasioned by him and shall pay the balance (if any) of the sale
 proceeds to the receiver

Synopsis

Scope and applicability of the Rule	Note No 1	Court may direct his property to be attached	Note No 3
Loss to property by wilful default or gross neglect	2	Removal of a receiver	4
		Appeal	5

Other Topics

Property in Cl (c) includes income See Property of receiver in the hands of his legal
 Note 2 Pt (1) representatives See Note 3 Pt (1)

1 Scope and applicability of the Rule

The Rule provides for coercive steps against the receiver who fails to carry out his duties as laid down in R 3 The Court has got a discretion in deciding whether to take action or not under this Rule as against the receiver^{1a} When the receiver is guilty of a wilful default or gross negligence the only provision for taking action against him apart from proceeding against the security, is that his property can be *attached* arrest and imprisonment are not to be the methods of enforcement¹

2 Loss to property by wilful default or gross neglect

Property includes not only *corpus* of the property entrusted to the receiver but also the *income* derived from it¹ The Rule is a residuary provision and covers a case of misappropriation also² Even a partner who is appointed receiver of partnership assets will be guilty of gross misconduct if he appropriates to his own use any of the partnership assets³

A separate suit is the proper procedure for proceeding against a receiver on

1 (1931) 1931 Mad 760 (763)

Note 2

1 (1916) 1916 Mad 521 (522) 30 Mad 584

2 (1916) 1916 Mad 521 (522) 30 Mad 584

3 (1925) 1925 L O 257 (259) (1 C)

the estate a wilful default and the fact that such a receiver would not be able to discharge his responsibilities as receiver of the estate. Similarly his accounts may be rejected and a receiver may be removed if he has been discharged after the passage of time. The proper procedure is to make an enquiry into the case of a receiver and if it is found that he has committed a wilful default or some other offence, the court may remove him and direct that the receiver should be removed from office. If the receiver is removed from office, the court may direct that the receiver should be removed from office and that the receiver should be removed from office.

If more particularly a receiver is removed from office, the proper procedure is to make an enquiry into the case of a receiver and if it is found that he has committed a wilful default or some other offence, the court may remove him and direct that the receiver should be removed from office. If the receiver is removed from office, the court may direct that the receiver should be removed from office and that the receiver should be removed from office.

Where at the time of appointing a receiver there was a decree in favour of the estate about 11 years old and after his appointment the receiver applied for the arrest of the debtor but not for attachment of his properties on the ground that it was very much encumbered it cannot be said that the receiver is guilty of any negligence at all. It must be shown by the party who wishes to establish negligence on the part of the receiver that it would have been practicable to the estate if the debtor's property had been attached.¹

3 Court may direct his property to be attached

Where a receiver dies his property in the hands of his legal representatives may be attached.¹ But before directing the attachment of property under this Rule the Court must first determine the exact amount for which he is liable after due enquiry under R 3, and give him an opportunity to pay the sum.²

4 Removal of a receiver—See Note 43 to R 1 s pra

The Court has an inherent power in the exercise of its discretion to remove a receiver appointed by it.¹ A receiver who has not complied with the Court's orders to keep proper accounts should be removed from office.² A receiver can be removed only by the Court appointing him.³

5 Appeal—See also Note 51 to R 1 s pra

An order under this Rule is appealable under O 13, R 1 (v).¹

No appeal lies from the following orders—

- (1) An order which merely declares that the receiver is liable to the estate for a certain sum of money and which is not accompanied by any order for the attachment of his property.^{1a}
- (2) An order fixing the period for which an account is to be filed.²
- (3) An order removing a receiver from office.³
- (4) An order for refund of losses to the estate due to the receiver's neglect.⁴

(1925)]

- 2 (1925) 1925 I 1 509 (712)
3 (1925) 1925 I 1 509 (710)

Note 5

- 1 (1920) 1920 I 1 220 (220) 41st I Jour
700

- 1 (1931) 131 Mal 700 (1 700) 11th I Jour
re built out of R 11th I Jour

the Receiver is held to have exercised the requisite degree of care
7* (1931) 1931 Mad 60 (764 765)

Note 3

- 1 (1916) 1916 Mad 521 (22) 30 Mad 584
2 (1923) 1923 Mad 55 (96)

Note 4

- 1 (1912) 17 I d Cas 583 (581) (Mad)
(1911) 1911 All 72 (73)
(1890) 13 M d 300 (331) (P C)
(See however (1916) 1916 Mad 924

- (5) An order directing the receiver to pay a certain sum of money into Court without any order for the attachment of his property⁵
- (6) An order directing the receiver to pay a certain sum of money by way of damages⁶

But in an appeal from an order for attachment under R 4 the propriety of an order under R 3 requiring the receiver to pay a certain sum of money to the estate can be attacked⁷

It has been held by the High Court of Bombay that an order passing a receiver's account is appealable inasmuch as it is really an order refusing relief against the receiver under this Rule⁸

R. 5. [S 504] Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property

[1877—S 504, 1859—S 92]

Synopsis

Property seized by collector as receiver Note No 1

1 Property seized by Collector as receiver

When attached property is seized and retained by a Collector acting as receiver his acts cannot be disputed by way of motion to discharge the attachment¹

ORDER XLI

APPEALS FROM ORIGINAL DECREES

R. 1. [S 541] (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader¹ and presented² to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment⁴ on which it is founded

(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection¹¹ to the decree appealed from without any argument or narrative, and such grounds shall be numbered consecutively.

[1877—S 541, 1859—Ss 333, 335 See S 96]

(1924) 137 J 61 d 35 (36) 18 Sth d LR 355
 8 (1921) 19 J 1 Com 417 (428) 45 1 or 1 JJ
 Order 40 Rule 5—Note 1
 1 (1871) 15 Sth W R 317 (318)

Local Amendments

LAHORE.

Add the following proviso to Sub rule (1) —

‘ Provided that when two or more cases are tried together and decided by the same judgment and two or more appeals are filed against the decrees whether by the same or different appellants, the officer appointed in this behalf may if satisfied that the questions for decisions are analogous in each appeal dispense with the production of more than one copy of the judgment

MADRAS

Add the following sentence and proviso to Sub rule (1)

‘ The copy of the judgment shall be a printed copy in every case in which the High Court has prescribed that the judgment shall be printed when a copy is supplied for, for the purpose of appeal

Provided that in appeals from decrees or orders under any special or local Act to which the provisions of Parts II and III of the Limitation Act IX of 1908 do not apply and in which certified copies of such decrees or orders have not been printed within the time prescribed for preferring an appeal the appellate Court may admit the memorandum of appeal subject to the production of the copy of the such time as may be fixed by the Court

statement of the valuation of the appeal for the

purposes of the Court fees Act

Add the following as a new Sub rule (3) to R 1 —

‘ (3) When an appeal is presented after the period of limitation prescribed therefor it shall be accompanied by a petition supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period and the Court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it either under Rule 11 of this Order or on the ground that it is not satisfied as to the sufficiency of the reasons for extending the period of limitation) until notice has been given to the respondent and his objections if any to the Court acting under the provisions of S 3 of Act IX of 1908 have been heard

RANGOON

The following shall be substituted for Sub rule (2) —

(2) The memorandum shall set forth, concisely and under distinct heads the grounds of objection to the decree appealed from without any argument or narrative, and such grounds shall be numbered consecutively. When Burmese dates are given the corresponding English dates shall be added. The memorandum shall also contain—

(i) the full names and addresses of all parties

(ii) particulars (class, number year and Court) of the original proceedings, and

(iii) the value of the appeal (a) for Court fees and (b) for jurisdiction

Material corrections or alterations shall be authenticated by the initials of the person

copies on

Note No		Synopsis		Note No	
Memorandum of appeal to be signed by appellant or by his pleader	1	Misdescription in the memorandum of appeal			10
Presentation of memorandum of appeal	2	Grounds of objection			11
Presentation with defective vakalat <i>nama</i>	3	Grounds that may be taken in the memorandum of appeal for first time			12
Memorandum must be accompanied by copies of judgment and decree	4	When appellate Court may not interfere with findings of fact			13
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G Form No 1

1 Memorandum of appeal to be signed by appellant or his pleader

It is necessary that the memorandum of appeal should be signed by the appellant or his pleader. By virtue of the provisions of O 3 R 1, *supra* an agent of the appellant, duly authorised may also sign the memorandum of appeal.¹ A defect in the authority will not necessarily invalidate the memorandum of appeal.² Where an appeal was filed on behalf of a company by one of its officers not duly authorised to do so, it was held that the defect could be cured by putting in a power of attorney duly authorising him to do so.³ Similarly where a memorandum of appeal was signed by a pleader whose vakalat was not signed by the party, it was held that the defect could be subsequently rectified by the party signing it.⁴ It is immaterial, if the appellant has signed the appeal, that he has not written the memorandum of appeal himself.⁵ Where an appeal consisted of two documents one containing the names of the parties and the other containing the grounds of appeal, the fact that the latter was not signed by the party is not fatal to the appeal.⁶

2 Presentation of memorandum of appeal

Order 3, Rule 1 provides that an appearance, application or act in or to any Court required or authorised by law to be made by a party may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent or by his pleader. The presentation of a memorandum of appeal by a pleader holding a power of attorney from the party expressly authorising him to present it is valid though the power is not filed with the appeal.¹ A memorandum of appeal may be presented where the appellant is a minor, by the appellant's guardian *ad litem*.² But a presentation by an unauthorised agent is no presentation in the eye of the law.³ As to a presentation by the clerk of the pleader, see Note 9 to O 3 R 4, *ante*.

The memorandum of appeal should be presented to the Court or to such officer as it appoints in this behalf. A presentation to the Judge at his private residence after Court hours on the last day of limitation, is sufficient compliance with the law.⁴ A presentation during the vacation or even on a Sunday is valid, provided it is to the proper officer.^{4a} It was held in the undermentioned case⁵ that a memorandum of appeal must be taken to have been validly presented where it was deposited in the box put up by the appellate Court for the purpose. But a presentation to an officer of the Court

Order 41 Rule 1—Note 1

- 1 (1923) 1923 Lah 484 (485)
- 2 See Note 2 to O 3 R 2
- 3 (1900) 31 Bom 1 (11)
- 4 (1913) 21 Ind Cas 444 (445) (All)
- 5 (1920) 1920 Lah 212 (213)
- 6 (1923) 1923 Lah 484 (485)
- 7 (1920) 1920 Lah 314 (314)

Note 2

1

[But see (1900) 22 All 331 (332) Pre

presentation of appeal to High Court by authorised agent—Held not valid—The decision it is submitted, is not correct]

- 2 (1930) 1930 All 456 (457) 52 All 191
- 3 (1930) 1930 All 112 (112) Court not justified in treating such appeal as appeal in due form and rejecting it as statute barred
- 4 (1912) 14 Ind Cas 744 (744) 34 All 482 (1931) 1931 Lah 671 (672)
- 4a (1923) 1923 Pat 150 (151) 2 Pat 204
- 5 (1905) 1905 Pan W R 71.

other than the one appointed by the Court in this behalf⁶ or the placing of the memorandum on the table of the appointed officer when he was absent⁷ or the sending of a memorandum by post⁸ is not a valid presentation

A debtor in Civil Jail is entitled to present an appeal without the assistance of a pleader.⁹

An omission to join the necessary parties to an appeal makes the appeal invalid.¹⁰

See also Notes to O 4, R 1 as to the presentation of *plaints*

3 Presentation with defective vakalatnama

The presentation of a memorandum of appeal by a vakil without any authority from the party is not valid¹ But the mere fact that the party has omitted by oversight to sign the vakalatnama² or the fact that the vakalatnama was not filed with the memorandum of appeal³ does not invalidate the appeal Where an appellant executes a vakalatnama in favour of two persons, but one of them alone accepts it, the presentation of the appeal by the latter is a valid presentation^{3a}

There is a difference of opinion as to whether the presentation of a memorandum of appeal is valid where the name of the vakil presenting it, is omitted in the vakalatnama. The High Court of Allahabad has held that it is not a valid presentation, the reason given being that the word shall in O 3 R 4 shows that the Rule is of an imperative character.⁴ The High Courts of Calcutta,⁵ Lahore,^{5a} Patna⁶ and the Judicial Commissioner's Court of Nagpur,⁷ on the other hand, have held that the presentation is not invalid and that the defect is one that can be cured. *See also* O 3, R 4, Notes 14 to 16.

4 Memorandum must be accompanied by copies of judgment and decree

It is absolutely essential that a memorandum of appeal should be accompanied with a copy of the decree appealed from.¹ A memorandum of appeal not accompanied by such a copy is not a valid appeal² and thus is so even if the

- 6 (1923) 1923 Pat 150 (150) 2 Pat 264 Registrar authorised to receive appeals
—Presentation to Deputy or Assistant Registrar in Registrar's absence not
(1672) 4 (1931) 1931 All 767 (768)
(1927) 1927 All 816 (816)
(1926) 1926 All 252 (253)
(1914) 1914 All 536 (537) 23 Ind Cas 461
(464) 36 All 46
7 (1841) 8 (1890) 8 C P L R 93 (93)
{See also (1899) 15 Mod 137 (138)
Appeal under Criminal Procedure
Code, S 41J—Sending by post is not
enough}
9 (1870 71) 6 Mad H C R App 38 (39)
10 (1913) 18 Ind Cas 37 (39) 1913 Penn Re No 59
5 (1918) 1918 Cal 482 (483)
5a (1932) 1932 Lah 134 (135)
6 (1932) 1932 Pat 3 (4)

Note 3

- 1 (1920) 1920 Pat 581 (582)
(1934) 1934 Lah 444 (445)
(1934) 33 P L R 517 (1) Appeal filed on
the last day of limitation—Power
of attorney filed 9 days later—Appeal
not in time
(1921) 1921 Nag 27 (27, 28)
(1911) 11 Ind Cas 387 (385) (Cal)
2 (1920) 1920 Lah 212 (213)
(1913) 21 Ind Cas 444 (445) (All)
3 (1926) 1926 Bom 336 (336)
[See however (1911) 11 Ind Cas 357
(1920) 1920 Pat 260 (261)]

²² Note 4

- 1 (1923) 1923 Mad 482 (483)
[See (1933) 1933 Lah 938 (939). Decree

1, decree has not yet been prepared³ or the appellant is under an erroneous impression that it has not yet been prepared⁴ It has been held that the Court may in such cases give time for getting a copy of decree prepared and filing the same^{4a} But see the criticism of this view in S 2 (2), Note 8 The Court may, however, where the copy of the decree is filed after the expiry of the period of limitation, excuse the delay under S 5 of the Limitation Act^{4b} The fact that a copy of the decree has already been filed in another proceeding is not sufficient⁵ In an appeal in a land acquisition case a copy of the award which is the decree in the case should be filed along with the memorandum of appeal⁶ Similarly in a prolate case, a copy of the decree should accompany the memorandum of appeal⁷

A memorandum of appeal should also be accompanied by a copy of judgment appealed from Only the *final* judgment need however be filed It is not necessary to file *interim* orders and judgments disposing of preliminary issues in the case⁸ This Rule makes a distinction between the filing of a copy of the decree and the filing of a copy of the judgment The Court has no power to dispense with a copy of the *decree*,⁹ but it can dispense with a copy of the judgment But unless dispensed with, a memorandum of appeal unaccompanied by a copy of the judgment is not valid¹⁰ Where, however, an appeal is admitted without a copy of the judgment, the order admitting the appeal may be taken to amount to an order dispensing with such copy¹¹ The power to dispense with the copy of the judgment should, ordinarily, be exercised at the first hearing¹² The fact that a copy of the judgment has been filed in another proceeding is not a sufficient ground for dispensing with the copy¹³ By force of O 43 R 2 a memorandum of appeal from an

- (1915) 1915 Cal 693 (694)
(1912) 17 Ind Cas 99 (100) (Cal)
(1912) 14 Ind Cas 1006 (1007) (Cal)
(1911) 11 Ind Cas 8 (8) (Cal)
(1920) 1925 Nag 59 (53)
(1924) 1924 Nag 271 (278) 20 Nag L R 131
(1921) 1921 U B R 15 (16) 4 U B R 75

- 1926 Lah 638, 1927 Lah 449, 1927 Lah 451, 1928 Lah 45, 1928 Lah 46, and 1928 Lah 60 Overruled
[See also (1931) 1931 Lah 202 (203)]

- (1932) 1932 Lah 136 (137)
(1928) 1928 Lah 601 (603)
(1929) 1929 Lah 42 (43)
(1929) 1929 Lah 295 (297) 10 Lah 613
(1929) 1929 Lah 379 (380)
(1922) 1922 Lah 93 (93)
(1927) 1927 Lah 629 (630)
(1927) 1927 Lah 640 (641)

[See however (1927) 1927 Lah 905 (905 906) No longer good law since the Full Bench decision referred to above]

from mortgage decree—Copy of preliminary judgment and final decree filed Held, appeal not in order and appellant cannot impugn preliminary

L R 67

- (1920) 1920 Lah 438 (438) 6 Lah 218
(1907) 1907 Pun Re No 22 p 67
10 (1917) 1917 Lah 416 (437) 1917 Pun Re No 67 (113)
(1910) 1910 Lah 151 (151)
(1928) 1928 Nag 131 (132)
(1927) 1927 Lah 413 (413) Copy dispensed with
(1907) 1907 Lah 27 (27) (130)
11 (1920) 1920 Nag 77 (77)
(1927) 1927 Lah 11 (11)
12 (1928) 1928 Lah 11 (11)
13 (1927) 1927 Lah 721 (722)

(See also (1922) 1922 Lah 170 (171))

- (1927) 1927 Lah 424 (424)
(1928) 1928 Lah 263 (264)
(1927) 1927 Lah 49 (49) 7 Lah 11
(1921) 1921 Ind Cas 99 (100) (Cal)
(1927) 1927 Lah 451 (453) 10 Lah 87 (111)

order should be accompanied by a copy of the Order appealed from^{13a} In cases however where a formal order is not drawn up^{13b} or where the formal order is an exact copy of the concluding portion of the judgment^{13c} the failure to file a copy of such order has been held not to invalidate the appeal

An appeal from a decree which has been amended must be accompanied by a copy of the amended decree and not a copy of the original decree¹⁴ Where the decree is amended after the filing of the appeal the appellate Court may permit a copy of the amended decree to be attached to the memorandum of appeal and the appeal becomes from that moment, an appeal against the amended decree¹⁵ Where the amendment of the decree is only for the purpose of making the meaning of the decree clear there is no such alteration as to make it a new decree and no copy of the amended decree need be filed in order to make the appeal already filed competent¹⁶

The word copy in the Rule means a certified copy¹⁷ A copy of the translation of the decree is not enough¹⁸ Nor does the Rule require a printed copy of the judgment to be filed¹⁹ It is also not necessary that the copy should be one obtained by the *appellant* himself²⁰ See also the case cited below¹

As to whether in second appeal a copy of the trial Court's judgment should be filed see O 42 R 1 and the cases cited in Note 2 thereof A copy of the trial Court's *decree* need not, under this Rule, be filed along with a memorandum of second appeal^{21a} The Rule does not apply to appeals under the Madras Rent Recovery Act²² or under the Oudh Rent Act²³

5 Date of presentation for purpose of limitation

An appeal will be deemed to be validly presented for the purposes of limitation only when it is accompanied by a copy of the decree appealed from and of the judgment on which it is founded Hence though the memorandum of appeal may be filed within the period of limitation, it will be barred if the copies of the decree and judgment are not filed till after the expiry of the period of limitation¹ Where an appeal is filed against a minor respondent,

13a (1918) 1918 All 394 (394) 40 All 12 Appeal from order under S 47—Judgment and decree must be filed

(i) 02) 6 Cal W N 253 (254) Appeal from order under S 47—Order must be

14 (1910) 11 Ind Cas 8 (8) (Cil)
[See also (1916) 1916 Mad 1073 (1063)]

15 (1918) 1918 Cil 30 (31)

16 (1926) 1926 Cil 1176 (1167)

17 (1923) 1923 Lah 771 (772)

[But see (1926) 1926 Jch 404 (404) Where it was held that an unattested copy was enough where the report was that the record could not

while dismissed for non compliance with the condition — Order of dismissal should also be filed, but objection on the ground of failure to file was only technical and the defect was corrected]

13b (1924) 1924 All 162 (162 163)

(1933) 1933 All 762 (763, 764) 36 All 27 Presentation of appeal with copy of only order on record containing grounds of decision and formal decision is substantial compliance with Ch 3, R 2 of All India High Court Rule

(1912) 14 Ind Cas 1003 (1006 1007) (Cil)

13c (1923) 1923 All 573 (574)

C P. C. 325 & 326

Second Appeal — Copy of decree of lower Court not containing grounds of appeal to that Court is enough

21a (1908) 32 Bom 14 (24) But under the Rules of the appellate Court it should be filed

(1882) 4 Mil 419 (420)

22 (1822) 20 Mad 476 (476)

23 (1916) 84 Ind Cas 706 (706) (Oudh)

Note 5

1 (1908) 32 Bom 14 (22, 23)

- 1, the mere fact that the name of a guardian *ad litem* was not brought on record till after the period of limitation, will not make the appeal itself barred by limitation²

As to when an application for revision may be converted into an appeal, see S 115, Note 18

6 Omission to file copy of decree in rival appeal

Where there are several appeals from one judgment by different appellants a copy of the judgment and of the decree should be filed in *each* appeal¹ Thus in an appeal from an award under the Land Acquisition Act the fact that the award disposed of many references and it was filed in an appeal filed by a party in one appeal does not enable its being dispensed with in the other appeals² But where the same appellant files different appeals from the *same* judgment it has been held that it is sufficient if he files a copy of the judgment in one of the appeals only³

7 Two decrees in two cross appeals

Where two cross appeals are heard together and disposed of by a single judgment but two separate decrees are drawn up one in each appeal there is a conflict of opinion as to whether an appeal against the judgment filing a copy of one of the decrees only, is valid¹ The conflict is due to another aspect of the question, namely whether an appeal against one of such decrees only is barred by *res judicata* by the non-filing of an appeal from the other This aspect is discussed in Note 29 to S 11, *ante*

8 Limitation for appeal

See Arts 152 and 156 of the Limitation Act

The said Act provides for the *extension* of the period of limitation prescribed in certain cases and for *exclusion* of certain periods in computing the period of limitation prescribed

Extension of the period—S 4 of the Act provides that where the period prescribed expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court

furnishing second copy was extended under S 5 Lim Act]

Note 7

- 1 (1916) 1916 Lah 166 1916 Pun Re No 81 (Yes)
 (1926) 1926 Lah 458 (458) 7 Lah 41 (Yes)
 (1929) 1929 Nag 229 (237) 25 Nag LR 183 (Yes)

(1917) 1917 Lah 436 (437) 1917 Pun Re No 67

2 (1903) 30 All 55 (56)

Note 6

1 appellant to be allowed to elect to which decree he would confine his

the expiry of limitation—Appeal [ad]

[See also (1932) 1932 Pat 310 (319) 12 1st 36 Two appeals against one order with one copy—On demand second copy furnished—Time required for

- (1921) 1921 Lah 346 (347) 56 Ind Cas 63 (70) (No)
 (1911) 10 Ind Cas 415 (416) (Cal) (No)
 (1926) 13 6 Jour 137 (4) 30 Ind Cas 330 (Oudh) (No)
 (1915) 1915 Cal 42 (47) (No)
 (1914) 1918 1st 219 (220) 3 1st L Jour 30 (No)

reopens¹ Under S 5 of the Act the Court has a discretion to admit the appeal after the expiry of the limitation period, if it is satisfied that there was 'sufficient cause' for not preferring the appeal within the time² In exercising the direction under the section, the Court must, on the other hand, be fully satisfied of the justice of the grounds on which the delay is sought to be excused³ On the other hand, the expression "sufficient cause" should be liberally construed so as to advance substantial justice when no negligence, nor inaction nor want of *bona fides* is imputable to the appellant⁴ So construed it will include not only those circumstances which the law expressly recognises as extending the time, but also such circumstances as are not expressly recognised but which may appear to the Court to be reasonable looking to the facts of the case⁵ As to what constitutes "sufficient cause" within the meaning of that section, see the undermentioned cases⁶

Note 8

- (1912) 17 Ind Cas 119 (120) (Cal)
 (1912) 17 Ind Cas 150 (156) (Cal)
 (1912) 17 Ind Cas 99 (100) (Cal)
 (1876) 24 South W R 100 (105, 106) (I B)
 (1922) 1922 Lah 93 (93)
 (1923) 1923 Mad 462 (488)
 (1920) 1920 P C 56 (58) 43 Mad 500 47 Ind App 33 (P C) Excusing delay under S 5, Limitation Act, may be implied by allowing appeal to be argued [See also (1933) 1933 Lah 1 (2) District Judge dismissed suit on 17th March 1930—High Court remanded case—District Judge passed decree on 17th March 1931—On appeal copy of decree of 1930 only filed—The copy of 1931 decree against which really appeal was presented

cause

6 *A bona fide mistake of law is sufficient*

under R 10—Appellant being under belief that filing of the returned plaint with the endorsement was enough—Order filed after expiry of limitation—Delay excused under S 5 Limitation Act
 [But see (1890) 12 All 461 (491) (I B) Bare mistake of law is no excuse]
 [See also (1888) 12 Bom 320 (322) Mere ignorance of law is no excuse]

A bona fide mistake in calculating the period of limitation is sufficient cause —

- (1876) 1 All 250 (252)
 (1886) 13 Cal 266 (267, 268)
 (1907) 12 Cal W N 20 (27)
 (1913) 19 Ind Cas 931 (933) (Cal)
 (1906) 28 All 414 (416) Mistake of appellant's pleader—Delay excused
 [See also (1909) 4 Ind Cas 495 (2) (496) (Cal) Respondents not added in time due to mistake of clerk of appellant's pleader—Delay excused]

Delay due to amendment of decree in material particulars is sufficient cause —

- (1906) 3 Cal L Jour 188 (192)
 (1905) 32 Cal 908 (909, 910)

Miscellaneous —

- (1920) 1921 Lah 346 (347) 56 Ind Cas 69 (71) Joint appeal filed under mistaken impression that the cases had been consolidated—Separate appeal allowed to be filed though limitation had expired
 (1861) 9 Moo Ind App 26 (38) (P C) Unavoidable accident—Delay excused
 (1926) 96 Ind Cas 416 (Lah) Delay in fil-

be extended]

- (1928) 1928 Lah 216 (218) 9 Lah 76
 (1924) 1924 Lah 41 (42) 4 Lah 122 Second appeal—Rule requiring copy of trial Court's judgment having come into force only recently—Delay in filing the same was excused
 (1930) 1930 Sind 252 (253) Order under O 7 R 10—Appeal against—Returned plaint with the endorsement thereon filed but not copy of order

100? Amendment not in material particulars—Even then it may be sufficient cause if appellant waited on the *bona fide* belief that he was entitled to do so]

Potential of appellant—Not a sufficient cause —

- (1887) 9 All 655 (659) Confirming judgment of Mahmood, J in 9 All 11 (18)

A Judge sitting in the Admission Court has power to excuse the delay in filing the appeal under S 5 of the Limitation Act.⁷ But an *ex parte* order admitting an appeal after the period of limitation can be set aside by the Court on objection by the opposite side after notice.⁸ Such an objection should, however, be taken at the earliest possible opportunity after becoming aware of the order.⁹ If an appeal is transferred from a District Judge who has admitted the appeal *ex parte*, to a subordinate Judge for hearing the latter can decide the question of limitation.⁹

An order admitting an appeal beyond limitation can be attacked in second appeal preferred against the appellate decree.¹⁰ But the lower Court's direction in allowing or refusing to allow an appeal to be filed beyond limitation under S 5 of the Limitation Act will not be lightly interfered with.¹¹ S 5 of the Limitation Act does not apply to appeals in *forma pauperis*.¹²

Exclusion of period under S 12 of the Limitation Act—In computing the period of limitation for an appeal the appellant is entitled under S 12 of the Limitation Act to a deduction of the time required for obtaining copies of the decree and of the judgment appealed from.¹³ It is not necessary for the extension of time under S 12 that the copy must have been applied for by the appellant himself or his authorised agent.¹⁴

The following points should be noted in computing the Time requisite for obtaining the copies—

- (1) The period between the date of the application and the date on which the stamp papers and the necessary amounts are called for should be excluded.¹⁵

(1886) 13 Cal 179 (7)

(1901) 28 Cal W N 25 (2)

(1917) 1317 P C 149 (180) 41 Mad 412 43

I d App 2, (P C)

(1570) 13 South W R 245 (246)

8, (1923) 1323 Mad 92 (33)

J (1830) 14 Bom 334 (396)

(1898) 21 Mad 278 (229)

(1897) 2 Cal W N 461 (467)

[But see (1880) 3 Cal 1 (1 2) Sub Judge cannot interfere with District Court's order—But District Court itself can set it aside]

10 (1863) 10 South W R 178 (178)

11 (1887) 9 All 244 (246)

(1903) 30 Cal 309 (315 316) 30 I A 20 (PC)

(1904) 26 All 327 (328 329)

(1892) 29 Bom 513 (518)

(1911) 1915 All 453 (460) 31 I C 816 (817)

(1914) 1914 I Ch 265 (265) 1914 P R No 32

Other cases—

(1900) 14 Bom 365 (365) Two writs may be in same question—Similar decisions—Order set aside in appeal—Subsequent appeal against the other decision—Delay not excused

(1915) 1915 Mad 433 (434) No merits in appeal—Delay in filing copy of judgment not excused

(1932) 1932 Oudh 167 (167) Limitation expiring on 9th but appeal filed on 19th—Appellant stating that he misread 9 as 19 in his counsel's letter—Letter not produced—Delay not condoned

(1933) 1933 Cal 462 (463) Extension not

307 55

Ill App 161 (P C) I ven though the High Court rules dispense with the production of such a copy

(1878 90) 2 All 192 (193) (Do)

[But see (1915) 1315 Mad 493 (494)]

(1901) 29 All 664 (266)

14 (1920) 1920 M L 179 (160)

(1907) 29 All 264 (266)

(1898) 3 Cal W N 55 (5)

15 (1907) 7 Cal W N 103 (110)

action forms no proper cause for delay

7 (1913) 21 Ind Cir 96 (98) (Mad)

(1918) 1918 P C 135 (136) 43 Bom 376 46

Ind App 15 (1 C)

8, (1915) 1915 Cal 666 (667) 42 Cal 433

(1936) 9 Mad 450 (451)

- (2) The period between the date on which the stamp papers are supplied and the date on which the copy is ready for delivery should be excluded¹⁶ In calculating such period the day on which the stamp papers are supplied and the day on which the copy is ready should *both* be excluded¹⁷
- (3) The interval between the date on which the copy is ready and the actual date on which the party takes delivery thereof cannot be excluded¹⁸
- (4) Where separate applications are made for copies of the judgment and of the decree the periods necessary for obtaining each of the copies can be excluded except to the extent to which such periods overlap each other¹⁹
- (5) Holidays intervening in such a way as to prevent a party from taking the necessary steps for obtaining copies should be regarded as part of the time requisite for obtaining copy²⁰ But to claim the benefit of S 12 the application for copy must be made before the expiry of the period of limitation for the appeal²¹ If the period of limitation for the appeal expires on a day on which the Court is closed and the appellant applies for copy on the re-opening day, he is not entitled to any extension of time on account of the intervention of the holidays²²
- (6) An appellant is entitled to deduct as time requisite for obtaining copy of decree, any period during which the decree remains unsigned²³ But he is not entitled to do so if the delay in signing the decree was *before* his application for copy²⁴

Exclusion of period under S 14 of the Limitation Act—S 14 of the Limitation Act does not apply to appeals But where time has been spent in prosecuting an appeal in a wrong Court through a *bona fide* mistake, the delay in filing the appeal may be excused in the exercise of the discretion of the Court under S 5 of the Limitation Act²⁵ But where the appellant has been guilty of carelessness, he is not entitled to extension of time on the ground of having

19

20

decree called for on a day when Court closes for vacation and stamp supplied on the re-opening day—Intervening time should not be counted

ratio for copies struck off for non deposit of stamp papers—Subsequent

ed—
anti

where the V P P system of dispatch of copies is in common use, time to be excluded under the section is that between date of application for copy and date of despatch whether by ordinary post or by V P P from copying department]

(1933) 1933 Lah 511 (512) Appeal presented to wrong Court on mistaken but *bona fide* advice by pleader—Time during which appeal remains pending should be excluded

1 prosecuted his remedy in a wrong Court²⁶ In the cases cited below²⁷ it was held that the time during which an appellant was prosecuting an application under O 9, R 13 cannot be deducted in calculating the period of limitation against him

The High Court of Madras has added sub-rule 3 to this Rule under which when an appeal is presented out of time, the question whether the delay in filing the appeal should be excused or not should be decided before the memorandum of appeal is admitted²⁸

9 Exclusion of time in seeking review of judgment

An appellant is not entitled, as of right, to the exclusion of the time spent by him in seeking a review of the judgment, in computing the period of limitation for his appeal¹ But if the appellant can show that he had reasonable grounds for applying for review instead of preferring an appeal and that he had exercised due diligence, the time taken up by the review application may be excused under S 5 of the Limitation Act in computing the limitation for the appeal²

10 Misdescription in the memorandum of appeal

The mere misdescription of an appeal as where, it is described as being an appeal from an order instead of its being described as one from a *decree* will not invalidate the appeal¹

11 Grounds of objection

The general principle is in favour of the correctness of the lower Court's judgment and the *onus* is on the appellant to show that it is wrong¹ Accord-

(1896) 23 Cal 526 (531)

(1897) 21 Bom 552 (555)

[See also (1910) 1916 Lah 401 (407)]

33 Ind Cas 1006 (1007) Appeal erroneously returned by appellate Court for presentation to proper Court—To be deemed as filed in proper time if represented with due diligence]

[See also (1932) 1932 Cal 713 (713) Appeal against decree based on modified award under *bona fide* belief that appeal lies—Appeal can be converted into one from order and extension of time may be granted]

[See also (1933) 1933 Lah 568 (569) Legal adviser's mistake to justify extension of limitation must be *bona fide* one that is it must be done with due care and attention—Where Law

lay not excused and memorandum of

Note 9

- 1 (1841) 15 Smith W R 61 (61)
(1891) 14 Mad 81 (81 82)
(1854) 7 Mad 584 (585 586)
- 2 (1903) 33 Cal 1323 (1325)
(1884) 7 Mad 584 (585 586)
(1888) 15 Cal 242 (244)
(1909) 2 Ind Cas 961 (967) (Cal)
(1886) 9 Mad 247 (248)

Note 10

of time
(1907) 31 Bom 33 (36) Appellant having known that the correctness of course being pursued by him was doubtful, delay not excused

(1907) 34 Cal 216 (219) Mere inadvertence not enough

(1922) 1922 Lah 233 (234) 2 Lah 1 Rev

appeal
[But see (1890) 12 All 61 (63) (F B) Appeal erroneously presented as appeal from order was refused to be converted into appeal from decree]

Note 11

- 1 (1922) 1922 P C 30 (40) (P C)

ingly this Rule provides that the memorandum of appeal should state the grounds of objection on which the decree is attacked.² Such grounds should not be vague³ but must raise specific issues.⁴ R. 2 of this Order provides that where an objection has not been raised in the *memorandum of appeal*, the appellant is not entitled, without the leave of the Court, to raise it at the *hearing*.

It is open to the appellant to set up any circumstance showing that the Judge of the lower Court was disqualified to try the case.⁵

12 Grounds that may be taken in the memorandum of appeal for the first time

The general rule is that the appellant cannot be allowed to raise in his memorandum of appeal, a new case,¹ or a plea abandoned by him in the trial Court,² or a case inconsistent with that alleged by him in the lower

(1921) 1921 P C 55 (56) 17 Nig L R 72 (P C)

(1866) 67 11 Moo Ind App 177 (181) (P C)

(1918) 1918 Cal 363 (368, 366)

(1871) 15 Suth W R 223 (229)

(1876) 25 Suth W R 30 (31)

(1917) 1917 Lah 297 (300) 1917 Pun Re No 106

(1913) 19 Ind Cas 964 (966) (Lah)

(1920) 20 Ind Cas 703 (704) (Oudh)

(1925) 1925 Oudh 224 (224)

(1924) 1924 Oudh 326 (328)

not raised in the first Court and a decree is allowed to be passed—The plea cannot be raised in appeal

(1911) 10 Ind Cas 230 (231) (All)

(1927) 1927 All 28 (35) 49 All 162 New plea cannot be raised for the first time in Letters Patent Appeal

(1927) 1927 All 63 (65) Point deliberately omitted to be taken in lower Court not allowable

2 71 set

3 (1895) 8 C P L R 81 (82)

4 (1923) 1923 Oudh 113 (113)

5 (1879) 22 Mad 155 (159, 160)

[See (1879) 3 Cal L Rep 23 (24) If party wishes to make misconduct of Judge a ground of appeal, he ought to draw Judge's attention to the matter]

Note 12

1 See generally Note 55 to Section 100

[See also (1905) 2 All L Jour 485 (487)]

(1902) 1902 P C 95 (97) (P C) Suit on negligence—Plaintiff in trial Court setting up a particular kind of negligence—Having failed to prove it, he cannot in appeal ask Court to find negligence on a quite different species facti

(1932) 1932 Cal 356 (362) 59 Cal 556

(1923) 1923 Cal 267 (268) Objection that

135

[See also (1933) 1933 Lah 383 (384) Question of fact raised in appeal on which no evidence is on record—Appellate Court will not express opinion]

(1933) 1933 Lah 179 (182, 183) Plea of estoppel cannot be raised for the

2 (1921) 1921 All 197 (197) Plaintiff accepting decision of trial Court and not appealing—Cannot challenge in second appeal

(1933) 1933 All 104 (106) Act admitted by plaintiffs to have been done by defendant in official capacity in trial Court—Admission not withdrawn in

that a certain defendant is a minor

1 Court especially when the opponent is thereby placed at a disadvantage.
2 Nor can he raise in his memorandum of appeal an objection which, if it had been taken in the lower Court, might have been cured, by appropriate

first appeal—(Question being a mixed question of law and fact, High Court will refuse to allow plaintiffs to raise new plea to the effect that set was not done in official capacity)

- (1911) 11 Ind Cas 403 (109) (Lah)
(1917) 1917 Lah 211 (2) (212) 33 Ind Cas 391 (382)
(1926) 1926 Mad 1167 (1168) 30 Mad 10
(1926) 1926 Nag 160 (161)
(1921) 1921 Oudh 41 (42) 24 Oudh Cas 181
(1922) 1922 Oudh 102 (103)

suit on this ground]

- 3 (1921) 1921 P C 27 (29) (P C)
(1926) 1926 P C 18 (20) 53 Ind App 64 49 Mad 243 (P C)
(1879) 15 All 166 (187) Allegation that defendant was tenant precludes contention that he was trespasser

- (1898) 20 All 10
(1904) 26 All 331 (334)
(1919) 11 I C 661 (662) (All) Suit based on *mortgage* not allowed to be changed into suit on *charge*
(1920) 1920 All 148 (149)
(1921) 1921 All 154 (155)
(1886) 10 Bom 461 (467) 13 Ind App 66 (P C)
(1911) 3 Ind Cas 941 (942) 33 Bom 231

Effect of separate oral agreement can not be converted into one of fraud

- (1923) 1923 Bom 114 (115)
(1870) 13 South W R 10 (11) Suit by a Hindu widow for possession and declaration of title—Defendant cannot urge for the first time in appeal that by a family custom, females could not inherit

- (1874) 22 South W R 502 (503)
(1874) 22 South W R 216 (218 219) Inconsistent plea of title by adverse possession cannot be raised for first time in appeal
[See also (1875) 21 South W R 441 (445) Plaintiff cannot succeed on title different from that alleged in the plaint]

- (1879) 4 Cal L Rep 52 (54)
(1881) 6 Cal 55 (55) Ejectment suit — Defendant claiming adverse title in himself cannot in appeal contend that he is occupancy ryot and is such not liable to ejectment

- (1892) 19 Cal 507 (512) 19 Ind App 90 (P C)

- (1893) 3 Cal W N 325 (328) A suit for possession based on fraud cannot be converted on appeal into one for redemption

- (1907) 3 Cal L Jour 653 (662)
(1902) 3 Cal W N 787 (791) Plea of fraud

cannot be raised for first time in appeal

- (1907) 1 Cal L Jour 116 (117) Defendant repudiating plaintiff's title in ejectment suit in the trial Court — In appeal he cannot set up a plea of tenancy and want of notice

- (1910) 5 Ind Cas 103 (104) (Cal)
(1910) 6 Ind Cas 523 (530) (Cal) Fraud alleged in first Court — Plea cannot be changed into that of negligence in appeal

- (1920) 1920 Cal 36 (37)
(1925) 1925 Cal 341 (344)

- (1926) 1926 Cal 553 (570) Actual possession pleaded but found against — Constructive possession through the defendant cannot be set up for the first time in appeal

- (1917) 1917 Lah 220 (221) Case sought on hundred — Plaintiff cannot in appeal seek to rely on original cause of action

- (1921)

for title

- (1892) 15 Mad 503 (511) 13 Ind App 173 (P C)

- (1908) 18 Mad L Jour 562 (563) Plaintiff decree holder having asserted right to rateable distribution in lower Court cannot in appeal demand entire rateable portion

- (1910) 6 Ind Cas 423 (423) (Mad) Plaintiff suing only for partition cannot in second appeal be permitted to set up new case in nature of easement

- (1910) 7 Ind Cas 568 (569, 570) (Mad)

tract of sale

- (1915) 1315 Mad 74 (76)
(1925) 1928 Mad 962 (963)
(1916) 1916 Oudh 329 (330)
(1913) 19 Ind Cas 547 (548) 3 Nag L R 35

Issue in lower Court whether mortgaged debt has or has not been satisfied — Plea that occupier has no interest entitling him to be joined as party to the suit cannot be raised for the first time in appeal

- (1916) 1916 Oudh 313 (314) 19 Oudh Cas 166 Redemption suit — Defendant pleading in first Court that he had also purchased the equity of redemption — He cannot in appeal

amendments or otherwise.⁴ Thus objections as to joinder of parties or causes of action which might have been cured by amendment even in the trial Court cannot be raised for the first time in the memorandum of appeal.⁵ Again, there are certain objections such as those relating to the place of suing or the valuation of the suit that cannot under the specific provisions of the statute be raised for the first time in appeal (see S 21 of the Code and S 11 of the Suits Valuation Act 1887). Such objections therefore cannot be allowed to be raised for the first time in the memorandum of appeal.⁶ An objection that a declaratory decree cannot be passed with respect to a future right will not also be allowed to be raised for the first time in the memorandum of appeal.⁷

The following are, however, recognised as exceptions to the general rule that a new case cannot be raised for the first time in the memorandum of appeal—

(1) Objections as to jurisdiction apparent on the face of the record.⁸

(2) Matters going to the root of the case and which are obvious on the face of the record,⁹ such as non-joinder of essential parties¹⁰ or want of notice to quit,¹¹ or insufficiency of notice in suits for foreclosure.¹²

- It is held that there has been a finding on the merits of the case.
- (116) 116 Pat 337 (35-) Plaintiff claim in direct possession cannot in appeal be set aside on the ground that the plaintiff is not entitled to possession through co-heirs.
- (111) 111 Pat 60 (37)
- 4 (111) 111 Pat 60 (37) (Lah)
- See also (1134) 1134 Oudh 50 (50) 9 Luck 363. Objection that suit is barred under S 47 C P C.]
- 5 (1153) 1153 Cal 116 (6) 1153 Ind App 221 (P C)
- (187) 187 South W R 359 (383)
- [See also (1805) 26 Mid 363 (364) Want of notice is required by S 33 of the Rent Recovery Act (Madras Act VIII of 1865) should be pleaded. If it is not, it cannot be allowed to be raised in appeal.]
- 6 (18) 18 Cal 111 (111) 18 Cal 111 (111)
- (1810) 18 South W R 131 (116)
- (1112) 1112 Ind Cas 16 (47) (Cal) Case turning on S 11 of Suits Valuation Act
- (1834) 1834 All 165 (165) Case turning on S 12 of the Court fees Act
- (1875) 1875 South W R 225 (226)
- (1116) 1116 Cal 116 (116) 1116 Cal 116 (116) Objection as to stamp
- (1857) 1857 Bom 320 (324) Reception of inadmissible document in evidence
- (1801) 1801 Cal 111 (111) (Do)
- (1881) 1881 Cal 666 (670) (Do)
- (1861) 1861 South W R 112 (112) (Do)
- (1865) 1865 South W R 237 (238) (Do)
- (1870) 1870 South W R 80 (80) (Do)
- (1875) 1875 South W R 170 (170) (Do)
- (1910) 1910 G Ind Cas 1006 (1007) (Lah) (Do)
- (1909) 1909 Ind Cas 1086 (1086) (U L) (Do)
- (1909) 1909 Ind Cas 522 (522) (Lah) (Do)
- 7 (1893) 1893 Bom 197 (200) (21)
- (1891) 1891 Bom 697 (701)
- [See also (1889) 1889 Bom 145 (51)]
- Objection as to suit being filed under S 42 Specific Relief Act not taken in trial Court—Appellate Court in it dismisses suit on such objection.]
- 8 See generally Note as to Section 100 (1864 66) 2 Bom II C R 40 (45)
- (1134) 1134 Oudh 50 (50) 9 Luck 363
- (1864) 1864 South W R 253 (260)
- (1880) 1880 Cal 480 (492)
- (1024) 1924 Cal 233 (233) 1924 Cal 915 (1024) though abandoned in trial Court can be raised in appellate Court [See also (1886) 1886 Cal 112 (114)]
- (1886) 1886 Mid 137 (133)
- (1913) 1913 Ind Cas 130 (131) (Lah) Objection as to place of suing cannot be allowed unless there is consequent failure of justice
- 9 See generally Note as to Section 100 [See also (1863) 1863 South W R 40 (41)]
- Apparent defect in plaint—Objection can be raised at any stage.
- 10 (1836) 1836 All 109 (112)
- 11 (1834) 1834 Bom 110 (114)
- (1889) 1889 Mid 303 (304)
- 12 (1883) 1883 Cal 111 (111) 1883 Ind App 156 (P C)

(3) Questions of law¹³ such as a question of limitation¹⁴ or of *res judicata*¹⁵ which can be substantiated on the facts already on the record

13 When appellate Court may not interfere with findings of fact

In *Bombay Cotton Manufacturing Co v Moti Lal*,¹ their Lordships of the Privy Council observed as follows —

On appeal the whole case including the facts are within the jurisdiction of the appeal Court. But generally speaking it is undesirable to interfere with the findings of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Court of appeal.

In *Prasanna Moyce v Baikunthnath*,² the Calcutta High Court observed as follows —

Two conflicting view points have to be reconciled namely on the one hand the undoubted duty of the Court of appeal to review the recorded evidence and to draw its own inferences and conclusions and on the other hand the unquestionable weight which must be attached to the opinion of the Judge of the primary Court who had the advantage of seeing the witnesses and noticing their look and manner.

See also the following cases³ (See also Ss 100 and 103)

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| 13 | (1863) 1863 Marsh 276 | |
| | Note 13 | |
| | (1878 80) 2 All 504 (505) Invalidity of document on the ground of registration | |
| | (1925) 88 Ind Cas 392 (392) (Mad) | |
| | (1917) 1917 Oudh 148 (144) | |
| | (1923) 1923 Pat 423 (429) 2 Pat 469 | |
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| 14 | (1887) 14 Cal 592 (594) | |
| | (1865) 2 Suth W R 40 (45) | |
| | (1914) 1914 Lah 210 (210 211) | |
| | (1912) 14 Ind Cas 1008 (1008) (Lah) | |
| | (1866) 3 Mad H C R 258 (259) | |
| | (1889) 9 Cal 635 (637) | |
| | (1889) 6 Cal L Rep 267 (269) | |
| | (1907) 17 Mad L Jour 281 (282) Plea of exemption under S 14 of the Limitation Act cannot be allowed to be raised in appeal | |
| | [See also (1933) 1933 Pat 224 (224) 12 Pat 261 Plea of special limitation neither taken nor urged in Lower Court— High Court will consider it only so far as it is question of Law and not a question of fact] | |
| 15 | (1899) 21 All 446 (448) | |
| | (1933) 1933 Oudh 101 (106) | |
| | (1865) 3 Suth W R Act 146 (147) | |
| | (1863) 1863 Marsh 276 | |
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| | (1925) 1925 Oudh 435 (437) | |
| | (1866) 8 All 548 (550) Objection as to the validity of an award on the ground that it was made beyond time can be raised in appeal for the first time | |
| | (1887) 14 Cal 592 (594) | |
| | (1865) 2 Suth W R 40 (45) | |
| | (1914) 1914 Lah 210 (210 211) | |
| | (1912) 14 Ind Cas 1008 (1008) (Lah) | |
| | (1866) 3 Mad H C R 258 (259) | |
| | (1889) 9 Cal 635 (637) | |
| | (1889) 6 Cal L Rep 267 (269) | |
| | (1907) 17 Mad L Jour 281 (282) Plea of exemption under S 14 of the Limitation Act cannot be allowed to be raised in appeal | |
| | [See also (1933) 1933 Pat 224 (224) 12 Pat 261 Plea of special limitation neither taken nor urged in Lower Court— High Court will consider it only so far as it is question of Law and not a question of fact] | |
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14 Competency of appeal

Where leave to appeal has to be obtained before preferring an appeal, the memorandum of appeal should be accompanied by a petition for such leave¹ An objection as to the maintainability of the appeal should be considered by the Court, though it was not raised in the first instance by the respondent's pleader² See also the following cases³ Where a party has accepted the order of the lower Court as correct and has enjoyed the benefit thereof he will be estopped from appealing against the same⁴ (See also Notes under S 96)

15 Consolidation of appeals

A Court has inherent power to consolidate suits or appeals in proper cases. But this cannot be done so as to affect the provisions of the Court-Fees Act or of this Code. Thus several appeals in cases disposed of by one judgment cannot be consolidated so as to enable the appellant to pay Court-fee on the value of the consolidated appeals and file only one *vakalat*² Where one decree only was passed in two appeals preferred by two sets of defendants against the decree of the trial Court it was held that one second appeal was enough³

16 Stamp on memorandum of appeal

It has been seen in Note 2 to S 149 *ante* that the institution of a suit or other proceeding will not be a *legal* institution if the fee chargeable under law is not paid *at the time* of the institution but that Court may under the provisions of S 149, allow the payment of the stamp fee at any stage and thus validate the institution. A memorandum of appeal which does not bear the proper stamp-fee prescribed therefor is not validly presented,¹ unless the Court allows under S 149 the fee to be paid subsequently.^{1a}

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(157) 1903 Suth W R 263 (364) It is an error of law to disbelieve witnesses believed by the original Court in the absence of sufficient grounds for doing so

(197a) 1925 Pat 68 (94) Where the opinion of the trial Court depends not on the honesty of the witnesses but upon reasons which the appellate Court must accept it is obviously the duty of the appellate Court to set aside the trial Court's finding of fact

(192) 1911 Cal 11931 (234) 1 Luck 71 1 All C judgment written by Judge who did not hear witnesses—Appellate Court is as good as good for nothing as trial Court

(1925) 1925 Pang 308 (304) 3 Rang 177 Failure of trial Judge to discuss evidence—Appellate Court can reverse finding

(1925) 1925 Bind 10 (16) Commission on behalf

pellate
th the
upon

clear grounds

(1872) 18 Suth W R 452 (453) (Do)
(1973) 1923 Mid 103 (104) Demeanour of witnesses is not invariably a safe guide to the truth of their evidence

Note 14

- 1 (1916) 1916 All 349 (350)
- 2 (1891) 18 Cal 469 (472)
- 3 (1930) 1930 Cal 748 (749) Non joinder of non contesting parties—Appellate held maintainable
- (1917) 1917 Lah 28 (28) 1916 Pun Re No 99
- 4 (1917) 1917 Cal 546 (547)

Note 15,

- 1 (1930) 1930 Mad 376 (381) 53 Mad 248 (F B)
- (1929) 1929 Nag 279 (281) 25 Nag L R 183
- 2 (1930) 1930 Mad 376 (381) 53 Mad 248
- 3 (1930) 1932 Mad 689 (691)

Note 16

- 1 (1913) 19 Ind Cas 971 (972) (C11)
- (1932) 1932 Cal 482 (485) 59 Cal 303 The memorandum of appeal should in such a case be at once returned to the party
- (1890) 12 All 129 (142) (F B)

1a See Notes to S 149

[See also (1906) 23 All 270 (272) (F B)]

[See also (1933) 1933 All 572 (573) 574] Memo of appeal presented on last day of limitation on insufficient stamp—On report by office deficiency made up—Single Judge allowing to receive deficiency—Bench admitting

18 Applicability of the Order to other proceedings

It has been held by a Full Bench of the High Court of Madras¹ that the provisions of this Order apply also to *Original Side* appeals. In the undermentioned cases it was held that appeals under S. 476 B of the Code of Criminal Procedure should also be treated as civil appeals regulated by the provisions of this Order.

The provisions of this Order apply to proceedings under the N.W.F.P. Law and Justice Regulation VII of 1901 S. 89 and the Punjab Pre-emption Act I of 1913 S. 29. See also the Agra Tenancy Act III of 1926 Sch. 2.

R. 2. [S. 542] The appellant shall not, *except by leave of the Court*, urge or be heard in support of any ground of objection *not set forth in the memorandum of appeal* but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this Rule.

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

[1877—S. 542, 1859—S. 334 Cf. S. 100, O. 6, R. 7 and O. S, R. 5 and 9]

Synopsis

	Note No.		Note No.
New case in appeal See Note 12 to R. 1	1	Point of limitation	5
Change of case in appeal See Note 12 to R. 1	2	Point of jurisdiction	6
Point not set forth in the memorandum of appeal	3	Appellate Court shall not be confined by leave of the Court	7
Leave of Court to raise new point	4	Party affected must have had an opportunity of contesting the case	8

Other Topics

Admission or waiver—Waiving objection in the Court—Effect See Note 12 to R. 1	Objection as to order of parties and causes of action See Note 12 Pt. (c) in R. 1
Appellate Court—Whether can set up a new case See Note 7 Pt. (f) Inconsistent pleas See Note 12 Pt. (3) in R. 1	Pleas not allowed in appeal See Note 12 Pts. (1) to (4) in R. 1
Objection as to validity of a document See Note 12 Pt. (6) in R. 1	Plea of law See Note 4 Pt. (c) and also Note 12 Pt. (3) in R. 1
	Limit of limitation See Note 5 Pt. (4) and also Note 12 Pt. (14) in R. 1

1 New case in appeal—See Note 12 to R. 1

2 Change of case in appeal—See Note 12 to R. 1

3 Point not set forth in the memorandum of appeal

The penalty for not raising an objection in the memorandum of appeal is that the appellant will not be entitled as of right to urge such an objection

High Court can order refund of Court fees paid in excess—It is for revenue authorities to decide whether to pay

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Under S 5 of the Court-Fees Act, 1870 the decision of the Taxing Officer as to the Court fee required is final. Where however, no such decision has been given by the Taxing Officer, the respondent can raise the question at the time of the hearing of the appeal.²

In order to see which part of the decree is the subject of appeal before the appellate Court must look at the memorandum of appeal and not at the stamp fee affixed thereon.³ Nor, where a memorandum of appeal is insufficiently stamped can the Court grant a relief proportionate to the stamp affixed.⁴ As to the amount of fee leviable in appeals, see the Court-Fees Act 1870 and the undermentioned cases.⁵

17 Refund where memorandum is over stamped

The Court has inherent jurisdiction in a fit case to order the refund of excess Court fee paid on the memorandum of appeal.¹ But the Court can only grant a certificate to the appellant authorising him to receive back such excess. The appellant should thereafter apply to the Collector for refund of the Court fee.² See also S 13 of the Court Fees Act.

- (1830) 133 Ind 731 (237) Appeal filed with no Court fee stamp cannot be deemed to be nullity.
 (1898) 21 All 26 (120) [But see (1893) 15 All 117 (118)]
 (1898) 11 All 39 (38)
 (1898) 10 South W R 242 (1242) But where the plaintiff has valued his appeal at a particular amount he cannot be awarded a larger amount.
 [See (1903) 30 Cal 501 (507)]
 (1893) 12 South W R 449 (449) Stamp value may be made up by several stamps.
 (1902) 6 Cal W N 687
 (1903) 16 Mad 310 (311) Decree directing

(1890) 17 All 275 (240) Appeal from 1st order under S 214 of Act VI of 1882 (Indian Companies Act) is properly stamped with a Court fee of Rs 2.
 (1890)

- (1895) 7 All 761 (763) Suit for profits—Ap-
 peal—Court fee to be calculated on
 aggregate amount of profits claimed
 and not separately on the profits
 claimed for each year.
 (1890) S 111 22 (24) Rejection of claim by
 District Settlement Officer Appeal to
 District Court under S 10 (7) of
 Madras Forest Act of 1882—Art 17
 (c) and not Art 11 (i) of Sch 2 ap-
 plicable.
 (1882) 4 Cal 207 (108 209) Suit for partition
 separation and share in a
 portion of that share after separation—
 Art 17 (c) Sch 2 Court fee Act ap-
 plicable.
 (1895) 21 Mad 371 (377) Merely that
 subsequent to institution of suit
 left to be determined in execution—
 No Court fee on such matter.
 (1893) 16 Mad 410 (415) Suit for partition
 and for arrears of rent—Art 17 (c) ap-
 plicable.

sion and mesne profits is to be taken
 as one entire claim and not two distinct
 subjects.

Reference under the Court fees Act 1870—

- (1894) 16 All 401 (406) (100)
 (1899) 21 All 301 (305) Appeal from the
 order of a District Judge as to the
 disposal of compensation in a land
 acquisition case must be stamped as
 an appeal from an original decree.

Reference under Court fees Act S 5—

- (1899) 22 Mad 162 (163) Appeal to Governor
 in Council against decision of the
 Governor General's agent at Vizag-
 patnam and referred by the Govern-
 ment to the High Court for disposal,
 is not chargeable under the Court
 fees Act.

Reference under S 29 of Act II of 1870

- Note 17
 1 (1918) 1918 Pat 496 (496) 31 at L J 496
 497
 2 (1932) 1932 Mad 433 (433) 33 at L J 433

18 Applicability of the Order to other proceedings

It has been held by a Full Bench of the High Court of Madras¹ that the provisions of this Order apply also to *Original Side* appeals. In the unmentioned cases it was held that appeals under S. 476 B of the Code of Criminal Procedure should also be treated as civil appeals regulated by the provisions of this Order.

The provisions of this Order apply to proceedings under the N.W.F.P. Law and Justice Regulation VII of 1901 S. 89 and the Punjab Pre-emption Act I of 1913 S. 29 *See also* the Agra Tenancy Act III of 1926 Sch. 2.

R. 2. [S. 542] The appellant shall not, *except by leave of the Court* urge or be heard in support of any ground of objection *not set forth in the memorandum of appeal* but the Appellate Court, in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this Rule.

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

[1877—S. 542, 1879—S. 334. *Cf.* S. 100, O. 6, R. 7 and O. S. R. 8 and 9.]

Synopsis

	Note No.		Note No.
New case in appeal <i>See</i> Note 12 to R. 1	1	Point of limitation	5
Change of case in appeal <i>See</i> Note 12 to R. 1	2	Point of jurisdiction	6
Point not set forth in the memorandum of appeal	3	Appellate Court shall not be confined by leave of the Court	7
Leave of Court to raise new point	4	Party affected must have had an opportunity of contesting the case	8

Other Topics

Waiver or waiver—Waiving objection in lower Court—Effect <i>See</i> Note 12 to R. 1	Objection as to jurisdiction and causes of action <i>See</i> Note 12 Pt. (5) in R. 1
Appellate Court—Whether can set aside new case <i>See</i> Note 7 Pt. (c) The sister pleas <i>See</i> Note 12 Pt. (3) in R. 1	Pleas not allowed in appeal <i>See</i> Note 12 Pts. (1) to () in R. 1
Objection as to validity of a document <i>See</i> Note 12 Pt. (6) in R. 1	Leave of law <i>See</i> Note 4 Pt. () and also Note 12 Pt. (13) in R. 1
	Leave of limitation <i>See</i> Note 5 Pt. (4) and also Note 12 Pt. (14) in R. 1

- 1 New case in appeal — *See* Note 12 to R. 1
- 2 Change of case in appeal — *See* Note 12 to R. 1
- 3 Point not set forth in the memorandum of appeal

The penalty for not raising an objection in the memorandum of appeal is that the appellant will not be entitled as of right to urge such an objection

¹ High Court can order refusal of Court fees, paid in excess — It is for revenue authorities to decide whether to pay

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Under S 5 of the Court-Fees Act, 1870, the decision of the Taxing Officer as to the Court-fee required is final. Where however, no such decision has been given by the Taxing officer, the respondent can raise the question at the time of the hearing of the appeal.²

In order to see which part of the decree is the subject of appeal before the appellate Court must look at the memorandum of appeal and not at the stamp fee affixed thereon.³ Nor, where a memorandum of appeal is insufficiently stamped can the Court grant a relief proportionate to the stamp affixed.⁴ As to the amount of fee leviable in appeals, see the Court-Fees Act 1870 and the undermentioned cases.⁵

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The Court has inherent jurisdiction in a fit case to order the refund of excess Court-fee paid on the memorandum of appeal.¹ But the Court can only grant a certificate to the appellant authorising him to receive back such excess. The appellant should thereafter apply to the Collector for refund of the Court fee.² See also S 13 of the Court-Fees Act

- Appeal under O 41 R 11—Preliminary objection that no valid appeal filed—Order of single Judge held could not be questioned at such late stage
- (1930) 103 Oudh 31 (232) Appeal filed with no Court fee stamp cannot be deemed to be nullity
- 2 (1898) 91 Cal 269 (270) [But see (1893) 15 All 117 (118)]
- 3 (1888) 11 All 3 (38)
- 4 (1868) 10 South W R 242 (1) (242) But where the appellant has valued his appeal at a substantial amount he cannot be awarded a larger amount [See (1903) 30 Cal 501 (502)]
- 5 (1862) 12 South W R 443 (443) Stamp value may be made up by several stamps
- (1902) 6 Cal W N 687

(1895) 17 All 208 (210) Appeal filed under S 214 of Act VI of 1880 (Judicial Commissions Act) is properly stamped with a Court fee of Rs 1

(1885)

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- (1885) 7 All 761 (763) Suit for profits—Ap-
peal — Court fee to be calculated on aggregate amount of profits claimed and not separately on the profit claimed for each year
- (1885) 8 All 22 (24) Rejection of claim of Forest Settlement Officer Appeal District Court under S 10 (1) Madras Forest Act of 1882—Art 1 (c) and not Art 11 (i) of Sch 3 applied
- (1882) 4 Cal 757 (758 759) Suit for partition and division and dissolution of that share after separation Art 17 (6) Sch 2 Court fees Act applies
- (1898) 21 Mad 371 (373) Merit of suit equivalent to institution of suit left to be determined in execution No Court fee on such merits
- (1893) 16 Mad 415 (418) Suit for partition and for arrears of rent—Art

not subjects
Reference under the Court fees Act 1870 —

(1894) 16 All 401 (406) (Do)

(1899) 21 All 354 (355) Appeal from the order of a District Judge as to the liability of compensation in a land acquisition case must be stamped as an appeal from an original decree

Reference under Court fees Act S 5 —

is not chargeable under the Court fees Act

Reference under S 28 of Act II of 1870

Note 17

- 1 (1918) 1918 Lat 496 (100) 3 Pat L 452
- (1932) 1932 Mad 438 (439) 55 Mad 641
- (1933) 1933 Oudh 170 (170) 7 Luck 50
- [See also (1870) 14 South W R 47]
- 2 [See (1920) 1920 All 54 (50)]
- (1932) 1932 Mad 438 (439) 55 Mad

Under S 5 of the Court-Fees Act, 1870, the decision of the Taxing Officer as to the Court fee required is final. Where however, no such decision has been given by the Taxing officer, the respondent can raise the question at the time of the hearing of the appeal.²

In order to see which part of the decree is the subject of appeal before at the appellate Court must look at the memorandum of appeal and not at the stamp fee affixed thereon.³ Nor where a memorandum of appeal is insufficiently stamped can the Court grant a relief proportionate to the stamp affixed.⁴ As to the amount of fee leviable in appeals see the Court-Fees Act 1870 and the undermentioned cases.⁵

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| <p>Appeal under O 41 R 11—Payer</p> <p>at such late stage</p> <p>(1933) 103 Oudh 331 (332) Appeal filed with no Court fee stamp cannot be deemed to be nullity</p> <p>2 (1898) 21 M.L.J. 263 (270) [But see (1893) 15 All 117 (118)]</p> <p>3 (1888) 11 All 33 (35)</p> <p>4 (1864) 10 South W.R. 242 (1) (142) But where the appellant is valued his appeal at a particular amount he cannot be awarded a larger amount [See (1903) 30 Cal 501 (502)]</p> <p>5 (1869) 12 South W.R. 449 (449) Stamp value may be made up by several stamps</p> <p>is one entire claim and not two distinct subjects</p> <p><i>Reference under the Court fees Act 1870 —</i></p> <p>(1894) 16 All 401 (406) (Do)</p> <p>(1899) 21 All 333 (333) Appeal from the order of a District Judge as to the disposal of compensation in a land acquisition case must be stamped as an appeal from an original decree</p> <p><i>Reference under Court fees Act S 5 —</i></p> <p>(1899) 21 Mad 162 (163) Appeal to Governor in Council against decision of the Governor General's agent at Vizagapatnam and referred by the Government to the High Court for disposal, is not chargeable under the Court fees Act</p> <p><i>Reference under S 28 of Act II of 1870 —</i></p> | <p>(1890) 17 All 225 (240) Appeal from order under S 214 of Act VI of 1853 (Indian Companies Act) properly stamped with a Court fee of Rs. 1</p> <p>(1880) 7 All 263 (367) Decision of a Judge under S 367 B of the Civil Procedure Code of 1882 — Appeal from decision — <i>Madras Court</i> [unintelligible]</p> <p>(1885) 7 All 761 (763) Suit for partition — Appeal — Court fee to be calculated on aggregate amount of rights claimed and not separately on the rights claimed for each year</p> <p>(1880) 8 Mad 22 (24) Rejection of claim by Forest Settlement Officer Appeal to District Court under S 10 (b) of Madras Forest Act of 1852 — Art 17 (6) and not Art 11 (i) of Sch 2 applied</p> <p>(1882) 4 Cal 757 (758, 759) Suit for partition separation and this is a continuation of that share after separation — Art 17 (6) Sch 2 Court fee Act applies</p> <p>(1893) 21 Mad 771 (377) Merely subsequent to institution of suit</p> <p>(1893) 16 Mad 326 (327, 378) Suit to redeem portion of mortgage — Court fee should be calculated on the proportionate part of the mortgage amount</p> <p>Note 17</p> <p>1 (1918) 1918 Pat 436 (406) 31st L.J. 452</p> <p>(1932) 1932 Mad 433 (439) 55 Mad 641</p> <p>(1933) 1933 Oudh 170 (170) 7 Luck 333 [See also (1870) 14 South W.R. 47]</p> <p>2 [See (1920) 1920 All 54 (55)]</p> <p>(1932) 1932 Mad 438 (439) 55 Mad 641</p> |
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18 Applicability of the Order to other proceedings

It has been held by a Full Bench of the High Court of Madras¹ that the provisions of this Order apply also to *Original Side* appeals. In the undermentioned cases it was held that appeals under S. 476 B of the Code of Criminal Procedure should also be treated as civil appeals regulated by the provisions of this Order.

The provisions of this Order apply to proceedings under the N.W.F.P. Law and Justice Regulation VII of 1901 S. 89 and the Punjab Pre-emption Act I of 1913 S. 29. See also the Agra Tenancy Act III of 1926 Sch. 2.

R. 2. [S. 142] The appellant shall not *except by leave of the*

Court urge or be heard in support of any ground of objection *not set forth in the memorandum of appeal* but the Appellate Court, in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this Rule.

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

[1877—S. 342. 1879—S. 334. Cf. S. 100, O. 6, R. 7 and O. S. R. 5 and 9.]

Synopsis

	Note No.	Note No.
New case in appeal	See Note 12 to R. 1	1
Change of case in appeal	See Note 12 to R. 1	2
Point not set forth in the memorandum of appeal	3	4
Leave of Court to raise new point	4	5
		6
		7
		8

Other Topics

Objection to notice or waiver—Waiving objection in lower Court—Effect. See Note 12 to R. 1	Objection is to the order of parties and cause of action. See Note 12 Pt. (c) in R. 1
Appellate Court—Whether can set aside a new case. See Note 12 Pt. (c) in R. 1	Plea not allowed in appeal. See Note 12 Pt. (d) to (e) in R. 1
Objection to the admission of a document. See Note 12 Pt. (f) in R. 1	Plea of law. See Note 12 Pt. (g) and (h) in R. 1
	Plea of limitation. See Note 12 Pt. (i) and (j) in R. 1

1 New case in appeal—See Note 12 to R. 1

2 Change of case in appeal—See Note 12 to R. 1

3 Point not set forth in the memorandum of appeal

The penalty for not raising an objection in the memorandum of appeal is that the appellant will not be entitled as of right to urge such an objection

High Court can order return of Court fees paid in excess—It is for revenue authorities to decide whether to pay

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2 at the hearing of the appeal¹ though he can do so with the *permission* of the Court²

4 Leave of Court to raise new point

The Court has under this Rule, a direction to permit a new point, not raised in the memorandum of appeal, to be raised and argued at the hearing¹. The leave may however, be express or implied^{1a}. But, unless such permission is taken the Court will not allow such a point to be argued at the hearing^{1b}. The mere fact that the respondent has had notice of the fact that the appellant intends to raise such point at the hearing cannot dispense with the Court's permission under this Rule².

The Court will refuse to permit a new point to be argued where at the time of taking it, the period of limitation for the appeal had expired and where the allowing of such a point to be argued would practically amount to the appellant to set up a new appeal³. But where the point sought to be raised is *involved* in the points already raised in the memorandum of appeal⁴ or is a question of law depending on no new facts except those already on the record⁵ or is a point to which the other side cannot legitimately raise an

Order 41, Rule 2- Note 3

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|------------------------------------|-----------------------------------|----------------|
| 1 (1924) 1924 All 140 (149) | (1880 81) 5 Bom 621 (627) | |
| (1926) 1926 Lah 11 (12) | (1914) 1914 Lah 403 (403) | 1914 Pun Re |
| (1923) 1923 Mad 11 (11) | | |
| (1929) 1929 Mad 573 (574) | | |
| (1926) 1926 Nag 147 (148) | | |
| (1912) 15 Ind Cas 270 (272) (Oudh) | | |
| (1911) 19 Ind Cas 50 (56) (All) | (1914) 1914 Lah 39 (41) | 1913 Pun Re No |
| (1915) 30 Ind Cas 374 (375) (Oudh) | 34 | |
| (1920) 1920 Cal 106 (107) | (1912) 17 Ind Cas 232 (233) (Lah) | |
| (1920) 1920 Sind 11 (11) | (1912) 17 Ind Cas 247 (249) (Lah) | |
| | (1922) 64 Ind Cas 182 (183) (Cal) | |
| | (1918) 1918 Oudh 113 (114) | |
| | (1922) 1922 Oudh 236 (240) | 25 Oudh Cas |

- (1909) 3 Ind Cas 510 (511) (All)
 (1910) 6 Ind Cas 651 (651) (Lah)
 (1916) 1916 P O 245 (246) (P O)
 (1918) 1918 P O 154 (156) 1919 Pun Re
 No 82 (P O)
 (1924) 1924 All 918 (919)
 (1927) 1927 All 231 (232) 49 All 50
 2 (1925) 1925 Pat 57 (59) 3 Pat 818
 3 (1921) 1921 Lah 228 (229)
 (1916) 1916 Lah 452 (453) 1916 Pun Re
 No 7
 [See also (1932) 1932 Lah 414 (416)
 13 Lah 8 0]

42) 55
 Mad 856 Point as to jurisdiction of
 executing Court not raised in lower
 Court—Nor in grounds of appeal
 from order—such plea cannot for
 first time be raised in appeal]

- 2 (1913) 1915 Lah 449 (450)
 (1921) 1921 All 337 (339) 43 All 193
 (1900 1902) 1 L B R 184 (185)
 (1895) 8 C P L R 81 (82)

Note 4

- 1 [See also (1923) 1923 Lah 115 (116) 3 Lah
 382]

[See also (1933) 1933 Lah 738 (739)]

- 1a (1931) 1931 Rang 314 (315)

- 1b. (1902) 29 Cal 355 (357) Especially a tech
 nical point

- (1932) 1932 All 174 (176)
 (1933) 1933 Lah 447 (447)
 (1869) 12 Suth W R 33 (34)
 (1919) 1919 Cal 353 (359)

[See also (1891) 1891 All W N 100
 (100) Plea of invalidity of demand

of arguments]

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objection on the ground of surprise⁶ the Court may grant the appellant leave to raise it. The Court should, however, grant the permission only on such terms as would indemnify the opposite party for the loss caused to him by re-argument on the failure of the appellant to raise the point in time.⁷

5 Point of limitation

Under S. 3 of the Limitation Act a Court is bound to reject a suit or appeal if it is barred by limitation even though the bar of limitation may not have been raised in the pleadings.¹ But this section does not apply where the plea is not that the *appeal before that Court* is barred by limitation but that the suit or appeal in the *lower Court* was barred by limitation.² Hence, unless a plea that the suit or appeal in the lower Court was barred by limitation is taken in the memorandum of appeal preferred to the higher Court under R. 2, it cannot be urged at the hearing of the appeal without the leave of the appellate Court.³ As a general rule, the appellate Court will permit a point of limitation though not raised in the memorandum of appeal, to be raised at the hearing of the appeal, where it is *apparent on the face of the proceedings and does not involve any new question of fact*.⁴ But it will not do so where such a plea involves an investigation of further facts.⁵

6 Point of jurisdiction

A point of jurisdiction not involving an investigation into other facts than those on the record will be allowed to be raised at the hearing of an appeal, though it was not raised in the memorandum of appeal. Thus a plea as to the jurisdiction of the Court to make a reference to arbitration¹ or a plea as to the competency of the Court to grant the relief claimed² or a plea of *res judicata*³ or a plea that the plaint does not disclose a cause of action against the defendant⁴ can be permitted to be argued at the hearing of the appeal.

7 Appellate Court shall not be confined by leave of the Court

An appellant is confined to the grounds set forth in the memorandum of appeal or taken at the hearing with the permission of the Court. He

6 (1910) 8 Ind Cas 900 (991) (L B)

can be decided without any further

(1830) 13 All 580 (581)

(1931) 1931 Lah 390 (391) Basic question on the face of the pleadings clear

7 (1911) 11 Ind Cas 497 (499) 39 Cal 629 G L B R 18 (P C)

Note 5

1 (1902) 23 Cal 167 (185) 29 Ind App 51 1903 Pun Re No 25 (P C)

2 (1884) 8 Bom 335 (537)

3 (1903 1904) 2 L L R 237 (239)

(1902) 25 Mad 367 (378) 29 Ind App 76 (P C)

trial Court can be raised by defence

(1920) 1920 Cal 846 (848)

(1916) 1916 Mad 535 (535)

(1913) 18 Ind Cas 445 (447) (Lah)

(1911) 13 Ind Cas 792 (794) 1911 Pun Re No 81

(1920) 1929 Lah 432 (433)

(1924) 1924 Lah 468 (469)

(1921) 1921 Cal 661 (672)

Note 6

1 (1918) 1918 Cal 396 (397)

2 (1920) 1920 Cal 239 (239 240) 47 Cal 733

(1933) 1933 All 302 (393)

3 (1931) 11 All W N 10 (11)

See also Footnote (5) Note 4, above

4 (1839) 21 All 341 (345) (F L)

1911 Pun Re No 81 But appellate Court has option of refusing to listen to plea of limitation even though it

cannot advance at the hearing a point not so raised or taken. But the appellate Court is not confined in deciding the appeal to the points so raised or taken. It is entitled to base its decision on grounds neither set forth in the memorandum of appeal nor taken with the leave of the Court.¹ Thus it can *suo motu* raise a point of limitation² or of jurisdiction³ apparent on the face of the record and decide the appeal on that point. Where alternative grounds of appeal are raised it can go into questions which are admitted for the purpose of an alternative argument and give a finding against the appellant.⁴ But a party cannot claim as of right that the Court *must* exercise power given under this Rule.⁵

The power given to the appellate Court under this Rule does not extend to the making out a new case for either party and to grant them relief on that basis⁶ or to go behind a finding of fact which is accepted by the appellant⁷ or to interfere with a part of the decree which is not appealed from.⁸ Thus in an appeal by the defendants where there is no cross objection by the plaintiff the appellate Court cannot while dismissing the appeal, enlarge the relief granted to the plaintiff by the lower Court.⁹ The Court will not also be justified in taking up a new question under this Rule unless there can be no reasonable doubt on the record that the evidence on the new point had been completely given on both sides or the point is a pure question of law and it is expedient in the interest of justice to consider and decide it.¹⁰ An appellant can give up any of the grounds of appeal at the hearing¹¹ and the appellate Court is bound to give a decision only on those pleas which are urged and argued.¹²

8 Party affected must have had an opportunity of contesting the case

Although in appellate Court can under R. 2 decide the appeal on a point not raised in the memorandum of appeal or raised at the hearing of the

(1815-50) 7 All 884 (884)

[But see (1899) 11 Suth W R 350

(351) Such a plea does not raise a question of jurisdiction]

Note 7

1 (1815) 17 All 260 (281)

[See (1919) 1918 Oudh 269 (270)]

2 (1868) 10 Suth W R 71 (71-72)

3 (1811) 13 All 575 (576)

(1877-78) 3 Cal 612 (615-616) Illegality of decree

[But see (1875) 23 Suth W R 404

(404) Objection to jurisdiction not raised in first Court—Suit tried on merits—Appellate Court cannot of its own motion raise issues as to jurisdiction but appeal must be heard on merits]

4 (1921) 1921 Lah 201 (202)

5 (1891) 13 All 381 (382-383)

6 (1893) 17 Bom 772 (773-774)

(1811) 1891 Bom P J 31 (32)

(192) 1377 Cal 96 (87)

(1918) 1918 Cal 686 (684)

(190) 9 Cal W N 400 (103)

(1812) 17 Suth W R 407 (408)

(1872) 17 Suth W R 361 (362)

(1865) 2 Suth W R 2 (3)

(1867) 7 Suth W R 61 (62)

(1875) 24 Suth W R 268 (268)

(1918) 18 Ind Cas 795 (795) (Lah)

(1927) 1327 Lah 96 (96)

(1905) 1905 Pun Re No 89 page 273

(1925) 1925 Mid 357 (357)

(1894) 4 Mid L Jour 14 (16) 17 Mid 69

(1913) 13 Ind Cas 411 (416) 1913 Pun Re No 20

(1927) 1927 Lah 231 (233)

(1909) 33 Bom 35 (38)

7 (1921) 1921 Lah 182 (183)

(1871) 16 Suth W R 300 (301)

8 (1911) 3 Ind Cas 121 (122) (Cal)

9 (1870) 2 N W P H C R 14 (15)

10 (1920) 1920 Mid 88 (91)

(1918) 1918 Lah 88 (85) 1918 Pun Re No 31 Point of law can be raised in appellate Court *suo motu*

11 (1915) 1915 Oudh 193 (194) 50 Ind Cas 207 (208)

12 (1921) 1921 Lah 229 (231)

[See however (1869) 6 Bom H C R (1869) 9 (11-12)]

the widow had in effect *re married*

appeal with the permission of the Court, it cannot do so unless it gives an opportunity to the party affected thereby, to contest the case on that point¹.

R. 3. [S. 543.] (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment.

[1877—S. 543; 1859—S. 336. Cf. O. 7, Rr 10 to 13.]

Local Amendments

ALLAHABAD

Substitute the following for rule (1)

3 (1) Where the memorandum of appeal is not drawn up in the manner herein before prescribed or accompanied by the copies mentioned in R 1 (1) it may be rejected or where the memorandum of appeal is not drawn up in the manner prescribed, it may be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

OLDH

In sub rule (1) substitute the following —

3 (1) Where the memorandum of appeal is not drawn up in the manner herein
before prescribed or accompanied by the copies mentioned in R 1 sub rule (1) it
may be rejected or where the memorandum of appeal is not drawn up in the
manner prescribed it may be returned to the appellant for the purpose of being
renewed within a time to be fixed by the Court or be amended then and there

Synopsis

	Note No		Note No
May be rejected	1	Scandalous matters	4
Or be returned to the appellant for the		Reasons for rejection	5
purpose of being amended	2	Appeal	6
Defect of parties	3	Second appeal	7

Other Topics

Appellate Court 11 1984 98 (11) Comit See Article 1 Pt (2) and S 107

1 May be rejected

The power to reject a memorandum of appeal under this rule is limited to cases where it is defective in point of form or in respect of the grounds which it must contain. It cannot be interpreted as enabling the Court to reject a memorandum of appeal on the ground that it is insufficiently

Appellate Court is not justified in holding that a point has been abandoned merely because the valuer has not argued it.]

1 (1914)

Note 8

3. stamped¹ or on the ground that it is barred by limitation^{1a} But independently of the provisions of this rule, the Court can, under O 7, R 11 read with S 107, reject an appeal if it is not sufficiently stamped provided that an opportunity is given to the appellant to make good the deficiency and he fails to do so within the time fixed² See S (2), Cl (2), Note 13, O 7, R 11 Notes 6 and 11 and O 7, R 13, *ante*

The rule does not impose any *duty* on the appellate Court to examine every memorandum of appeal immediately on presentation, and add proper parties if the appellant neglects to do so³

The Court can exercise its power of rejecting a memorandum of appeal under this rule *at any stage*⁴ though, as a general rule, the proper time to do so would be the time of its presentation and not after it has been admitted⁵

2 Or be returned to the appellant for the purpose of being amended¹

Where the memorandum of appeal consisted of two documents, one, in the vernacular, containing the names of parties, and signed by the appellant, and the other in English containing the grounds of appeal but not signed by the appellant, it was held that the defect, if any, could be remedied by an amendment under this rule¹ A memorandum of appeal which merely states that the proceedings of the lower Court are irregular and contrary to law is too vague and general and requires amendment before the appeal can be heard² In this rule there is no limitation as to the time or stage when the memorandum of appeal may be returned for amendment³ But whenever a memorandum of appeal is returned for amendment the Court should fix a time for its re presentation⁴ The time that the Court allows for re-presentation of a memorandum of appeal is only by way of concession and cannot be demanded as a matter of right, at any rate after the expiry of the period of limitation within which the appeal can be filed^{4a}

A memorandum of appeal from the preliminary decree can be amended so as to constitute an appeal from the final decree also⁵

3 Defect of parties

Where the respondent is wrongly named owing to a clerical error in the decree, the mistake is not a fatal one but can be rectified¹ A single appeal by different persons having different defences and reasons for appealing is irregular² As to whether an appeal filed against a dead person can be rectified by adding the legal representatives, see S 153, Note 5 and O 1, R 10 and also the case cited below³

4 Scandalous matters

Where a memorandum of appeal contains irrelevant and scandalous

Order 41 Rule 3—Note 1	
1 (1914) 1914 Bom 249 (250) 21 Ind C14 337	2 (1860) 11 Moo Ind App 1 (2) (P C)
(337) 38 Bom 41	3 (1834) 7 All 79 (90)
(1973) 1923 All 349 (1) (349)	4 (1876) 1 All 260 (261)
17 (1970) 1920 Pat 818 (820)	
2 (1864) 1864 Suth W R Gap Vols 4 (1) (4)	
3 (1913) 18 Ind C14 87 (97) 1913 Puu Re	
No 59	
4 (1885) 7 All 79 (85)	
(1869) 13 Suth W R 351 (357)	
5 (1867) 8 Suth W R 141 (143)	
(1864) 1864 Suth W R Gap 13 (1) (135)	
Note 2	
1 (1920) 1920 Lah 314 (314)	
	tion of the appeal]
	4 (1933) 1973 Mid 359 (360)
	5 (1925) 1925 Cal 167 (169)
	Note 3
	1 (1918) 1918 Cal 582 (583)
	2 (1901) 23 All 137 (142) 27 Ind App 168 (P C)
	3 (1913) 21 Ind C14 200 (207) 1 U B R 175

allegations which are separable from the rest a Court of appeal should not reject it, but should either expunge the objectionable part or return the memorandum of appeal for amendment and refuse to receive it back until such part is struck out¹ The Court will return a memorandum of appeal making allegations of partiality against the Judge from whose decree the appeal is sought to be filed, and order the objectionable matter to be expunged therefrom² See also Notes 2 and 6 to O. 6, R. 16, *ante*

5 Reasons for rejection

A Court rejecting a memorandum of appeal under this rule should record its reasons for such rejection¹

6 Appeal

An appeal will lie from an order rejecting a memorandum of appeal if it amounts to a *decree* As to the question whether it amounts to a decree, see Note 13 to S. 2, Sub S. (2), *ante*, and the case cited below¹

A rejection of a memorandum of appeal on the ground of limitation amounts really to a dismissal of the appeal under R. 11 *infra* and is, therefrom² See also Notes 2 and 6 to O. 6 R. 16 *ante*

7 Second appeal

An order returning a memorandum of appeal for presentation to the proper Court is appealable *as an order* and hence under S. 104 sub S. 2 n second appeal lies therefrom¹ In the undermentioned case the High Court in second appeal refused to convert an order rejecting a memorandum of appeal into one returning it for amendment² The High Court in second appeal can interfere with the discretion of a lower appellate Court in admitting or refusing to admit an appeal after the expiry of limitation, where the lower Court has exercised its discretion arbitrarily and not according to legal principles³ See also Note 16 to S. 100, *ante*

Local Amendment.

BOMBAY

After R. 3 the following Rule shall be inserted namely —

3A Where an applicant applies for delay to be excused in order to show cause and at once to issue it the respondent and the matter shall finally be decided before notice is issued to the Court from whose decree the appeal is preferred under R. 13

R. 4. [S. 544] Where there are more plaintiffs or more defendants than one in a suit, and the decree²

One of several plaintiffs or defendants may obtain a reversal of whole decree and it proceeds on ground common to all

appealed from proceeds on any ground common³ to all the plaintiffs⁴ or to all the defendants,⁵ any one of the plaintiffs or of the defendants may appeal from the whole decree and thereupon the Appellate Court may reverse or vary the decree

in favour of all the plaintiffs or defendants⁶ as the case may be

[1877—S. 544, 1859—S. 337]

Note 4

- 1 (1875) 22 M.L.J. 17, (1 & 161)
(1871) 15 Bom. 453 (493)
2 (1875) 22 M.L.J. 17, (1 & 161)

Note 5

- 1 (1873) 15 All. 367 (371)
(1877) J. Bom. 452 (494) 1 Ind. Jur. O.S. 121

Note 6

- 1 (1900) 3 Oudh. C.S. 233 (233)
2 (1900) 1900 Pat. 518 (520)

Note 7

4.

Synopsis

	Note No		Note No
Scope and object of the Rule	1	case where the decree appealed from	
Decree	2	proceeds on a ground common to all	8
Common ground	3	of them	
Ground common to all the plaintiffs	4	Application for execution by non ap	
Ground common to all the defendants	5	pealing parties and the limitation	
May reverse the decree in favour of all		therefor	9
the plaintiffs or defendants	6	Court fee	10
Failure to file cross objections See	7	Review	11
Notes to Rr 22 and 23 <i>infra</i>		Revision	12
Death of one of several appellants in a			

Other Topics

Abatement See Note 8	Note 3
Appeal by some—variation in favour of all See	1 & <i>parte</i> decree See Note 2
Note 6	Rules 4 and 23 distinction between See
Decree proceeding on common ground See	Note 1

1 Scope and object of the Rule

The general rule is that on an appeal by one of several plaintiffs or defendants, the appellate Court can reverse or vary the decree of the trial Court only in favour of the party appealing. This Rule and R 33 provide exceptions to the general rule,¹ and give the Court ample power to make the appropriate order needed in the interests of justice.² While R 33 of this Order provides that the appellate Court has power to make the proper decree even in cases where the appeal is as to a *part only* of the decree,³ this Rule provides that where a decree proceeds upon a ground *common* to all the plaintiffs or defendants any one of the plaintiffs or the defendants may appeal from the *whole* decree and thereupon the appellate Court can reverse or vary the decree in favour of all the plaintiffs or the defendants as the case may be.⁴ In such a case the appeal by one is virtually treated as an appeal on behalf of all, though they may not be parties to the appeal.⁴ The Rule therefore will not apply where the appeal is directed only against that portion of the decree which affects the appellant,^{4a} or where the appealing plaintiff or defendant cannot, under the circumstances of the particular case, be considered as appealing *on behalf of* the non appealing plaintiffs or defendants, *e. g.*, where one of the defendants appeals *on his own behalf* and impleads the non-appealing defendants as respondents.^{4b} A decree passed by the ap-

Order 41 Rule 4—Note 1

(1928) 1928 Mad 1144 (1146)

1 (1927) 1927 All 311 (313)

1a (1920) 1920 Cal 428 (434)

2 (1920) 1920 Cal 428 (434)

3 [See (1916) 1916 Cal 654 (660)]

(1915) 1915 Cal 24 (25) 61 Cal 911 One
defendant may appeal without im-
pleading the others as respondents

fore

him alone—Such an appeal is not
one against the entire decree at all

(1918) 1918 Mad 660 (666) (67)

(1918) 1918 Lah 335 (337)

(1889) 11 All 35 (39 40) The fact that
Court fee is paid is on an appeal
against the entire decree is im-
material

(1911) 12 Ind Cas 605 (606) (Lah) It was
held in the case that the non appeal-
ing parties were satisfied with the
decree against them

(1897) 1897 Bom P J 419 (421)

(1916) 1916 Lah 113 (114 115, 117) (1917)

pellate Court does not, as a matter of course, enure to persons who have not joined in the appeal merely because the lower Court's decree has proceeded on a common ground. The Rule will apply only where the Court consciously decides to apply it.^{4c} The policy of the Rule is, *firstly*, to give the appellate Court full power to do justice to all parties, whether before it or not, provided the whole case is gone into at the instance of the parties representing all the necessary contentions in the case,⁵ and, *secondly*, to prevent contradictory decisions in the matter in the same suit.⁶

The Rule does not become inapplicable merely because the non-appealing defendant has, in the meanwhile, obeyed the lower Court's decree,⁷ or because he has separately appealed from the same decree and has failed in his appeal.⁸ But the Rule has no application where there are *several suits*, the decree in each of which, proceeds on a ground common to the defendants in all the suits,⁹ unless such suits are consolidated.¹⁰ Nor will the Rule apply where the plaintiff who appeals has no *locus standi* to appeal.¹¹ Where, for a suit under S. 92 of the Code, the consent of the Advocate-General has been given to three persons they all constitute in the eye of the law, *one* plaintiff and therefore one of them alone cannot appeal so as to make this Rule applicable.¹²

Where a decree is passed against two defendants on a ground common to both and one of them appeals against the decree while the other files cross-objections to the decree, the appellate Court can transpose the latter defendant as an appellant and decide the appeal in his favour¹³

Where there are several respondents before the lower appellate Court any one of them may maintain the second appeal on behalf of all under this Rule but he cannot represent a person who was not a respondent in the lower appellate Court.¹⁴ Nor can a person not a party to the first appeal prefer a second appeal under this rule.^{14a}

The Rule applies also to a cross-appeal by respondents.¹⁵

2 Decree

A decree may be reversed under this Rule in favour of all the defendants even if some of them allowed the decree to be passed *ex parte* against them, provided the other conditions laid down in the Rule are satisfied¹ But where a decree is passed against some of the defendants on

Re No 71
CO₂ (606) (Lah) In this held that the other defen the lower

10 (1922) 1925 Dom 290 (291) Several *appeals*
 —Rule does not apply unless, the
appeals are consolidated
 (1922) 1925 Oudh 732 (735) (Do)
 (1890) 19 Md 249 (257) (Do)
 11 (1917) 6 Ind Cas 496 (497) (Lah)
 12 (1929) 19¹ 1 Ind 382 (383)
 (1935) 1935 Lah 251 (254) [Per Jai Lal J]
 13 (1924) 1924 All 603 (609)
 14 (1887) 1¹ Dom 971 (375)
 15 (1931) 1931 All 703 (707) Person not party
 to first appeal cannot prefer second
 appeal

This Rule will not apply to the
 co plaintiff is at least in the
 [dependent to the appeal]
 6 (1916) 1316 Pitt 400 (401) 1 P. & J. 1
 113
 (1907) 30 Mil 470 (472) (H. T.)
 7 (1908) 18 Mid L Jour 33 (41)
 8 (1915) 1115 All 367 (368)
 9 (1890) 13 Mid 213 (252)
 (1913) 1313 Lath 101 (102) 1919 Penn Re
 No 116
 (1921) 1921 All 6 (46) 43 All 320 Com.
 bination of several of these against
 ex. of defendant - Rule does not

1a (1906) 1920 C. 128 (134)
 Note 2
 1 (1916) 1916 I. 400 (401) 1 Pat. L. Jour. 143
 (18 0) 13 Suth. W. R. 114 (116)
 2 Hvy. 288
 (1907) 12 Suth. W. R. 211 (211 212)

confession of judgment the decree cannot be reversed in their favour under this Rule²

3 Common ground

It is essential for the application of this Rule that the decree appealed from should have proceeded on a ground *common* to all the plaintiffs or defendants. Otherwise the appellate Court has no jurisdiction to reverse or vary the entire decree except on the appeal of all the plaintiffs or defendants¹. Further the Rule does not apply unless the *lower Court's* decree proceeds on a common ground and not where the appellate Court wishes to proceed on a common ground and reverse or vary the lower Court's decree in favour of all the parties². It is not necessary that all the grounds upon which the lower Court proceeds should be common to all the parties. It is enough if it proceeds on *any* ground common to all the plaintiffs or defendants². It is not also necessary that all the defendants should claim an *interest* in the property affected by the decree³. The Rule will apply when the defendants put forward a common defence as against the plaintiff although they dispute each other's rights⁴.

In applying this Rule, the Court is entitled to consider the ground or finding upon which the judgment or decision is based, and not merely the operative portion of the decree⁵.

4 Ground common to all the plaintiffs

Where there are several plaintiffs and the suit is dismissed on a ground common to all of them the appellate Court may reverse the decree in favour of all the plaintiffs although only some of them have appealed¹. *A* and *B* the alleged reversioners of one *F* sued *X* for possession. The suit was dismissed as *time-barred*. *A* alone appealed and the appellate Court came to the conclusion that the suit was not time-barred. The appellate Court reversed the decree in favour of *B* also although he had not joined in the appeal, inasmuch as the lower Court's decree proceeded on

(But see (1913) 1915 *Mad* 927 (229)

2 (1913)

lower Court consenting to the decree being executed as against him on which no order was passed can be given the benefit of the appeal preferred by other judgment debtors.

Note 3

- 1 (1927) 1927 *All* 177 (178)
(1896) 25 *Bom* 699 (702)
(1893) 1893 *Bom* P J 321 (322)

1 *Hay* 183

- (1861) 1 *Suth* W R 203 (201)
(1865) 2 *Suth* W R 170 (171)
(1865) 2 *Suth* W R 227 (223, 230)
(1865) 2 *Suth* W R 237 (238)
(1866) 6 *Suth* W R 32 (33) (Act N)
(1867) 7 *Suth* W R 366 (366)
(1867) 11 *Suth* W R 239 (240)
(1872) 17 *Suth* W R 353 (353, 354)
(1872) 18 *Suth* W R 26 (24)
(1872) 18 *Suth* W R 39 (40)
(1875) 23 *Suth* W R 166 (167)

- 3 (1901) 30 *Mad* 470 (472) Disapproving 17
Mad 260 (18 L)
4 (1921) 1927 *Pat* 103 (104)
5 (1900) 4 *Ind* Cas 166 (167) (Cal)

Note 4

- 1 (1914) 1914 *Lah* 255 (255) 1914 *Pan* No
No 65
(1912) 15 *Ind* C 403 (412) (Mad)
(1921) 1927 *Nig* 406 (407)
(1924) 1924 *On* 330 (330)
(1929) 1929 *All* 393 (394)

No 8

namely, that the suit was time-barred²

Though an application for commutation of rent under the Bengal Terance Act must be made by all the landlords, an appeal by some only of the landlords in such proceedings is maintainable³

5 Ground common to all the defendants

Under this Rule, where a decree is passed against several defendants and the decree proceeds on any ground common to all the defendants, it is open to any of them to appeal from the whole decree and on such appeal the appellate Court can reverse or vary the decree in favour of *all* the defendants¹ A mortgaged certain properties to *X* and sold the same to *B* on 5-3-1925 On 10-3-1925, *A* paid *X* the whole of the interest due up to that date and it was arranged that the principal should be paid by 16-10-1925, failing which further interest would accrue from 10-3-1925 till payment On 16-3-1925, *B* tendered to *X* a certain sum as the principal amount due on the mortgage On *X* refusing to receive the same, *B* deposited the amount in Court under S 84 of the Transfer of Property Act, 1882 on 22-10-1925 *X* thereafter filed a suit against *A* and *B* for the interest accrued due from 10-3-1925 to 22-10-1925 on the ground that no valid tender was made on 16-3-1925 *A* and *B* contested the suit on the ground that the tender was a valid one The trial Court passed a decree against both *A* and *B* overruling their plea *B* alone appealed against the decree It was held that the ground on which the decree of the lower Court proceeded, *viz*, that there was no valid tender being common to both *A* and *B*, the appellate Court could under this Rule reverse the decree against *A* also though he had not joined in the appeal²

(1924) 1974 Rang 376 (36) 2 Rang 480

2 (1922) 1922 Lah 57 (59)

3 (1914) 41 Ind Cas 78 (789) (Pat)

Note 5

1 (1930) 1930 Mad 65 (67)

(1910) 9 Ind Cas 388 (389) (Cal)

(1887) 1887 All W N 26 (37)

(1907) 6 Cal W N 194 (796) Suit for contribution against three persons—

Suit decreed—One defendant alone

pleading—Appellate Court finding

that plaintiff was not entitled to

contribution may dismiss the

suit against all the defendants

(1916) 1916 Cal 40 (40) Side set aside

against all the defendants

order in full set aside for

benefit of all

1 Ind Jur OS 32

1 Hav 333

(1877 75) 3 Cal 738 (741) (11)

(1891) 16 Mid 293 (294) L 111

(1874) 21 Suth W R 112 (113)

(1872) 18 Suth W R 831 (332)

(1894) 14 Suth W R 280 (281)

(1869) 12 Suth W R 376 (377)

(1864) 9 Suth W R 499 (500)

(1868) 9 Suth W R 472 (473)

(1884) 6 Suth W R 923 (924)

(1885) 4 Suth W R 68 (68)

(1901) 29 All 478 (481)

(1925) 1925 Mad 237 (238)

(1911) 11 Ind Cas 897 (898) (Cal)

(1914) 22 L 1 Cas 90 (92) (Cal)

(1914) 1914 Mad 696 (697)

(1915) 1915 Cal 454 (455)

(1918) 1918 Mad 794 (795) 40 Mid 416

(1916) 1916 Pat 400 (401) 1 Pat L Jour 149

(1915) 1915 Mad 227 (229) Decree for

possession against two defendants—

One alone appealing—Appellate Court

finding that the plaintiff had no

title to the property—Whether R 4

applied or not under R 33 entire

decree might be set aside

(1916) 1916 Mad 887 (887)

(1866) 6 Suth W R 104 (104 105) Cross

objections by one defendant—Com

mon ground with other defendant—

Decree varied as to latter only

(1811) 7 Beng L R App 25 (70)

(1932) 1932 All 710 (711)

(1918) 1918 Cal 76 (77)

2 (1929) 1929 Mad 230 (233) 52 Mad 322

10 Court fee

Where one of several appellants takes a ground of appeal which goes to the root of the respondent's case so that if the ground succeeds the entire decree will be reversed and not merely that portion of it which concerns the particular appellant the appellant must pay the Court fee sufficient to cover the whole relief obtainable on such a ground¹. The entire decree can be reversed in an appeal by some of the defendants under this Rule though one of them appealing as to costs alone engrosses his appeal with only a stamp to cover the amount of costs².

11 Review

This Rule does not apply to applications for review¹.

12 Revision

Where in a case coming under this Rule the appellate Court refuses to reverse a decree in favour of non appealing parties while reversing it in favour of the appellants on the ground that it has no power to do so its decree can be set aside in revision as it amounts to a failure to exercise jurisdiction¹.

The power of the High Court in revision under S. 25 of the Provincial Small Cause Courts Act is not less wide than under this Rule².

STAY OF PROCEEDINGS AND OF EXECUTION

R. 5. [S. 545] (1) *An appeal shall not operate as a stay of proceedings¹ under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree but the Appellate Court may for sufficient cause⁶ order stay of execution⁵ of such decree*

(2) *Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom the Court which passed the decree may on sufficient cause⁶ being shown order the execution to be stayed*

(3) No order for stay of execution shall be made under sub rule (1) or sub rule (2) unless the Court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made,

(b) that the application has been made without unreasonable delay,⁸ and

(c) that security¹¹ has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him

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Note 11
1101 P. 1 Re No 4, page 11

Note 12
192 (1951)

100 (106) 1 Nag L.R. 20

(4) *Notwithstanding anything contained in sub-rule (3), the court may make an ex parte order for stay of execution pending hearing of the application*

[1877—S 345, 1859—S. 338]

Local Amendment

RAS

Substitute the following for the existing sub-rule (1) —

5 (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed

decree and may when the appeal is against a preliminary decree stay the making of a final decree in pursuance of the preliminary decree or the execution of such final decree if already made

Synopsis

	Note No		Note No
Relative changes	1	Security for performance of decree	11
Scope and object of the Rule	2	Liability of surety	12
Rule does not apply where decree has been executed	3	Right of surety to appeal	See S 145
Rule applies only when decree under appeal is capable of execution	3a	Note 17	13
Stay of proceedings	4	When respondent is insolvent	14
	5	Insolvency of appellant and deposit	15
	6	Effect of stay order	16
	7	Effect of uncommunicated order stay	17
	8	ing execution	18
	9	Costs of application	19
	10	Appeal	20
Stay unreasonable delay		Letters Patent Appeal	21
Affidavit in support of the application		Revision	22
Access to decree holder		Review	22

Other Topics

Enforcement of security bond See Note 11 Power of trial Court to grant stay See Note and S 145
 Different power to stay See Note 2 It (9) Presentation of appeal If operates as stay See Note 4 It (1)

1 Legislative changes

- (1) The words "an appeal shall not operate as stay of proceedings under a decree or order appealed from except so far as the appellate Court may order in sub-rule (1) are new and have been added to make it clear that proceedings under a decree as well as execution of the decree can be stayed by the appellate Court See Note 4
- (2) Sub-rule (4) is new. It expressly authorises the Court to pass an ex parte order of stay pending the hearing of the main application for stay

2 Scope and object of the Rule

This Rule provides for—

- (1) A stay of proceedings under a decree or order appealed from and
- (2) A stay of execution of such decree or order

After an appeal has been filed the appellate Court may order the stay of proceedings under the decree or of execution of such decree¹ Where the application for stay is made to the appellate Court, it can grant stay of execution of the decree whether an application to execute it has in fact been made or not provided the conditions of sub-rule 3 are satisfied^{1a} Before an appeal

Order 41 Rule 5—Note 2

1 (1909) 1 Ind Cas 512 (512) (C 1)

1a (1933) 1933 Pcm 115 (119 120) 5, Bom 202.

6 May reverse the decree in favour of all the plaintiffs or defendants

The word *may* in the Rule shows that the exercise of the power under this rule is discretionary, and that the Court is not *bound* to exercise it.¹

There is a conflict of opinion as to whether this Rule applies to cases where one of the plaintiffs or defendants appeals without impleading the other plaintiffs or defendants as parties to the appeal. The High Court of Calcutta has held that it does,² while the Lahore High Court and the Judicial Commissioners Court of Peshawar hold that it does not.³ Opinion in the High Court of Allahabad is conflicting, some cases holding that it does⁴ and some, that it does not.⁵ It is submitted that the Calcutta view is correct.

The Court may under this Rule, reverse or vary the decree in favour of all the plaintiffs or defendants as the case may be. It does not enable a decree to be passed *against* a person. Such a decree may be passed under R. 33 *infra* if the person against whom the decree is varied or reversed has been impleaded as a party to the appeal.⁶ The reason is that it is a fundamental rule of law that no order can be passed against a person without his being given an opportunity of showing cause against it. It has however been held by the High Court of Bombay in the undermentioned case⁷ that where A and B obtain a decree against C for a part of the claim made in the suit, and in an appeal by B for the portion of the claim disallowed C filed cross-objections against the portion decreed, and the appellate Court dismissed the claim *in toto*, A was bound by the decision, notwithstanding he was not a party to the appeal, inasmuch as B's appeal was on behalf of A also. See also Note 13 to O. 41, R. 22 and Note 9 to O. 41, R. 33, *infra*.

Where a suit is partly decreed and partly dismissed and in an appeal by the plaintiff against the part dismissed, no cross-objections are filed against the part decreed, the appellate Court cannot interfere with such portion. This Rule has no application to such a case.⁸ Where a decree is passed against A and B, and B alone appeals from the decree, the appellate Court cannot while setting aside the decree against B pass a new decree against A.⁹

Where the appellate Court exonerates a particular defendant from the lower Court's decree and that defendant's interest is *separable* from that of the others, the appellate decree does not enure to the benefit of the latter.¹⁰

7 Failure to file cross objections - See Notes to R. 22 and R. 33, *infra*.

8 Death of one of several appellants in a case where the decree appealed from proceeds on a ground common to all of them

See O. 22, Rr. 2, 3, 4 and 11, *ante*. The provisions of O. 22 apply also to appeals, (*Vide* O. 22, R. 11). Hence, on the death of one of several appellants, if the right of appeal survives to the surviving appellants alone,

Note 6

- 1 (1912) 1912 Lah 71 (71)
(1912) 1912 All 710 (711)
(1913) 1913 Pun Ro No 8 page 11
(1912) 1912 Cal 111 (111) (Nid)
(1912) 1912 All 61 (61)
(1912) 1912 Cal 111 (111) (Mad)
(1914) 1914 All 71 (75) 18 All 510
(1918) 1918 Cal 287 (288)
- 2 (1928) 1928 Lah 43 (43)
(1935) 1935 Pesh 100 (107)
(1928) 110 Ind Cas 250 (Lah)
- 3 (1922) 1922 All 218 (218) 31 All 57

- (1927) 1927 All 311 (313)
- 4 (1924) 1924 All 873 (874)
- (1922) 1922 All 218 (244) 31 All 575
(1885) 13 Bom 371 (375)
(1914) 22 Ind Cas 92 (92) (Cal)
(1908) 1 Cal L Jour 144 (147)
(See (1922) 1922 Pat 4 (4) In this case the appeal itself was held to be maintainable in the absence of other parties)
- 7 (1887) 11 Bom 536 (538)
- 8 (1885) 11 All 15 (95, 40)
- 9 (1918) 1918 Cal 171 (175)
- 10 (1917) 1917 Pat 152 (153) 1 Pat L J at 15

the appeal may be proceeded with by the latter.¹ Where the right of appeal does not survive to the surviving appellant alone the appeal will abate so far as the deceased appellant is concerned if his legal representatives are not brought on the record within the prescribed period of limitation.

If the case is of such a nature that it cannot be disposed of in the absence of the legal representatives of the deceased the whole appeal will abate. But if the lower Court's decree proceeds on a ground *common* to the deceased as well as to the survivors then the latter can under this Rule appeal from the whole decree and the absence of the legal representatives of the deceased is no bar to the disposal of the appeal. Hence in such a case if the legal representatives are not substituted within the period of limitation the appeal abates only so far as the deceased is concerned and not as a whole² and if the appeal succeeds the appellate decree or order enures to the benefit of all the appellants including the deceased³.

Where one of several *respondents* dies and his legal representatives are not brought on the record within the period of limitation and the right of appeal does not survive against the surviving respondents alone, the appeal will abate against him. See O 22, R 4. But if the presence of the legal representatives of the deceased is essential for the determination of the appeal the entire appeal will abate and must fail by reason of defect of parties. This Rule does not apply to such a case so as to prevent the abatement of the appeal as the Rule applies only to *appellants* and not respondents to an appeal.⁴

The death of an *unnecessary* party does not affect the validity of a decree passed in the absence of his legal representatives.⁵

9 Application for execution by non appealing parties and the limitation therefor

When a decree is appealed from, limitation for an application for its execution runs from the date of the appellate decree, [see Limitation Act, Art 182 Cl (2)]. Where there are several plaintiffs or defendants and the appellate Court reverses or modifies the lower Court's decree on the appeal of some of the plaintiffs or defendants under this Rule, time for execution runs from the *appellate decree* even as regards the non-appealing parties. But where this Rule does not apply to the case the appeal does not postpone the starting of limitation for an application for execution by the non appealing parties.

Note 8

- 1 (1925) 1928 Lah 737 (737)
- 2 (1913) 20 Ind 1 Cas 902 (954) (Mad)
- (1933) 1933 All 733 (734)
- (1926) 1926 Cal 462 (463)
- (1930) 125 Ind 160 (Lah)
- [But see (1934) 1934 Lah 200 (203)
- 15 Lah 667]
- 3 (1925) 1925 Mad 910 (911)

[See however (1933) 1932 Cal 134 (135)
58 Cal 1341 Suit under S 101 H,
Jengul Tennancy Act — Separate
cause of action]
[See also (1933) 1933 Cal 787 (787)
(1936) 1926 Mad 991 (994)]

Note 9

- 1 (1898) 20 All 493 (496 497) Application
for execution by non appealing
parties
- (1887) 4 All 137 (140) Application for
execution against non appealing
(1903) 1 Ind Cas 459 (460) 33 L.R.
- (1870) 14 South W R 280 (281) Application
for execution by non appealing
parties
- 2 (1831) 13 All 1 (12) (FB)
- (1878) 2 Cal L Rep 471 (133)
[But see (1898) 22 L.R. 100
Application in Art 1, ...]

(1905) 1 Cal L Jour 144 (147)
(1907) 6 Cal W N 136 (197)

10 Court fee

Where one of several appellants takes a ground of appeal which goes to the root of the respondent's case so that if the ground succeeds the entire decree will be reversed and not merely that portion of it which concerns the particular appellant the appellant must pay the Court fee sufficient to cover the whole relief obtainable on such a ground¹. The entire decree can be reversed in an appeal by some of the defendants under this Rule though one of them appealing as to costs alone engrosses his appeal with only a stamp to cover the amount of costs².

11 Review

This Rule does not apply to applications for review¹.

12 Revision

Where in a case coming under this Rule the appellate Court refuses to reverse a decree in favour of non appealing parties while reversing it in favour of the appellants on the ground that it has no power to do so the decree can be set aside in revision as it amounts to a failure to exercise jurisdiction¹.

The power of the High Court in revision under S. 25 of the Provincial Small Cause Courts Act is not less wide than under this Rule².

STAY OF PROCEEDINGS AND OF EXECUTION

R. 5. [S. 345] (1) *An appeal shall not operate as a stay of proceedings¹ under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree, but the Appellate Court may for sufficient cause⁶ order stay of execution⁵ of such decree*

(2) *Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause⁶ being shown order the execution to be stayed*

(3) *No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—*

(a) *that substantial loss may result to the party applying for stay of execution unless the order is made,*

(b) *that the application has been made without unreasonable delay,⁸ and*

(c) *that security¹¹ has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him*

not necessarily stay appeal
which imperils the entire decree

Note 10

1 (1893) 13 All 112 (115)
2 (1865) 9 South W. R. 2 (61)

Note 11

1 (1904) 101 Ind. Re. No. 47 page 14

Note 12

1 (1885) 9 Mad 192 (195)
2 (1921) 1921 Vag 105 (106) 17 Vag. L. R. 2

(4) *Notwithstanding anything contained in sub-rule (3), the court may make an ex parte order for stay of execution pending hearing of the application.*

[1877—S 345; 1859—S. 338]

Local Amendment

IRAS

Substitute the following for the existing sub-rule (1)

5 (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed

decree and may when the appeal is against a preliminary decree stay the making of a final decree in pursuance of the preliminary decree or the execution of such final decree if already made

Synopsis

	Note No		Note No
legislative changes	1	Security for performance of decree	11
scope and object of the Rule	2	Liability of surety	12
it does not apply where decree has been executed	3	Right of surety to appeal	See S 140
it applies only when decree under appeal is capable of execution	3a	Note 12	13
stay of proceedings	4	When respondent is insolvent	14
stay of execution when may be granted	5	Insolvency of appellant and deposit	15
Sufficient cause	6	Effect of stay order	16
	7	Effect of uncommunicated order stay	
	8	ing execution	17
	9	Costs of application	18
	10	Appeal	19
		Letters Patent Appeal	20
		Revision	21
		Review	22
Notice to decree holder			

Other Topics

Enforcement of decree in Land See Note 11 Power of trial Court to grant stay of execution of decree See Note 11 Pt (d) 2 It (1) and Note 5 Pt (1) to (6)

Inherent power to stay See Note 2 Pt (d) Presentation of appeal If operate See Note 4 It (1)

1 Legislative changes

(1) The word "an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order" rule (1) the new and have been added to make it clear that *proceedings* under a decree shall mean execution of the decree can be stayed by the appellate Court.

(2) Section 141 (1) It expressly authorises the Court to grant an order of stay of execution of the main application for stay of execution.

2 Scope and object of the Rule

This Rule provides for—

(1) A stay of *proceedings* under a decree or order appealed from and

(2) A stay of *execution* of such decree or order

After an appeal has been filed the *appellate Court* may, on application for stay is made to the appellate Court, it can grant a stay of execution of the decree whether an application to execute it has been made or not provided the conditions of sub-rule 3 are satisfied in *Bhagat*

Order 41 Rule 5—Note 2

1 (1877) 1 Ind Cr 412 (411) 17 (1853) 1333 1 Ind 115 (11)

5, is filed from an appealable decree, the Court which passed the decree may order the execution to be stayed but not of other proceedings under the decree. Nor, in such a case has the appellate Court any jurisdiction to order the stay of execution of the decree."

The object of the Rule is to see that the ultimately successful party gets not merely a barren success but is able to reap the fruits of his success.³ At the same time the decree-holder's right to reap the fruits of his decree should not be lightly interfered with.⁴ This Rule combines these two principles and, while it provides for the execution of a decree being stayed pending an appeal, it restricts the circumstances under which such stay may be granted.

The Rule applies to all decrees including decrees relating to moveable as well as immoveable property⁵ and to decrees for the restitution of conjugal rights.⁶ But it does not enable the High Court to stay proceedings in a Court not subordinate to it.⁷

This Rule is not exhaustive of all the circumstances in which a stay of execution can be granted under the Code. Thus—

- (1) Under O 20, R 11 the Court which passed the decree can postpone the payment of the amount decreed.⁸
 - (2) Under O 21, R 26 the Court to which a decree has been transferred for execution can stay execution under the circumstances mentioned therein.
 - (3) Under O 21 R 29 where a suit by the judgment-debtor against the decree-holder is pending execution of the decree may be stayed.
 - (4) Under R 6 sub-rule (2), *infra*, the sale of immoveable property in execution of the decree appealed from may be stayed.
 - (5) Under O 45, R 13 the execution of a decree against which an appeal is preferred to the Privy Council can be stayed.
 - (6) In cases not covered by any of the said provisions a sale or execution can be stayed under the Court's inherent powers.⁹
- See also Note 2 to S 151 under the heading Stay of execution and other proceedings.

3 Rule does not apply where decree has been executed

The Rule does not apply where a decree has already been executed.¹ But, where a respondent prevented an order for stay of execution being passed by representing to the Court that there was no application for execution, and immediately afterwards applied for execution in the lower Court and obtained a delivery of possession, it was held that the respondent was

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174

3 (1902) 5 Cal W N 761 (7J7)

4 (1911) J Ind Cts 862 (86J) 35 Cal 7J4

5 (1868) J Suth W R 448 (448)

6 (1834) 1894 Pun Re No 2 page 2

7 (1931) 1931 All 57 (54) 53 All 180

8 (1927) 1927 All 416 (419)

9 (1932) 1932 All 298 (298) 54 All 344

(1910) 71 C 1017 (1017) 1910 Pun Re N 82

(1911) 1911 All 343 (344) 41 All J J or 3J1

by certain date is one under S 144 and S 148 applies to such order.¹

N 7

1

[See also (1916) 1916 Cal 72 (272 274) Receiver granted leave to train for estate—appeal filed after

guilty of over-reaching the Court, and that the delivery of possession could not be allowed to stand.²

3a Rule applies only when decree under appeal is capable of execution

This Rule will apply only when the decree under appeal is capable of execution.¹ Thus, where an appeal is filed against an order overruling the objections of the judgment-debtor to the execution of the decree and the appellant applies for stay of sale this Rule has no application.² But the Court has power to stay the sale under its inherent powers apart from the provisions of this Rule.

4 Stay of proceedings

The mere filing of an appeal does not suspend the operation of a decree and is no bar to proceedings being taken under the decree except so far as the appellate Court orders otherwise.¹ Under the old Code there was no express provision for staying *proceedings* under the lower Court's decree, other than execution proceedings.² It was, however, held that the appellate Court could, under its inherent power, stay such proceedings.³ The present rule now expressly authorises the appellate Court not only to stay the execution of the decree, but to stay *proceedings* under the decree as well.⁴ Thus in an appeal from an order directing the issue of a probate of a will, the appellate Court can pass an order staying the issue of probate.⁵ In an appeal against an order appointing a receiver, the appellate Court can pass an order directing the receiver not to act till further orders.⁶ In an appeal from a preliminary decree in a partition suit⁷ or in a mortgage suit⁸ further proceedings can be stayed under this Rule. Similarly, in an appeal from a preliminary decree in a suit for accounts an order can be made staying enquiry into the accounts pending the appeal⁹ though as a general rule no such stay will be allowed, unless ir-

Receiver had carried out the order is infructuous.

2 (1928) 1928 Pat 43 (J.O.)

Note 3a

1 (1933) 1933 All 664 (665)

2 (1933) 1933 All 664 (665) The provision of this rule is to secure and not apply

Note 4

1 (1918) 1918 P.C. 151 (153) 46 Cal 670 46 Ind App 52 (P.C.)

2 (1924) 1924 Lah 260 (260) Mere fact that appeal is pending is no reason to refuse to issue warrant for arrest

3 (1941) 1941 All 56 (388) 53 All 283 (F.B.) Proceedings relating to the partition of a fund decreed in mortgage suit are proceedings under a decree

(1883) 6 Mid 98 (99)

(1921) 1921 U.B. 5 (7) 41 I.R. 83

(1930) 1930 Pat 227 (229)

[See (1908) 12 Cal W.N. 88 884 887] *Ex parte* decree—Appellate Court may stay proceedings—Lower Court can deal with application to set aside *ex parte* decree

[See also (1933) 1933 Lah 723 (724)] Appeal from preliminary decree—Stay of further proceedings depends upon particular facts of case and conditions of Order R. h. u. l. i. c. satisfied

2 (1917) 1 Cal W.N. 264 (264)

See also (1906) 9 Cal. I. 21431 347

1 (1904) 31 Cal 722 (724) (F.B.)

(1906) 3 Cal L.J. 29 (34)

(1906) 39 Cal 927 (932)

3 (1900) 1930 Lah 108 (108)

But see (1921) 1921 Pat 328 (329) 3901 9 Ind. C. 893 (894) The

view taken in the case that under Rule 5 the appellate Court can only stay execution and not proceedings under a decree and its power to stay proceedings under a decree is not under Rule 5 but under its

7 (1924) 111 Ind. C. 383 (383) (F.B.) Partition suit

(1933) 1933 I. h. 590 (711) Practice of High Court is to stay proceedings

(1942) 1942 I. h. 271 (272) Mortgage

8 (1928) 107 Ind. C. 456 (457) (Lah)

See (1935) 1935 Lah 181 (1) (181)

Preliminary decree appealed from—Merely because of appeal, proceedings for final decree should not be stayed—No harm is caused thereby

9 (1901) 31 Cal 722 (724) (F.B.)

- 5 is filed from an appealable decree, the Court which passed the decree may order the execution to be stayed but not of other proceedings under the decree. Nor in such a case has the appellate Court any jurisdiction to order the stay of execution of the decree.

The object of the Rule is to see that the ultimately successful party gets not merely a barren success but is able to reap the fruits of his success. At the same time the decree holder's right to reap the fruits of his decree should not be lightly interfered with.⁴ This Rule combines these two principles and while it provides for the execution of a decree being stayed pending an appeal it restricts the circumstances under which such stay may be granted.

The Rule applies to all decrees including decrees relating to moveable as well as immoveable property⁵ and to decrees for the restitution of conjugal rights.⁶ But it does not enable the High Court to stay proceedings in a Court not subordinate to it.⁷

This Rule is not exhaustive of all the circumstances in which a stay of execution can be granted under the Code. Thus—

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- (3) Under O 21 R 29 where a suit by the judgment debtor against the decree-holder is pending, execution of the decree may be stayed.
- (4) Under R 6 sub rule (2), *infra*, the sale of immoveable property in execution of the decree appealed from may be stayed.
- (5) Under O 45, R 13 the execution of a decree against which an appeal is preferred to the Privy Council can be stayed.
- (6) In cases not covered by any of the said provisions a sale or execution can be stayed under the Court's inherent power.⁹ See also Note 2 to S 151 under the heading Stay of execution and other proceedings.

3 Rule does not apply where decree has been executed

The Rule does not apply where a decree has already been executed.¹ But, where a respondent prevented an order for stay of execution being passed by representing to the Court that there was no application for execution and immediately afterwards applied for execution in the lower Court and obtained a delivery of possession it was held that the respondent was

- 2 (1921) 1921 All 214 (214) 43 All 519
 (1921) 1921 All 342 (344) 43 All 198
 (1872) 17 Suth W R 341 (342)
 (1856) 6 Suth W R 15 (15)
 (1909) 4 Ind Cas 309 (300) 5 L B R 174
 3 (1902) 5 Cal W N 781 (797)
 4 (1911) 3 Ind Cas 869 (865) 38 Cal 774
 5 (1868) 3 Suth W R 448 (448)
 6 (1894) 1894 Pan R. No 2 page 2
 7 (1931) 1931 All 57 (55) 53 All 180
 8 (1927) 1927 Mad 416 (419)
 9 (1933) 1932 All 238 (238) 4 All 314
 (1910) 71 L 1017 (1017) 1310 L R N. 63
 (1913) 1913 All 313 (344) 41 All 17 (17)

(See also (1933) 1933 Mad 464 (564) Decree for possession—Order for stay of delivery of possession conditional on payment of list and rent by certain date is one under S 11 and S 148 applies to such order.
 Note 3

(See also (1916) 1916 Cal 416 (416) Receiver granted leave to transfer a title—Appeal not allowed

guilty of over-reaching the Court, and that the delivery of possession could not be allowed to stand²

3a Rule applies only when decree under appeal is capable of execution

This Rule will apply only when the decree under appeal is capable of execution¹ Thus, where an appeal is filed against an order overruling the objections of the judgment-debtor to the execution of the decree and the appellant applies for stay of sale this Rule has no application² But the Court has power to stay the sale under its inherent powers apart from the provisions of this Rule

4 Stay of proceedings

The mere filing of an appeal does not suspend the operation of a decree and is no bar to proceedings being taken under the decree except so far as the appellate Court orders otherwise¹ Under the old Code there was no express provision for staying *proceedings* under the lower Court's decree other than execution proceedings² It was, however, held that the appellate Court could under its inherent power stay such proceedings³ The present rule now expressly authorises the appellate Court not only to stay the execution of the decree, but to stay *proceedings* under the decree as well⁴ Thus in an appeal from an order directing the issue of a probate of a will, the appellate Court can pass an order staying the issue of probate⁵ In an appeal against an order appointing a receiver, the appellate Court can pass an order directing the receiver not to act till further orders⁶ In an appeal from a preliminary decree in a partition suit⁷ or in a mortgage suit⁸ further proceedings can be stayed under this Rule Similarly, in an appeal from a preliminary decree in a suit for accounts an order can be made staying enquiry into the accounts pending the appeal⁹ though as a general rule no such stay will be allowed unless it

Receiver had carried out the order is infructuous)

2 (1928) 1928 Pat 49 (30)

Note 3a

1 (1963) 1933 All 664 (64)

2 (1933) 1933 All 664 (665) The provisions of this rule is to ensure do not apply

Note 4

1 (1915) 1918 P C 151 (153) 40 Cal 604 Ind App 52 (1 C)

(1914) 1924 Lah 360 (360) Mere fact that appeal is pending is no bar to execution of decree without further stay

(1911) 1941 All 56 (988) 53 All 253 (F 1) Proceedings relating to the payment of a loan in a mortgage suit are proceedings under a decree

(1863) 6 Mad 98 (13)

(1921) 1921 U P 5 (7) 41 F R S 3

(1910) 1930 Pat 227 (227)

[See (1908) 12 Cal W N 88 88C 847] *Ex parte* decree Appeal from judgment—Lower Court can deal with application to set aside a final decree

[See also (1933) 1933 Lah 724 (724) Appeal from preliminary decree—Stay of further proceedings directed upon particular facts of conditions of Order in appeal filed]

2 (1917) 1 Cal W N 264 (264)

See also (1906) 3 Cal F R 21 (31) 94)

1 (1904) 31 Cal 722 (724) (F 1)

(1906) 3 Cal L J 29 (34)

(1906) 33 Cal 927 (932)

4 (1900) 1930 Lah 108 (108)

But (1921) 1921 F R 329 (329) 340) 3 Ind C 853 (884) The

view taken in the case that under Rule 5 the appellate Court can only stay execution and not proceedings under a decree and its power to stay proceedings under a decree is not under Rule 5 but under its

(1911) 1911 F R 329 (329)

7

But (1919) 1919 F R 740 (741) Practice of High Court to stay proceedings

(1932) 1932 F R 271 (272) Mortgage

(1917) 1917 F R 487 (487) (Lah)

See (1930) 1935 Lah 181 (1) (181)

In preliminary decree appealed from—Merely because of appeal proceedings for final decree should not be stayed—No harm is caused thereby]

(1901) 31 Cal 722 (724) (F 1)

reparable injury is likely to result to the appellant, by not passing such an order.

The High Court can under this rule read with S. 47, sub S. (2) of the Provincial Insolvency Act suspend a sentence of imprisonment passed under that Act pending the disposal of the appeal from such sentence.¹¹

A proceeding for restitution on a decree being varied or reversed is not a proceeding under the decree within the meaning of this Rule and cannot be stayed.¹² But an application for possession is a proceeding under the order confirming a sale and the appellate Court can under this rule, order the same to be stayed pending appeal by the judgment-debtor against the order confirming the sale.¹³

Where *proceedings* as distinct from execution of a decree, are stayed by an appellate Court, sub-rule 3 of this rule does not apply as such and therefore the furnishing of security is not compulsory though the Court has a discretion in the matter.¹⁴

The Court can make the payment of interest a condition for staying execution of the decree.¹⁴

5 Stay of execution when may be granted

As has been seen in Note 2 above, an appellate Court has no power before an appeal is filed before it, to order the stay of execution of the decree of the lower Court. It is the Court which passed the decree that can in such a case, stay the execution of the decree.¹ An application for stay of execution of a decree passed on the original side of the High Court in view of an intended appeal must ordinarily be made to the Judge who tried the case.² It is, however, essential for the applicability of sub-rule (2) that the decree, the execution of which is sought to be stayed should be an *appealable* one, and that the application for stay is made before the expiry of the period of limitation for the appeal.³ Thus if a decree has become final and unappealable the Court has no power to stay the execution thereof in view of a pending application for review.^{3a} The fact that a *preliminary* decree has been appealed against, does not empower the Court to order the stay of execution of the final decree in the suit from which no appeal is intended to be preferred.^{3b} A Court cannot under this rule order the stay of execution of the decree at the instance of a person not a *party* to the suit, who claims immovable property liable to be taken under the decree.^{3c}

After an appeal has been filed from a decree it is only the appellate Court that can under this rule, stay the execution thereof, the lower Court has no power to do so,⁴ though it can grant time to the judgment-debtor to enable

- (1106) 33 Cal 927 (322)
10 (1121) 61 Ind Cts J (13) (Pit)
11 (1120) 130 Bom 33 (55) 41 Bom 673
12 (1113) 1323 Nig 138 (133)
[See also (153) 10 Bom H Ct 111
(1113) 133]

- (1316) 1316 Cal 272 (271)
2 (1321) 1321 Cal 341 (312) 48 Cal 18
3 (1883) 3 All 36 (41)
(1884) 10 Cal 317 (313)
3a (1884) 3 All 36 (41)
3i (1317) 1321 Cal 60 (60)
(1333) 1321 Cal 43 (43) 5 Mad Hb Wr
order relating to writs de re-
Appel from such order—Execution
of decree can be stayed even though
no appeal has been filed from decree
3 (1884) 3 All 36
4 (1878) 1 Cal L R p 18 (36)
(1312) 17 Ind Cts J 728 (29) 33 All 113
(1883) 5 All 111 C R 35 (39)
(1301) 31 Cal 173 (31)

Held on construction of the stay order that payment of interest was not a condition of the stay.

13. (1127) 1327 Mid 227 (328) Order for payment of interest was executory.

Note 5

- 1 (1884) 3 All 36 (41)

him to obtain a stay order from the appellate Court.⁵ The appellate Court may grant a stay even where an appeal has been filed in *forma pauperis* and the application for leave to appeal as a pauper is pending disposal.^{6a} But in order that the appellate Court may exercise its powers under this rule, it is necessary that there should be an appeal pending against the *decree* the execution of which is sought to be stayed. Thus, where an appeal is filed against an *order* refusing to set aside an *ex parte* decree, the appellate Court has no power to stay the execution of the *decree*,⁶ though the original Court can postpone the sale in execution of such decree, under the provisions of O 21, R 69. Similarly, the appellate Court cannot, in an appeal against an *order* filing an award stay the execution of the decree on the award.⁸ It has been, however, held by the High Court of Bombay in the case cited below,⁹ that, in an appeal from an order refusing to set aside an award, it has *inherent* power to stay the execution under the award.

Rule 6, sub rule (2), *infra*, provides that the Court which passed the decree may stay the *sale* in an execution of the decree. This, however, does not affect the powers of the appellate Court under this rule to stay such sale.¹⁰ Nor does the refusal of a stay under this rule bar an application under R 6.¹¹ A stay may be granted though the decree may have specified a date within which the judgment-debtor should comply with it and such date has passed without the judgment-debtor doing so.¹²

It has been held by the High Court of Lahore that no order staying execution of the decree appealed from can be made when no execution application has been made or is pending before any Court.¹³ It purports to rely upon the undermentioned case of the High Court of Bombay¹⁴ which was a case of a stay of a *sale* under the section corresponding to R 6, which requires an application for execution to be pending before the lower Court. The said decision of the Lahore High Court cannot be accepted as laying down the correct law.

6 Sufficient cause¹

A stay of execution under this Rule either by the appellate Court or by the Court which passed the decree, can be ordered only on 'sufficient cause' being shown for such stay.¹ A stay will not be granted where the appeal does not raise fairly arguable questions.² The mere fact that the period of limitation for appeal from the decree has not expired is not a sufficient cause for ordering the stay of execution of the decree.³ The fact that the judgment debtor has been constructively guilty of contempt of Court in not having complied with a decree which specified a certain time within which he should have done so does not disentitle him to an order for stay.⁴ See

(1924) 124 I Ch 602 (603)
 (1903) 1 Ind C is 812 (812) (C 11)
 (1904) 27 Wld 602 (606)
 [See also (1923) 1373 Bom 700 (200)]
 5 (1909) 4 Ind C is 552 (552) (Lah)
 6 (1879) 1879 Pun Re No 70, page 191
 7 (1916) 1916 Pat 307 (305)

11 (1900) 25 Bom 243 (244)
 12 (1903) 4 Ind C is 746 (748 750) (C 11)
 13 (1920) 19-0 Lah 373 (373)
 (1921) 63 Ind C is 897 (897) (Lah)
 14 (1901) 25 Bom 583 (583)

Note 6

1 (1868) 3 South W R 448 (449)
 (1911) 9 Ind C is 862 (865) 38 Cal 754
 (1872) 17 South W R 63 (70)
 2 (1912) 17 Ind C is 219 (221) (Mad)
 3 (1866) 5 South W R 515 (513)
 4 (1869) 4 Ind C is 746 (748 750) (Cal),

security for the performance of the decree that may be ultimately binding upon him¹ Thus security may be ordered to be given for the restitution of mesne profits which may be ultimately declared due to respondent² A stay order on condition of security being given comes into operation only on security being given³

The Court should not accept any security without inquiring into its sufficiency⁴ The judgment-debtor must be allowed an opportunity to show that the security offered is sufficient⁵ A security, the enforcement of which is likely to lead to litigation should not be accepted⁶

Stay of execution is often granted on condition that the appellant deposits the amount of the security in Court In such cases if the appeal is dismissed the money so deposited is held to the credit of the *decree-holder* The depositor cannot withdraw it⁷ even if the decree-holder has failed to apply for execution within the prescribed period of limitation⁸ A decree-holder attaching the amount in execution of his decree is not entitled to claim any portion thereof in preference to the decree-holder with reference to whose decree the deposit was made⁹ If the sum so deposited exceeds the sum ultimately awarded to the decree-holder it should be applied towards the payment of the costs¹⁰ Where, however, the judgment-debtor satisfied the decree otherwise, the sum deposited as security should be returned to him¹¹ See also the under-mentioned case¹²

A security bond hypothecating immovable property is chargeable with stamp duty under Art 40 of the Stamp Act, 1899¹³ According to the High Courts of Madras¹⁴ and Rangoon¹⁵ such a bond for a sum exceeding Rs 100 is compulsorily registrable The High Courts of Lahore¹⁶ and Bombay¹⁷ have on the other hand held that it is not

After execution has been stayed on giving security, it is not open to the judgment-debtor to cancel the security bond¹⁸ though, where it is no longer required the Court may cancel it¹⁹

As to the enforcement of security bonds given under this rule, see Notes to S 145 *ante* and also the undermentioned case²⁰ As to the form of

Note 11

- 1 [See (1865) 1865 Bourke O C 103]
(1935) 1335 Mad 43 (46) 58 Mad 116 Pro-
vision as to security is mandatory
(1934) 1934 Dig 160 (162) R 5 does not
empower Court to impose terms prior
to granting stay—But conditions
imposed by sub cl (3) must be ful-
filled, or decree holder must consent
—Stay order without making provi-
sion for security is illegal
(1920) 1920 Lah 464 (465) In fact it is the
duty of the judgment debtor to ask
the Court to fix the amount of
security

2 (1914) 1914 Lun L R No 59 page 182

3 (1924) 1924 All 693 (699)

10 (1931) 1931 Cal 474 (476) 58 Cal 1
11 (1911) 12 Ind Crs 632 (693) (Mad)
11a (1934) 1935 Bom 200 (200 201) Decree

notes—Such investment increases
in value by date of appellate decree
—Decree holder is entitled only to
decretal amount and not what in

(1934) 1934 Lah 138 (142) Overruling 1914
Lah 8

16 (1928) 1928 Bom 42 (44) 52 Bom 72,
17 (1920) 1929 Lah 76J (770)
18 (18 0) 13 South W R 403 (404)
19 (1934) 1934 Mad 1 (3) 57 Mad 218 Im

security bond, *see* Appendix G, Form No 2.

12 Liability of Surety

See Notes to S 145 *ante* generally and also the undermentioned cases ¹

13 Right of Surety to appeal — S 145 Note 12

14 When respondent is insolvent

Where the respondent decree-holder was an insolvent and the appellant judgment-debtor applied for stay of execution as to costs, he was ordered to pay the costs to the respondent's solicitor on his personal undertaking that he would return the amount, if the appellant succeeded in the appeal ¹

15 Insolvency of appellant and deposit

Where execution is stayed on the appellant depositing in Court the decretal amount and the appellant is thereafter declared an insolvent, the amount deposited in Court is payable, on the appeal being dismissed, to the decree holder and not to the Official Assignee ¹

16 Effect of stay order

The jurisdiction of a Court to deal with further proceedings under the decree ceases when the appellate Court stays such proceedings, and an order passed while the stay order is in force is without jurisdiction ¹ Where the stay order is conditional on security being given it does not come into operation till such security is given and does not affect the validity of a sale held after the order for stay and before the giving of the security ² Where an order for stay is set aside on the ground of fraud the effect is, as if the stay had never been ordered at all. Therefore a sale held while the order was in force, is valid ³ The appointment of a receiver does not operate as a stay of execution ⁴

17 Effect of uncommunicated order staying execution

There is a conflict of decisions on the question whether execution proceedings held by a Court after passing of an order for stay, but before the communication thereof to the Court, are valid. It has been held by the Calcutta High Court that an order for stay of execution takes effect as soon as it is passed and not after it has reached the executing Court, and that therefore, a sale held after an order for stay has been passed but before it reaches the execution Court is invalid ¹ According to the Madras High Court an order for

movable property—Security given by judgment debtor as security for due performance of decree in pursuance of order of stay of execution under this Rule can be realized in execution

(1906) 8 Bom L R 557 (561) Bond was binding on the surety for the period during which it was allowed to operate

(1923) 117 Ind Cas 65 (Iah) The liability of surety is co-extensive with that of the judgment debtor

Note 12

1 (1874) 2 Ind App 219 (234) (1st C) Bond can be enforced in execution

(1935) 1935 Nig 16 (19) 31 Nig L R 172
Security furnished — Surety undertaking to be bound by decree that may be passed — Surety is bound even by consent decree that is passed unless fraud or collusion or decree comprises matters beyond litigation

Note 14
1 (1923) 1923 Mad 223 (230)

Note 15
1 (1923) 1925 Cal 416 (417) 51 Cal 1010

Note 16
1 (1923) 1925 Cal 1073 (1074)
(1923) 1925 Pat 503 (555)
(1927) 1927 Mad 400 (451)
2 (1924) 1924 All 638 (639)
3 (1916) 1918 All 381 (384)
4 (1921) 1921 Pat 131 (137) 6 Pat L Jour

a security taken under the directions of the High Court

Note 17
1 (1906) 33 Cal 227 (234)

5, stay of execution operates only from the time it is communicated to the executing Court and hence a sale held before such communication, is not invalid.² A similar view has been taken by a Full Bench of the Allahabad High Court.³ But an opinion was expressed therein that if the decree-holder himself was the purchaser the sale would not be valid as he takes the property subject to all orders made in the suit. The Bombay High Court has held that it is difficult to lay down a principle as to the moment of operativeness of the stay order. According to that High Court a great deal depends on the nature of the order, the question of good faith and other facts.⁴ According to the Lahore High Court a sale held before the stay order reaches the auctioneer is valid.⁵ The High Court of Hongkong has held that such a sale is illegal.⁶

18 Costs of application

It has been held by the High Court of Bombay that in the absence of special circumstances the general rule is that the costs of the application for stay should be costs in the appeal.¹ The High Court of Calcutta has on the other hand held that the order for stay is only an *indulgence* shown to the appellant and therefore he should be made to pay the costs thereof even though he is successful in his application.²

19 Appeal

The question whether an order granting or refusing stay of execution is appealable or not depends upon the question whether such an order falls within S. 47. As to this see generally Notes 44, 84 and 86 to S. 47 and the undermentioned cases.¹ It was held in the undermentioned case that an order rejecting the security offered and ordering execution to continue is not amounting to a refusal to stay the execution of the decree and is not, therefore, appealable as a decree under S. 47.²

20 Letters Patent Appeal

An order granting or refusing stay of execution is a judgment within the meaning of the Letters Patent and is appealable as such.¹ An order relating to the *sufficiency* of the security tendered does not come within the purview of S. 47 of the Code nor is it a judgment within the meaning of

ay or (L. B.)
2. (1856) 23 Cal 803 (891)

Note 19

1 (1923) 1923 Lah 446 (446) Order rejecting surety is only an interlocutory order and does not determine the rights of parties and is therefore not appealable as a decree under S. 47.

(1898) 1 Oudh Cas 102 (103) Order refusing stay is decree under S. 47 and is appealable.

2 (1927) 1927 Lah 527 (528)

Note 20

A person may be guilty of contempt although the order of Court which he alleged to have wilfully disobeyed has not been officially communicated to him.]

in

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4 (1928) 1928 Bom 180 (190-191) 52 Bom 290

5 (1930) 1930 Lah 17 (18)

[But see (1917) 1917 Lah 336 (337)]

6 (1933) 1933 Rang 416 (418) 11 Rang 410

Note 18

1 (1932) 1932 Bom 127 (128) 56 Bom 276

order refusing stay a judgment.]

the Letters Patent ²

Appeal to the Privy Council—An order refusing to stay execution is not a final order within the meaning of Cl (a) of S 109 of the Code ³

21 Revision

This rule does not apply to applications for revision ¹ But, as has been seen in Note 2 above the Court has an inherent power of stay under S 151 ²

22 Review

An order of stay of execution made under this Rule is open to review ¹

R. 6. [S 546] (1) *Where* an order is made for the execution of a decree *from* which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security ⁴ to be taken for the

Security in case of order for execution of decree appealed from

restitution³ of an execution⁵ of the property and for

Appellate Court or the Appellate Court may for like cause direct the Court which passed the decree to take such security

(2) *Where* an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed⁸ on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of

[1877—S 546, 1861—S 36]

Synopsis

	Note No		Note No
Legislative changes	1	bond—See O 41 R ⁵	6
Scope and applicability of the Rule	2	Mode of enforcement of security bond—	
Restitution—See S 144 a etc	3	See Notes to S 145 a etc	7
Security	4	Stay of sale of immovable property	8
Property which may be or has been taken in execution	5	Petition to stay sale where to be made	9
Registration and attestation of security		Appeal	10
		Form	11
		Revision	12

Other Topics

Effect of stay of sale See Note 8 Pt (i) Pt (3a) and Note 9 Pt (7)
 Powers of the appellate Court See Note 9

1 Legislative changes—

The present Rule corresponds to S 546 of the old Code subject to the following changes—

- 2 (1927) 1927 Mad 398 (401) 50 Mad 380
 {See also (1927) 1927 Mad 597 (592)
 Order granting an injunction staying execution is applicable }
 3 (1911) 10 Ind Cas 444 (445) (Cal)

Note 21

- 1 (1909) 1929 Lah 167 (168)
 2 [See (1911) 9 Ind Cas 373 (374) (Cal)]

Note 22

- 1 (1881) 9 All 96 (404) Order made without jurisdiction—Reviewed

1. The words "or has been taken" have been added in sub-rule (1). See Note 5, *infra*.
2. The words "for money" which occurred after the words "in execution of a decree" in the third para of the old section (corresponding to sub-rule (2) of the present Rule) have been omitted. Hence, sub-rule (2) applies to all decrees whether they are decrees for the payment of money or not. The decisions under the old section leaving upon the meaning of the expression "decree for money" are only of academic interest now.
3. The words "to the Court which made the order" in sub-rule (2) are new. See Note 9 *infra*.

2 Scope and applicability of the Rule

In order that this rule may apply it is essential that an appeal should be pending against the decree under execution, *and* an order should have been made for the execution of the decree. Where therefore, no appeal has been filed against the decree¹ or where no order for execution has been made,² there can be no order for security for restitution under this rule. Where an appeal is only against a *part* of the decree, an order for security for restitution cannot be passed with reference to the portion not appealed against.³ It is competent for the trial Court as well as the appellate Court to pass an order for security under this rule. There is, however, a distinction between the powers of the two Courts. The Court which passed the decree shall, on sufficient cause being shown, require security, while the appellate Court *may* for like cause, direct the trial Court to take security. The rule applies only to parties to the suit.⁴

Pending an appeal to the Privy Council the trial Court has no jurisdiction to pass an order for security under this rule. The matter is governed by the provisions of O. 45 and not by this order.⁵

3 Restitution—See S. 144 *ante*

4 Security.

A surety is not discharged merely by reason of the death of the decree-holder.¹ Where under a decree for redemption, the mortgagor decree-holder deposits the mortgage money in Court and applies for execution of the decree the money so deposited can be accepted as security for restitution under this rule.² Where the holder of a decree for money is willing to give security for restitution, the Court should not ordinarily grant a stay of execution of the decree.³ As to the extent of the liability of the surety, see Note 8 to S. 145 and the cases cited below.⁴

5 'Property which may be or has been taken in execution'

The words in the rule "or has been taken" are new and make it clear

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| <p>Order 41 Rule 6—Note 1</p> <p>1 (1898) 25 Cal 322 (323) Decree for arrears of rent is decree for money¹</p> <p>1</p> <p>not declared to be chargeable on any specific immovable property is a decree for money</p> <p>Note 2</p> <p>1 (1886) 8 All 639 (640)
(1887) 9 All 56 (41)
(1866) 6 South W. R. M. R. 16 (1*)</p> | <p>2 (1901) 25 Bom 583 (583)</p> <p>3 (1890) 1890 Pun. R. No. 120 page 392 In such a case, stay of execution can not be granted</p> <p>3a (1932) 1932 Bom 326 (326)</p> <p>4 (1925) 1925 Rang 251 (255) 3 Rang 155</p> <p>Note 4</p> <p>1 (1917) 1917 Cal 594 (595)</p> <p>2 (1912) 15 I. O. 383 (383-384) (Mad) Per Abdur Rahim, J. contra, Sundara Ayyar J.</p> <p>3 (1890) 13 Bom 241 (241)</p> <p>4 (1893) 1893 Bom P. J. 528 (530) Surety for fulfilling such orders or decrees as may be given in appeal—If said surety liable for costs awarded in appeal</p> |
|--|---|

that security for restitution may be ordered even after property has passed into the hands of the decree holder in execution of his decree¹ They give effect to the case cited below² under the Code of 1882 The view seems to have been the same even under the previous Codes³

6 Registration and attestation of security bond—See O 41 R 3

7 Mode of enforcement of security bond—See Notes to S 145 a 1

8 Stay of sale of immovable property

Sub-R (2) is a mandatory provision It is, therefore incumbent on the Court to stay the sale of immovable property, on such terms as to giving security or otherwise as it thinks fit¹ An order for stay of sale can be passed even where the sale has already taken place provided it has not been confirmed² The sub rule applies also to sale of immovable property in execution of a mortgage decree³ Where a person has become liable as a surety for the performance of a decree and an order for the execution of such a decree by the sale of immoveable properties is made against him under S 145 ante, he is a judgment debtor within the meaning of this rule and is therefore entitled to apply for stay of execution^{3a}

The expression on such terms as to giving security or otherwise in sub rule 2 of this Rule means that the terms may be either giving security or any other term such as the deposit of the decree amount in the Court ordering the stay The Court has therefore jurisdiction to make it a condition that the stay would be given only on the judgment-debtor depositing the decree amount in Court^{3b}

An order for the stay of sale of immovable property under this rule does not preclude the execution of the decree in other ways, e g by proceed-

(1933) 1333 Mad 309 (310) Surety bond for allowing execution of a decree pending appeal—Appeal compromised giving time to principal debtor—Surety not party to compromise—Surety is discharged

(1924) 1924 Lah 631 (631)
(1924) 1924 Lah 71 (72)
(1929) 1929 Lah 68 (69)
(1911) 9 Ind Cas 323 (324) (C 11)
(1928) 108 Ind Cas 242 (Lah)
(1911) 11 Ind Cas 22 (29) (11)

Note 5

1 [See (1928) 1928 Pat 187 (188 189) In this case it was held that the Court has inherent power to order security in such a case The learned Judges seem to have overlooked the fact that under the present Rule it is not necessary to resort to inherent power to order security in such a case]

[But see (1932) 1932 All 501 (502) Sub rule (2) is only complementary to R 5—There is no obligation to

2 (1906) 83 Cal J (934)

3 (1963 66) 10 Moo Ind App 190 (200) (P C)

(1867) 8 South W R 144 (145) (F L)

(1872) 17 South W R 501 (501) Special, in such as waste to be proved [But see (1840) 7 Rom H C R 412 (124) No power to order security for restitution after property has passed into hands of a successful party]

Note 8

1 (1925) 1925 Lah 69 (69)

(1933) 1933 All 732 (733) 5 All 98 Where application for stay is made Court ought not to dismiss execution application

1. Mortgage suit—Application for execution of final decree—Appeal must be

[See also (1934) 1934 Lah 117 (117) Mortgage decree—Properties decreasing in value and capable of being destroyed by fire etc—Before making sale Judgment debtor asked to furnish security for money that may occur in execution on sale]

2a (1934) 1934 Bom 252 (254)

7b (1934) 1934 Mad 709 (709)

ing against the *movables* of the judgment-debtor ⁴ Where, on the rejection of a claim petition in execution proceedings, the claimant filed a suit for a declaration of his title and on its being dismissed, appealed from the decree and pending the appeal applied for a stay of sale, it was held that the sale could not be stayed inasmuch as the rule applied only where the appeal was against the decree which was to be executed and not where the decree appealed from was different from the decree to be executed ⁵

9 Petition to stay sale where to be made

The words to the Court which made the order in sub-rule (2), which are new show that an application for stay of sale under that sub-rule should be made to the executing Court and not to the appellate Court ¹ This is in accordance with the following decisions under the old Code ^{2a} But the Madras High Court has held that the appellate Court can direct a stay of sale of immovable property by virtue of its general powers under O 41, R 5 ²

The Court cannot, under this rule stay the sale in execution of a decree passed by another Court in another suit ³

10 Appeal

An order requiring security to be given for restitution is one falling within S 47 and is appealable [See Note 71-A Pt (21) to S 47, *ante*] An order accepting or refusing to accept security is however, not appealable either as a decree or order under S 47 of the Code ¹

A surety against whom a decree is sought to be executed under S 145 can by virtue of that section appeal from an order made against him in execution proceedings ^{2a}

A judgment debtor to whose instance a sale was stayed cannot subsequently appeal from the stay order even assuming such an order is otherwise appealable ²

11 Form

For form of security bond see App G, Form No 3

12 Revision

Where the Court refuses an application under sub-R (2) of this rule, and declines to stay execution pending appeal, the High Court can under S 115 revise the order and direct execution to be stayed on the judgment-debtor furnishing security ¹

¹ (1926) 13 G Loh 103 (163)

⁵ (1922) 13 J Loh 108 (10) Proper remedy is to ask for temporary injunction under O 33

[See however (1931) 1331 L at 637 (637) This rule does not apply but the Court can order stay under its inherent powers—Even in such a case Court would be acting without jurisdiction if it did not put the applicant on terms]

Note 9

Note 10

1 (1932) 1932 Loh 10 (1-1)

[See however (1919) 1919 Cal 41 (472) But an order accepting security and directing delivery of possession is a final order and is appealable]

1a (1888) 1 L Bom 71 (74)

2 (1930) 1930 Loh 100 (191)

N 10

R. 7. [S 547.] No such security as is mentioned in *Rules 5 and 6* shall be required from the Secretary of State for India in Council or, *where* the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.

[1877—S 547, 1859—S. 340]

R. 8. [New] *The powers conferred by Rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree*

Exercise of powers in appeal from order made in execution of decree

Synopsis

Scope and object of the Rule Note No 1

1 Scope and object of the Rule

This rule is new and gives effect to the following decisions under the old Code¹ It makes the provisions of Rr 5 and 6 applicable *mutatis mutandis* to cases in which the appeal is not from the decree (as contemplated by those rules) but from an order in execution of the decree²

Under the rules framed by the High Court of Patna, the Registrar has no power to hear an application under this rule³

PROCEDURE ON ADMISSION OF APPEAL

R. 9. [S 548.] (1) *Where* a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

Registry of memorandum of appeal

(2) Such books shall be called the Register of Appeals.

[1877—S 548; 1859—S 341]

Local Amendment.

Madras

prescribed

Synopsis	
Note No	Note No
Registration of appeal	1
Ex parte admission of appeal—Power to dismiss appeal subsequently on ground of limitation	2
Second appeal from order of rejection	3
Withdrawal of appeal after registration	4

Order 41 R 8—Note 1

- 1 (1901) 28 Cal 734 (736)
(1888) 8 All W N 245 (246)
(1875 '6) 1 All 178 (180) (F B)

- 2 [see (1917) 1917 All 40 (40) Order for sale

in execution—Appeal against—Application for stay—Stay can be granted even after sale but before confirmation]

- 3 (1932) 1932 Pat 21, (1918)

10.

such time as the Court orders the Court shall reject the appeal. There again the Court is given no discretion in the matter.¹

Compare O 25, Rr 1 and 2

Under this rule security for costs can be demanded either *before* or *after* the respondent is called upon to appear and answer.² Further, the security may be for the costs of the appeal, or of the original suit or of both.³

An order for security for costs can be passed under the rule only against the appellant. No such order can be passed against the respondent.⁴ Nor can the Court demand even from the appellant, security for the *entire decree amount*. Thus the Court cannot while admitting an appeal under R 11 of this Order issue notice to the respondent conditional on payment by the appellant of the decretal amount plus a sum of Rs 500 as security for the costs of the respondent.⁵

2 To what appeals the Rule applies

This rule applies to appeals from *decrees*. By S 2, sub-S (2) an order determining any question under S 47 is also a decree. It follows that this rule will apply to appeals from orders under S 47.¹ By virtue of O 43, R 2 *infra* this rule will apply also to appeals from *orders* other than those falling under S 47.

3 Appeals in forma pauperis

There is a conflict of opinion as to the applicability of the rule to appeals in *forma pauperis*. According to the High Court of Madras¹ and Rangoon² and the Judicial Commissioner's Court of Nagpur³ the rule applies to pauper appeals but the Court should not make an order for security except for very special reasons such as, the appeal being a speculative one and the pauper a mere puppet in the hands of persons well able to find security.⁴ The High Courts of Calcutta⁵ Bombay⁶ and Lahore⁷ have, on the other hand, held that O 41, R 10 does not apply to appeals by paupers.

4 Insolvency appeals

This Rule applies also to an appeal from an order passed by a Judge of the High Court exercising jurisdiction in insolvency under the Presidency

Order 41 Rule 10—Note 1

- 1 (1896) 18 All 101 (103 104) (F B)
- 2 Under the Code of 1859 there seems to have been some doubt on this point—See for instance the following cases—
(1866) 6 Suth W R M 123 (124) Question was left open in this case
(1872) 18 Suth W R 102 (102) Court can order security at any time before hearing of appeal
(1870) 13 Suth W R 431 (432) (Do)
- 3 (1871) 7 Beng L R App 59 (60) It was held under the Code of 1859 that security could be ordered only for the costs of the appeal and not of the original suit
(1867) 8 Suth W R 217 (217) (Do)
- 4 [S e (1870) 4 Beng L R (O C) 92 (93)]
(1871) 16 Suth W R 311 (311)
(1932) 1932 All 511 (511 512) (F B)

Note 2

- 1 (1900) 21 Bom 314 (316)

Note 3

- 1 (1920) 1920

(1907) 17 Mad L Jour 583 (583)

(1880) 3 Mad 66 (67)

[See also (1933) 1903 Mad 519 (520) 56 Mad 323]

- 2 (1928) 18 Rang 244 (245) In this case however the judgment *assures* rather than decides that security for costs can be ordered in pauper appeals—The actual decision is that special reasons are necessary for requiring security for costs from a pauper appellant

3 (1930) 1930 Nag 28 (32)

4 (1879) 3 Mad 66 (67)

(1933) 1933 Mad 519 (521) 56 Mad 323
Absence of *prima facie* good case on appeal by pauper is good ground for security

5 (1918) 1918 Cal 618 (618)

R. 7. [S 547.] No such security as is mentioned in *Rules 5 and 6* shall be required from the Secretary of State for India in Council or, *where* the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.

[1877—S 547, 1859—S 340]

No security to be required from the Government or a public officer in certain cases

R. 8. [New] *The powers conferred by Rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree*

Exercise of powers in appeal from order made in execution of decree

Synopsis

Scope and object of the Rule Note No 1

1 Scope and object of the Rule

This rule is new and gives effect to the following decisions under the old Code¹ It makes the provisions of Rr 5 and 6 applicable *mutatis mutandis* to cases in which the appeal is not from the decree (as contemplated by those rules) but from an order in execution of the decree²

Under the rules framed by the High Court of Patna, the Registrar has no power to hear an application under this rule³

PROCEDURE ON ADMISSION OF APPEAL.

R. 9. [S 548.] (1) *Where* a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose

Registry of memorandum of appeal

Register of Appeals

(2) Such books shall be called the Register of Appeals.

[1877—S. 548; 1859—S 341]

Local Amendment

Madras

Substitute the following for Sub rule (2) —

Registers in accordance with forms Nos 22, 23 24 and 25 in Appendix II are prescribed for use in all Civil Courts having jurisdiction over the classes of suits specified therein

Synopsis

Note No

1

Note No

3

Second appeal from order of rejection
Withdrawal of appeal after registra-
tion

4

2

Order 41 R 8—Note 1

1 (1901) 29 Cal 734 (736)

(1888) 8 All W N 245 (246)

(1875 76) 1 All 178 (180) (F B)

2 [See (1917) 1917 All 40 (40) Order for sale

in execution—Appeal against—Application for stay—Stay can be granted even after sale but before confirmation]

3 (1932) 1932 Pat 21, (218)

9,

Other Topics.

Power of Sub Judge to dismiss on ground of limitation See Note 2 I t (3)

1 Registration of appeal

The registration of an appeal is a purely ministerial act The Court can reject an appeal after it has been registered ¹

A memorandum of appeal which has not been registered is not to be regarded as an appeal that is before the Court, but only as a memorandum of appeal presented to it Therefore the provisions of law as to how an appeal can be dealt with after admission do not apply at the stage before registration of the appeal ²

2 Ex parte admission of appeal—Power to dismiss appeal subsequently on ground of limitation

Where an appeal is presented after the expiry of the period of limitation along with an application to excuse the delay under S 5 of the Limitation Act, the question of excusing the delay ought to be determined at the stage of admission of the appeal after notice to the respondent ¹ Where, however *ex parte* order is made admitting such an appeal the Court can again go into the question of limitation at the hearing of the appeal and dismiss it if there is no sufficient ground for excusing the delay ² Where a District Judge admits such an appeal *ex parte*, and the appeal is thereafter transferred to a Subordinate Judge for disposal the latter has power to dismiss the appeal on the ground of limitation ³

3 Second appeal from order of rejection

An order refusing to admit an appeal under this rule and rejecting it is a decree and is open to appeal ¹ See Note 13 to S 2 Sub-S (2), *ante*

4 Withdrawal of appeal after registration

See also Note 3 to O 23, R 1 Where an appellant applies for leave to withdraw the appeal after notice of hearing has been served on the respondent, the respondent should be given notice of the application He is always entitled to his costs when leave is granted for withdrawal of the appeal ¹

10

R. 10 [S 549.] (1) The Appellate Court² may in its discretion,¹ either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both

Appellate Court
may require appellant
to furnish security
for costs

Order 41 Rule 9—Note 1

¹ (1870) 13 Suth W R 351 (302)

² (1938) 1933 Mad 358 (359)

N. 2

Note 3

¹ (1904) 8 Cal W N 64 (65)

Note 4

¹ (1869) 3 Mad H O R 368 (367)

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immovable property within British India *other than* the property (if any) to which the appeal relates.

(2) *Where* such security is not furnished within such time as the Court orders the Court shall reject the appeal.¹¹

[1877—S 549; 1859—S 342.]

Local Amendments

ALLAHABAD

¹¹ The full words are also to sub rule (1) and also Cl (2) —

(1) It is also provided that in case of every appeal other than a further appeal from any decree or order passed in appeal by any Court subordinate to the High Court confirming the decree or order of the Court below or modifying it only in favour of the appellant, the appellant shall deposit with the Court a sum of Rs 100 as a security for the costs of the appeal, to be paid by the respondent if the appeal is allowed.

2 In the condition referred to in Cl (1) of this Rule 'costs of the appeal' means advocate's fees calculated on the valuation of the appeal together with a sum of Rs 2 for Court fees on a *dalatnama* to be filed by the respondent. Re 1 inspection fee and in the case of a single Judge a further sum of Rs 100. Original Cl (2) of the Rule.

Synopsis

	Note No		Note No
I Scope and object of the rule	1	VIII <i>Is a</i>	11
II To what appeals the rule applies	2	IX <i>Is a</i>	12
(a) Appeals in <i>forma pauperis</i>	3	X <i>Is a</i>	13
(b) Insolvency appeals	4	XI <i>Is a</i>	14
(c) Letters Patent appeals	5	XII <i>Is a</i>	15
III Grounds for demanding security	6	XIII <i>Is a</i>	16
IV Delay in applying for security	7	XIV <i>Is a</i>	17
V Notice to show cause	8	XV <i>Is a</i>	18
VI Amount of security	9		
VII Extension of time for furnishing security	10		

Other Topics

In its discretion See Note 1, Pt (1) and security See Note 7 Pt (1)
 Note 6 Revision See Note 11, Pt (3)
 Respondent—At what stage should apply for

1 Scope and object of the Rule

In *Lekha v Bhauna*, 1 L R 18 All 101, which was a case under S 549 of the old Code corresponding to this rule, Edge, C J, observed as follows —

The object of that section was to secure the respondent in an appeal from the risk of having to incur further costs which he might never succeed in getting out of the appellant. It was intended under the first paragraph that the Court should have entire discretion in all cases not coming under the second paragraph in making or refusing an order for security for costs. Under the second paragraph which is the proviso to the first, the Court is given no discretion in the matter. In cases falling within that proviso the Court has to follow the mandate of the statute and make an order for security for costs. An order for security for costs having been made under either the first paragraph or the second, it is by the third paragraph of the section enacted that if such security be not furnished within

0,

such time as the Court orders the Court shall reject the appeal. There again the Court is given no discretion in the matter.¹

Compare O 25, Rr 1 and 2

Under this rule security for costs can be demanded either *before* or *after* the respondent is called upon to appear and answer.² Further, the security may be for the costs of the appeal or of the original suit or of both.³

An order for security for costs can be passed under the rule only against the appellant. No such order can be passed against the respondent.⁴ Nor can the Court demand even from the appellant, security for the *entire decree amount*. Thus the Court cannot while admitting an appeal under R 11, of this Order issue notice to the respondent conditional on payment by the appellant of the decretal amount plus a sum of Rs 500 as security for the costs of the respondent.⁵

2 To what appeals the Rule applies

This rule applies to appeals from *decrees*. By S 2, sub-S (2) an order determining any question under S 47 is also a decree. It follows that this rule will apply to appeals from orders under S 47.¹ By virtue of O 43, R 2 *infra* this rule will apply also to appeals from *orders* other than those falling under S 47.

3 Appeals in forma pauperis

There is a conflict of opinion as to the applicability of the rule to appeals in *forma pauperis*. According to the High Court of Madras¹ and Rangoon² and the Judicial Commissioners Court of Nagpur³ the rule applies to pauper appeals but the Court should not make an order for security except for very special reasons such as, the appeal being a speculative one and the pauper, a mere puppet in the hands of persons well able to find security.⁴ The High Courts of Calcutta⁵ Bombay⁶ and Lahore⁷ have, on the other hand, held that O 41, R 10 does not apply to appeals by paupers.

4 Insolvency appeals

This Rule applies also to an appeal from an order passed by a Judge of the High Court exercising jurisdiction in insolvency under the Presidency

Order 41 Rule 10—Note 1

1 (1896) 18 All 101 (103 104) (F B)

2 Under the Code of 1859 there seems to have been some doubt on this point—See for instance the following cases—

(1866) 6 Suth W R Mis 123 (124) Question was left open in this case

(1872) 18 Suth W R 102 (102) Court can order security at any time before leaving of appeal

(1870) 13 Suth W R 431 (432) (Do)

3 (1871) 7 Beng L R App 59 (60) It was held under the Code of 1859 that security could be ordered only for the costs of the appeal and not of the original

(1907) 17 Mad L Jour 583 (583)

(1880) 3 Mad 66 (67)

[See also (1933) 1903 Mad 519 (520)

56 Mad 379]

2 (1923) 1923 Rang 244 (245) In this case however the judgment assures rather than decides that security for costs can be ordered in proper appeals—The actual decision is that special reasons are necessary for requiring security for costs, from a pauper appellant

3 (1930) 1930 Nag 23 (32)

4 (1879) 8 Mad 66 (67)

(1933) 1933 Mad 519 (521) 56 Mad 323
Absence of *prima facie* good case on appeal by pauper is good ground for security

5 (1918) 1918 Cal 618 (618)

Note 2

1 (1900) 24 Bom 314 (316)

Note 3

1 (1920) 1920 Mad 318 (318)

6 {

7 (1922) 1922 Lah 87 (88) 3 Lah 30

Towns Insolvency Act, 1909¹

5 Letters Patent Appeals

The rule applies to appeals under Cl 15 of the Letters Patent¹ unless the rules framed by the particular High Court are inconsistent therewith in which case the former will override the latter R 736 of the Bombay High Court which requires an appellant to deposit Rs 500 as security for costs in all cases is *not* inconsistent with this Rule and an appellant may be called upon under that Rule to furnish any additional security for costs that may be considered proper² Similarly R 354 framed by the Madras High Court is not inconsistent with this Rule³

6 Grounds for demanding security

As has been seen in Note 1 above the Court has in cases coming under the first paragraph of sub rule (1), a *discretion* in the matter of demanding security for costs But in view of the fact that the Rule tends to restrict a party's right of appeal, it should be applied with great caution¹ and very satisfactory grounds should be shown before making an order for security under this Rule² The discretion is not an arbitrary one but must be exercised in accordance with sound judicial principles³ The appellate Court may well be guided in exercise of such discretion by the provisions of O 25 R 1⁴ The following have been held not to be sufficient grounds for making an order for security under this Rule —

- (1) The mere fact that the appellant may lose and may not pay the costs of the appeal⁵ or that the appellant is an undischarged insolvent⁶ or is a poor man from whom, if the appeal fails it would be difficult to recover costs of the appeal⁷ It was never intended by the Legislature in enacting this rule to

Note 4

- 1 (1917) 1917 Cal 626 (696) 43 Cal 243
[But see (1810) 5 Beng L R 179 (150)]

Note 5

- 1 (1921) 1921 P C 50 (82) 48 Cal 481 48 Ind App 76 (P C) Overruling (1904) 27 Mad 121 (123)
(1925) 1925 Mad 1132 (1133)
(1924) 1924 Cal 781 (781) 51 Cal 693
(1923) 1923 Bom 399 (399)
2 (1923) 1923 Bom 399 (399)
(1926) 1926 Bom 49 (43)
[But see (1912) 17 Ind Cts 739 (740) 37 Bom 572]
[See also (1933) 1933 Bom 120 (120) The fact that costs of appeal are likely to be heavy is no ground for demanding further security]
3 (1925) 1925 Mad 1132 (1133)

ation
for order for security—Unsworn
statements of very vague character
—Security should not be ordered—
Applicant may apply again filing a
satisfactory affidavit in support of
his application

- 3 (1889) 13 Bom 459 (461)

- (1923) 1923 Bom 399 (399)

[See however (1923) 1923 Bom 264 (264) Where Macleod C J observed that the Court being given an absolute discretion no Bench of Judges can lay down Rules fettering the discretion of other Judges—It is submitted that His Lordship could not have meant by this to lay down that discretionary power need not be exercised in accordance with legal principles but may be exercised arbitrarily]

- 4 (1903) 6 Bom L R 661 (662)
5 (1923) 1923 Bom 399 (399)
6 (1890) 24 Q B D 656 Cook v Whellock—
Preferred in 30 Mad 145 and 1919 Cal 713
7 (1921) 1921 Pat 233 (233)
(1923) 1923 Mad 204 (205)
(1930) 1930 Lah 623 (630)
(1930) 1930 Lah 382 (383)
(1930) 1930 Lah 381 (384)
(1894) 21 Cal 576 (527)
(1887) 14 Cal 533 (536) Security for costs of suit
(1879) 3 Bom 241 (247)
(1886) 8 All 203 (204)
(1886) 1886 All W N 256 (256)
(1884) 4 All W N 99 (99)
(1883) 1883 All W N 147 (148)

derogate from the right of appeal given by law to every person who is defeated in the Court of first instance⁸

- (2) The mere fact that a third person has incited the appeal⁹ or that the appellant has parted with a portion of his interest in the subject-matter of the suit for the purpose of obtaining funds for the carrying on of the litigation¹⁰ or that a relative of the appellant is assisting the appellant financially in the litigation¹¹ or that the appellant has rich relations who can afford to pay the decree amount¹²
- (3) The mere fact that the appellant has not paid the costs of the original suit¹³
- (4) The fact that one of the appellants is a female¹⁴

From the above cases it is clear that mere poverty is no ground for ordering security. But poverty along with other circumstances may justify an order under this Rule¹⁵. Thus where the appellant is proved to be a mere puppet in the hands of others who are promoting the litigation from behind the scenes¹⁶ or where there is evidence of facts which cast doubts on the honesty and *bona fides* of the appellant, or the appeal is vexatious,¹⁷ the appellant may be ordered to furnish security under this Rule. Where the parties have agreed that security for costs should be given, the Court should pass an order for security under this Rule¹⁸.

Although mere poverty of the appellant is no ground for ordering security for the costs of the appeal it is also on the other hand not a ground for dispensing with security where such security is necessary in the circumstances of the case¹⁹.

Security for costs should not be ordered where the consequences of such an order would be unduly penal²⁰.

7 Delay in applying for security

The respondent should be prompt in taking advantage of this rule and must apply for security for costs, before he himself or the appellant incurs

(1888) 1888 All W N 46 (49)

a ground for ordering him to give security for costs

(1865) 1865 Bourke O O 110 Appellant who has no available property must if required give security for the costs of an appeal before proceeding with it

8 (1885) 7 All 542 (546)

9 (1886) 6 All W N 286 (286)

10 (1887) 14 Cal 533 (536)

11 (1923) 1923 Rang 244 (245)

12 (1915) 1915 Cal 595 (595)

13 (1931) 1931 Lch 70 (70)

(1933) 1933 Mad W N 263 (264)

(1903) 5 Bom L R 661 (662)

14 (1886) 1886 All W N 286 (286)

15 (1923) 1923 Bon 264 (264)

(1933) 1933 Mad W N 263 (264) Pauler v

pellant may in proper cases be ordered to give security.—Court can also go into matters which were not gone into when giving leave to appeal as a pauper

Bourke A O C 40

(1876 77) 2 Cal 233 (259) 4 Ind App 23 (12 C)

(1872) 18 South W R 102 (103)

(1881) 3 Mad 66 (67)

(1921) 1921 Pat 233 (233)

18 (1866) 1 Ind Jur N S 223

19 (1923) 1923 Mad 204 (205)

20 (1930) 1930 Nag 23 (29)

costs in the appeal¹ Any delay on his part will be construed as a waiver by him of his right under this rule²

8 Notice to show cause

It is a fundamental principle of law that no order can be passed against a person without giving him an opportunity to be heard in defence Hence, an order for security for costs of an appeal cannot be passed against a person without giving him notice to show cause why such an order should not be made¹ A mere notice to show cause does not amount to a demand and if the order for security is passed in his absence, he cannot be held to have failed to comply with the order if it was not communicated to him²

9 Amount of security

An order under this Rule may direct specified amount to be paid into Court as security for costs¹ It is, however, not necessary in all cases to specify the sum for which security must be given It is enough if the order directs security to be given for the costs of the appeal, or of the original suit or of both² A surety under this Rule is discharged as soon as the appeal is allowed, the liability is not revived merely because the appellate order is reversed by a higher Court³ The Taxing Officer's decision as to the amount for which security should be given is subject to revision by the High Court³

In Bombay, the practice is not to require security proportionate to the estimated costs of appeal but to require generally a security of only Rs 500⁴ See also the undermentioned case⁵

10 Extension of time for furnishing security

The Court may, in its discretion, enlarge the time allowed for furnishing the security ordered¹ and this may be done even though the period originally fixed has expired² (See S 148) But when once an appeal has been rejected for failure to give the security ordered, it is not thereafter open to the Court to extend the time for furnishing security³

As to the circumstances which would justify extension of time it is a matter purely in the discretion of the Court⁴ Thus, when the period fixed expires on a day on which the offices of the Court are closed for business, the security

Note 7

surely without inquiry on report of mamlatdar—The delegation of taxing security does not prevent the appellate Court from inquiring into its sufficiency

Note 8

1 (1883) 5 All 380 (351)

2 (1892) 5 Mad 205 (206)

Note 9

1 (1930) 1930 Mad 355 (356)

1 (1836) 18 All 101 (105) (E B) Overruling (1857) 9 All 164 (166)

2 (1927) 1927 All 522 (523)

(1921) 1921 Cal 525 (528)

3 (1927) 1927 Bom 493 (501)

4 (1884) 13 Bom 458 (462)

5 (1931) 1931 Bom 13 (15 16) Security for costs directed to be taken by lower Court—That Court accepting a

Note 10.

1 (1932) 1932 Mad W N 655 (655)

(1888) 1888 All W N 241 (242)

(1889) 17 Cal 1 (3) (P C)

2 (1885) 17 Cal 512 (515) 17 Ind App 1 (P C)

(1897) 21 Bom 546 (549)

(1891) 10 Bom 263 (266) Case of amendment of pleadings

(1897) 19 All 240 (243)

The following decisions to the contrary are obsolete —

(1888) 11 Mad 190 (191)

(1885) 11 Cal 716 (717)

(1875 78) 1 All 687 (688)

3 (1923) 1923 Cal 317 (316)

4 (1906) 17 Cal 1 (3) (P C)

(1890) 17 Cal 516 (517) 17 Ind App 9 (P C)

10. may be accepted on the re-opening day.⁵ Similarly where the appellant applied for extension of time on the ground that, on account of the prevalence of plague in Bombay he was not able to arrange for the security, it was held that time should be extended.⁶ That the appellant is a wandering Fakir is no excuse for not furnishing the security in time, it is the duty of every litigant to keep in touch with his case.⁷

11 Dismissal of appeal for failure to give security

On appellant's failure to give the security within the period fixed, the Court is bound under sub-R (2) to reject the appeal.¹ A special application by the respondent to have the appeal rejected is not necessary, and he can raise the objection at the hearing of the appeal.² Where the period fixed for giving security expired during the long vacation but the Court office was open during the vacation, it was held that it was not a compliance with the order if the security is given on the reopening day and that the appeal should be rejected.³ Where the security bond furnished was not drawn up in the terms of the Judge's order, it was held that there was a failure to give security and that the appeal should be rejected.⁴ But an appeal should not be rejected merely for a clerical error in the security bond and the error should be allowed to be corrected.⁵ In the undermentioned case⁶ where it was objected that the executant of the security bond had not been duly authorised to execute it on behalf of the appellant, the Privy Council held that the case should have been adjourned till a proper bond was executed and that the appeal should not have been summarily rejected. The appeal should not be rejected if the order for security has been passed without giving notice to the appellant.⁷ (See Note 8 *supra*) A mere notice to show cause does not amount to a demand for security and where an order for security is passed in the appellant's absence, the order must be communicated to him before he can be held to have failed to comply with it.⁸ Reasonable opportunity should be given to the appellant to furnish the security and where it is not given and the appeal is dismissed for the appellant's failure to comply with the order for security, the High Court can interfere in revision.⁹

Once an appeal is dismissed for failure to give security for costs, the Court cannot afterwards extend the time for giving security.¹⁰

12 Restoration of appeal so rejected

Under S 107 (2) read with O 25, R 2 (2) the Appellate Court may,

Discretion not to be lightly interfered with

5 (1876) 77 2 Cal 272 (273)

[But see (1893) 1883 All W N 254 (254) Period expiring during vacation—Court open for such business during vacation—Furnishing security on re-opening day is not enough]

6 (1897) 21 Bom 576 (579)

7 (1922) 68 Ind Cas 303 (307) (Lab)

N 11 1

view of the clear language of sub rule (1) this ruling is of doubtful correctness]

3 (1883) 1883 All W N 254 (254)

4 (1891) 1891 All W N 35 (35)

5 (1925) 1925 Oudh 402 (403)

6 (1927) 1927 P C 264 (265) (P C).

7 (1883) 5 All 380 (381)

8 (1892) 5 Mad 265 (266)

9 (1915) 1915 All 133 (134)

10 (1923) 1923 Cal 317 (319)

not permissive
(1875-78) 1 All 687 (688)

in its discretion, restore an appeal which has been rejected for failure to give security for costs¹ But where the appellant's application for extension of time has been heard and dismissed, on the merits, an application for restoration of the appeal rejected for failure to furnish security will be barred² An order restoring an appeal rejected under sub-R (2) will not bind the respondent if it is made without notice to him³

13 Limitation for application for restoration

It has been held by the Madras High Court that Art 168 of the Limitation Act applies to an application for the restoration of an appeal dismissed for failure to furnish security under this rule¹ Even if Art 168 be held not to apply the application ought to be made within a reasonable time and ordinarily would be too late after thirty days from the date of dismissal²

14 Appeal

An order rejecting an appeal for failure to furnish security for costs is not appealable either as an order under S 104 or as a decree.¹ Nor is such an order covered by Ss 109 and 110 *ante* so as to be appealable to the Privy Council.² No appeal lies against an order restoring³ or refusing to restore⁴ an appeal rejected under sub-R (2) for failure to give security

Letters Patent Appeal—An order dismissing a petition asking the Court to receive a sum of money as security for the costs of an appeal is a judgment within the meaning of Cl 15 of the Letters Patent and is appealable as such.⁵

15 Stamp and registration

See Arts 15 and 57, Sch I of the Stamp Act, 1899¹ and Art 6, Sch II of the Court Fees Act 1870. In cases where a security bond is compulsorily registrable, it is not necessary to register the bond until the security has been accepted.²

16 Practice

The usual procedure followed when ordering security for costs under this rule is that the respondent first obtains a rule nisi on affidavit as to the facts on which he relies. On the day fixed for hearing, the appellant shows cause and the respondent then replies. The respondent has a right of reply though the appellant has used no affidavit.² If neither party appears on the day fixed

1 (1907) 1 Ind Cas 748 (748) 11 Oudh Cas 40 (1893) 18 All 101 (104) *Occurring* (1893) 5 All 340
(1910) 4 Ind Cas 436 (437) (Mad)
(1903) 30 All 143 (145) 146
(1922) 1922 Lah 87 (87) 3 Lah 90
Contra (1874) 6 N W P H C R 172
(176) This case is obsolete
2 (1914) 1914 All 54 (54) 76 All 32
(1910) 4 Ind Cas 310 (341) 13 Oudh Cas 40
3 (1900) 1900 All 112 (114)
4 (1916) 1916 Cal 227 (228)
(1908) 70 All 143 (145)
5 (1902) 22 Mid 604 (604)
Note 15.
1 [See also] (1887) 11 All 10 (17) (F B)]
2 (1870) 13 Sath W R 41 (43)
Note 16.
1 (1871) 7 Beng L R 11 p 59 (60).

- 10, for hearing the rule *nisi* and the rule is discharged in consequence, it can be restored if a sufficient cause for the non-appearance of the applicant be shown²

17 Enforcement of security

Under S 145 of the Code, the liability of a surety under a security bond given under this rule can be enforced by summary proceedings in execution and a separate suit is not necessary for the purpose.¹ But the remedy by suit is *also* available and a suit against the surety is maintainable though execution of the decree against the judgment-debtor is barred by limitation. See Note 11 to S. 145 *ante*.

18 Form—See Appendix G, Form No 4.

- 11 **R. 11.** [S. 551.] (1) The Appellate Court, *after sending for the records*³ if it thinks fit *so to do*, and *after* fixing a day for hearing the appellant or his pleader⁵ and hearing him accordingly if he appears on that day, may dismiss the appeal^{4,6} without sending notice to the Court *from* whose decree the appeal is *preferred* and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not *appear* when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed¹¹

(3) The dismissal of an appeal under this *Rule* shall be notified to the Court *from* whose decree the appeal is *preferred*.

[1877—S. 551.]

Synopsis.

	Note No		Note No
Legislative changes	1	mortgage decree	10
Scope and object of the Rule	2	Dismissal for default under sub rule (2)	11
'After sending for the record'	3	Re admission of appeal dismissed for	
'May dismiss the appeal'	4	default	12
Notice to appellant	5	Review	13
Judgment, if should be written	6	Reference	14
Time barred appeal	7	Revision	15
Order of dismissal if a decree	8	Second appeal	16
Effect of dismissal—Amendment of		Restriction of grounds of 'appeal on	
decree	9	admission	17
Effect of dismissal of appeal from		Insolvency appeals	18

Other Topics

Dismissal after issue of notice to respondent, whether legal See Note 2, Pt. (4a).

2 (1885) 7 All 542 (544)

Note 17

1 The following are decisions to the same

effect prior to the present Code —
 (1877-78) 3 Cal 318 (319)
 (1889) 16 Cal 323 (326)
 (1906) 1906 Pun Re No 103, page 337 (F B).

1 Legislative changes

- 1 The words in sub-r (1) after sending for the record *if it thinks fit* so to do are new This makes it clear that the Court is not bound to send for the record in any case (See Note 3)
- 2 In sub-r (2) the words the Court may make an order that the appeal be dismissed have been substituted for the words the appeal shall be dismissed for default This makes it clear that when an appeal is dismissed under sub-r (2) the order is merely an order of dismissal for default and not a decree and hence is not appealable [See S 2 sub-s (2)]

2 Scope and object of the Rule

This rule refers to a stage after the memorandum of appeal has been admitted and the appeal has been registered under R 9, *ante* ¹ It applies also to Letters Patent Appeals where the rules of the High Court do not prohibit its application to them ² But the rule does not apply to the summary dismissal of an appeal under S 476 of the Criminal Procedure Code ³ An order of dismissal for the appellant's failure to make the necessary deposit for printing may be covered by this rule or R 16 ⁴ The procedure of the rule is not applicable to a case where notice of the appeal has been issued to the respondent ^{4a} The rule contemplates the dismissal of an *appeal* Hence pending an appeal by the *defendant* the summary dismissal by the appellate Court, of plaintiff's suit as not being properly stamped is irregular ⁵ The rule applies also to proceedings under the Agra Tenancy Act III of 1926 but the Board is not bound under that Act to hear any *party before* rejecting an appeal summarily It applies also to appeals under the Bengal Tenancy Act of 1885 ⁶

3 After sending for the record

The words in sub-R (1) after sending for the record if it thinks fit so to do are new But even prior to the present Code it was held that it was not obligatory on the appellate Court to send for the record in every case in which it summarily dismissed the appeal ¹ But when the record has been lost and the appeal has been dismissed in consequence, the appeal should be retried when the record is found ²

4 May dismiss the appeal

The discretion given by this rule is a *judicial* discretion and not an arbitrary discretion ¹ It should be very sparingly used and only in exceptional cases ²

A pre-emption suit was decreed on condition of plaintiff paying the pre-emption money within a month from the decree The plaintiff appealed against the condition but the appeal was dismissed on the ground that the money had not been paid within one month It was held that the suit should not have been dismissed on that ground inasmuch as the condition of payment of money within one month was itself the subject of appeal ³ Where the High

Order 41 Rule 11—Note 2

- 1 (1893) 15 All 367 (363)
- (1905) 30 All 290 (292) (293)
- 2 (1970) 1900 Pat 509 (509) 4 Pat L Jour 695 Patna High Court Rules permit of summary dismissal of Letters Patent Appeals
- 3 (1930) 1290 Cal 282 (284)
- 4 (1916) 1916 Mad 473 (474)
- 4a (1906) 1906 All W N 186 (186)
- 5 (1892) 15 Mad 258 (283)
- 6 (1934) 1934 Cal 6 (7c) Appeal under S 174 of L T Act—Court has power to dismiss under this Rule

Note 3

- 1 (1903) 2 Ind Cas 405 (406) (Cal)
- (1876) 18 G Pun Re No 43 page 60
- 2 (1891) 1851 All W N 26 (27)

Note 4

- 1 (1916) 1916 U B 9 (10) 2 Upp Bur R 22
- 2 (1883) 1883 All W N 221 (221)
- [See (1873) 80 J Bom 462 (465) *Held* that the lower appellate Court had gone wrong in disposing of the appeal by *ex parte* order under R 11 summarily]
- 3 (1917) 17 Ind Cas 503 (1) (508) (All)

Court in dismissing under this rule, an appeal from an order of remand, reframed a certain issue it was held that the procedure adopted, though irregular, was not *ultra vires* ⁴

If an appeal is severable, it is open to the judge hearing the appeal under this rule to dismiss it in part and admit it in part, just as at the final hearing the Court may dismiss the appeal in part and allow it in part ⁵. But it is not open to the Court to admit the appeal and at the same time to restrict the grounds on which the appeal should be heard. See Note 17 *infra*

5 Notice to appellant

An appeal should not be dismissed under this rule unless notice of the day of hearing has been given to the appellant or his pleader ¹. The mere fact that the appellant on the day of filing the appeal may say that he does not intend to appear at the preliminary hearing, is no justification for the failure to give notice ².

6 Judgment if should be written - See O 41, R 31 Note 9

7 Time barred appeal

An appeal cannot be rejected on the ground of limitation *at the time of admission*, without fixing a date for hearing the appellant. If the Judge thinks that the appeal is too late, he should admit the appeal if it is otherwise valid, and fix a date for hearing the appellant on the question of limitation under R 11 before issuing notice to the respondent ¹. The rejection of an appeal under R 11 as being time barred is equivalent to a *dismissal* thereof and such an order is appealable ².

8 Order of dismissal if a decree

The dismissal of an appeal under this rule is a decree ¹ and appealable as such ² even if a formal judgment is not written under the provisions of R 31, *infra*.

9 Effect of dismissal—Amendment of decree

The dismissal of an appeal under this rule amounts to a decree which supersedes the decree of the lower Court. Hence after the dismissal, the decree can be amended only by the appellate Court and not by the lower Court ¹. The Bombay High Court has, however, held that the dismissal of an appeal under this rule leaves untouched the decree appealed from and the lower Court alone

⁴ (1932) 1932 All 16 (18)

⁵ (1934) 1934 Bom 207 (211) 38 Bom 397 and 406 (6 B). For instance if appeal relates to two survey numbers held under distinct titles Court may dismiss the appeal as to one and order notice as to the other survey number (1935) 1935 Lah 34 (35)

N. S. R.

Note 8

¹ (1926) 1926 Cal 638 (634) (1897) 24 Cal 759 (767)

²

never
appeal

was treated as a revision

Note 9

¹ (1908) 30 All 290 (292) (1829) 22 Mad 233 (234) (1897) 24 Cal 759 (762) (1906) 4 Cal L Jour 566 (567) (1910) 5 Ind Cas 261 (262) (Cil) [See also (1900) 1900 Lun Re No 9 page 31] [See further (1890) 18 Mad 214 (216) (F B) Decree confirmed on appeal—Appellate Court alone can amend

Note 7

¹ (1909) 2 Ind Cas 309 (360) 1 L L R 1, (1925) 1925 Oudh 643 (643 644) Appeal rejected as time barred without fixing date for hearing appellant—Order of rejection may be set aside on revision

² (1920) 1920 Pat 818 (870)

can amend the decree notwithstanding such dismissal² The High Court of Patna³ and the Judicial Commissioners Court of Nagpur⁴ have taken a similar view.

10 Effect of dismissal of appeal from mortgage decree—See O 94 R 3

11 Dismissal for default under Sub R (2)

If the appellant or his pleader does not appear when the appeal is called on for hearing, the appeal may be dismissed for default¹ But when no notice of the date fixed for hearing has been given to the appellant the appeal cannot be dismissed for default under sub-R (2)² A dismissal for default implies the *absence* of the party or his pleader—so where the pleader of the appellant is present but is unable through a physical disability to argue the case, and the appeal is dismissed, such dismissal is not for default³ Where an appeal is dismissed for default, it is the lower Court's decree that is the executable decree in the case⁴

12 Re admission of appeal dismissed for default

Under R 19, *infra*, an appeal dismissed for default under this rule may be re admitted See R 19, *infra*

13 Review

The dismissal of an appeal under sub R 1 precludes the lower Court from entertaining an application for review of the decree because it cannot be said in such a case that no appeal was preferred within the meaning of S 114 and O 47, R 1¹

But it is open to the appellate Court to review its order dismissing an appeal under sub-R (1), and it is not necessary to send notice to the respondent before doing so² An order granting a review of such an order of dismissal without notice to the respondent cannot be questioned by a different bench from that which granted the review³ When the dismissal of an appeal is set aside on review, the hearing of the appeal cannot be restricted to the grounds on which review was asked for⁴ Conversely the grounds urged in the application for review which were not raised in the original memorandum of appeal, cannot be argued at the hearing of the appeal after its restoration on review⁵ The summary rejection of an appeal as being time barred without fixing a date for hearing the appellant is in contravention of the law and forms a good ground for review⁶

When a second appeal is dismissed under R 11 (1) no application is maintainable for review of the order on the ground of the discovery of *new and important matter* as the High Court in second appeal is bound by the

decree]

¹ (1897) 21 Bom 543 (551)

² (1972) 1932 Pat 238 (239 240) 11 Pat 409

³ (1933) 1933 Nag 117 (118)

(1917) 1317 Cal 417 (419)

² (1916) 1916 Cal 741 (743) 43 Cal 178

Note 11

¹ (1892) 1892 Pun Re No 4 page 7 (Rev)

² (1892) 1892 Pun Re No 19 page 47 (Rev)

³ (1911) 9 Ind Cas 857 (857 858) (11)

⁴ See Note 5 to S 38 *ante*

[See also (1903) 1903 Pun Re No 8, page 28 Application to set aside a decree passed under S 551 (now the

Note 13

¹ (1906) 30 Bom 625 (630)

(1906) 4 Cal L Jour 566 (567)

(1922) 1922 Bom 130 (131) 46 Bom 1

1, findings of fact of the lower Court ⁷

14 Reference — See the undermentioned case ¹

15 Revision

Where no decree is drawn up on the dismissal of an appeal under sub-R (1) the so called appeal from the order of dismissal may be treated as an application for revision ¹ In the undermentioned case ² where the dismissal was due to a mistake of fact a revision was allowed

16 Second appeal

Summary rejection — At the time of admitting a second appeal the admission Judge is entitled to consider whether any of the grounds mentioned in S 100 and raised in the memorandum of appeal in fact exist and apply to the case before him, and if they do not, to reject the appeal summarily ¹ without fixing any date for hearing the appellant

17 Restriction of grounds of appeal on admission

A Court cannot on admission of an appeal under R 11, restrict the grounds on which the appeal is to be heard finally and any such restrictive order is *ultra vires* ¹ Where an appeal summarily dismissed under R 11 is restored on review the appellant is not confined at the hearing of the appeal to the grounds taken by him in his application for review ²

18 Insolvency appeals

The High Court has concurrent jurisdiction with the District Judge to grant leave to appeal under S 46 of the Insolvent Debtors Act (11 and 12 Vic C 21) and if the District Judge refuses leave to appeal the High Court may grant the same in which the appeal may be taken as admitted and there is no necessity to make a further application under O 41 ¹ There is nothing in the Provincial Insolvency Act (III of 1907) to interfere with any right of appeal to the Privy Council that might otherwise exist ²

2

R. 12. [S 552] (1) Unless the Appellate

Day for hearing
appeal

Court dismisses the appeal under Rule 11, it shall fix a day for hearing the appeal

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal so as to allow the respondent sufficient time to appear and answer the appeal on such day

[1877—S 552, 1859—S 211]

⁷ (1915) 1915 Cal 71 (71) 41 Cal 509

(1922) 1922 Cal 165 (165)

Note 14

1 (1878) 2 All 819 (823) (F B)

Note 15

1 (1914) 1914 Lah 174 (175)

2 (1914) 1914 Lah 174 (175)

Note 16

appeal the Court may summarily dismissing the appeal under R 19 Board's Circular S—II without giving notice to the parties]

Note 17

1 (1911) 11 Ind Cas 212 (213) (Cal)
(1934) 1934 Bom 207 (211) 38 Bom 30, and 406

(1916) 1916 Cal 741 (743) 43 Cal 178

2 (1916) 1916 Cal 741 (743) 43 Cal 178

Note 18

1 (1915) 1915 Cal 47 (477)

2 (1913) 1913 Ind Cas 435 (436) 40 Cal 654

Synopsis
Day for hearing appeal

Note No 1

1 Day for hearing appeal.

Care should be taken not only in fixing the original date for the hearing of a case, but in altering the date of hearing so that none of the parties is taken by surprise. But there is nothing illegal in a Judge taking up an appeal on any day he chooses to fix so long as the parties or their pleaders have sufficient notice and no prejudice is caused.¹ When fixing a date for the hearing of the appeal under this rule, the appellate Court is not entitled to restrict the appeal to one or more of the grounds specified in the memorandum of appeal.²

Appellate Court to
give notice to Court
whose decree appeal
ed *fr* c

R. 13. [S 550] (1) *Where the appeal is not dismissed under Rule 11, the Appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred*

Transmission of
papers to Appellate
Court

(2) *Where the appeal is from the decree of a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court*

Copies of exhibits
in Court whose dec
ree appealed *fr* o

(3) *Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made, and copies of such papers shall be made at the expense of and given to, the applicant*

[1877—S 550, 1859—S 343]

Synopsis
Note 1 o
1 Form
2

Note No
3

Legislative changes
Scope of the Rule

Other Topics

Records See Note^a Pts (1) d (3)

1 Legislative changes

The words "the appeal is not dismissed under Rule 11" have been substituted for the word "the memorandum of appeal" to be read

2 Scope of the Rule

If any part of the record has not been sent up by the lower Court and the appellant wishes to bring it before the appellate Court he should ask the appellate Court to send for it before the day of trial.¹ When a notice of appeal is sent by the High Court to the Court below with instructions to make a return within a specified time the appellant is entitled to the whole of the

on which the application for review
of order summarily dismissing the
appeal under O 41 R 11 was based
Order 41 Rule 13—Note 2

1 (1899) 11 South W R 245 (249)

1, findings of fact of the lower Court.⁷

14 Reference — See the undermentioned case 1

15 Revision

Where no decree is drawn up on the dismissal of an appeal under sub-R (1) the so called appeal from the order of dismissal may be treated as an application for revision¹ In the undermentioned case² where the dismissal was due to a mistake of fact a revision was allowed

16 Second appeal

Summary rejection — At the time of admitting a second appeal the admission Judge is entitled to consider whether any of the grounds mentioned in S 100 and raised in the memorandum of appeal in fact exist and apply to the case before him, and if they do not, to reject the appeal summarily¹ without fixing any date for hearing the appellant

17 Restriction of grounds of appeal on admission

A Court cannot, on admission of an appeal under R 11, restrict the grounds on which the appeal is to be heard finally and any such restrictive order is *ultra vires*¹ Where an appeal summarily dismissed under R 11 is restored on review, the appellant is not confined at the hearing of the appeal to the grounds taken by him in his application for review²

18 Insolvency appeals

The High Court has concurrent jurisdiction with the District Judge to grant leave to appeal under S 46 of the Insolvent Debtors Act (11 and 12 Vic, C 21), and if the District Judge refuses leave to appeal, the High Court may grant the same in which the appeal may be taken as 'admitted', and there is no necessity to make a further application under O 41¹ There is nothing in the Provincial Insolvency Act (III of 1907) to interfere with any right of appeal to the Privy Council that might otherwise exist²

R. 12. [S 552] (1) Unless the Appellate Court dismisses the appeal under *Rule* 11, it shall fix a day for hearing the appeal.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

344]

Note 14

1 (1878) 2 All 819 (823) (F B)

Note 15

1 (1914) 1914 Lab 174 (175)

2 (1914) 1914 Lab 174 (175)

Note 16

1 (1593) 15 All 367 (369)
[Compare (1917) 40 Ind Cas 139 (139) (Oudh) This was a decision of the United Provinces Board of Revenue. It was held in it that an allegation that there is no evidence to support a specific finding of fact is a ground

appeal the Court is not justified in summarily dismissing the appeal under R 19 Board's Circular 8-II without giving notice to the parties]

Note 17

1 (1911) 11 Ind Cas 212 (213) (Cal)
(1934) 1934 Bom 207 (211) 58 Bom 59² and 406

(1916) 1916 Cal 741 (743) 43 Cal 148
2 (1916) 1916 Cal 741 (743) 43 Cal 178

Note 18

1 (1915) 1915 Cal 477 (477)
2 (1913) 19 Ind Cas 435 (436) 40 Cal 653

Synopsis

Day for hearing appeal

Note No 1

1 Day for hearing appeal.

Care should be taken not only in fixing the original date for the hearing of a case, but in altering the date of hearing so that none of the parties is taken by surprise. But there is nothing illegal in a Judge taking up an appeal on any day he chooses to fix so long as the parties or their pleaders have sufficient notice and no prejudice is caused.¹ When fixing a date for the hearing of the appeal under this rule, the appellate Court is not entitled to restrict the appeal to one or more of the grounds specified in the memorandum of appeal.²

Appellate Court to
give notice to Court
whose decree appeal
ed from

R. 13. [S 550] (1) *Where the appeal is not dismissed under Rule 11, the Appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred*

(2) *Where the appeal is from the decree of a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be*

Transmission of
papers to Appellate
Court

specially called for by the Appellate Court

(3) *Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of, and*

Copies of exhibits
in Court whose dec
ree appealed from

given to, the applicant

[1877—S 550, 1859—S 343]

Synopsis

Legislative changes
Scope of the Rule

Note No 1
1
2 | Form

Note No
3

Other Topics

Records See Note 2 Pts (1) and (3)

1 Legislative changes

The words *here the appeal is not dismissed under Rule 11* have been substituted for the words *here the memorandum of appeal is registered*

2 Scope of the Rule

If any part of the record has not been sent up by the lower Court and the appellant wishes to bring it before the appellate Court, he should ask the appellate Court to send for it before the day of trial.¹ When a notice of appeal is sent by the High Court to the Court below with instructions to make a return within a specified time the appellant is entitled to the whole of the

Order 41 Rule 12—Note 1

1 (1863) 9 All W R 20 (21)

2 (1911) 11 Ind Cas 212 (213) (Cal)

(1916) 1916 Cal 741 (741) 43 Cal 118 Nor
is appellant restricted to the ground

on which the application for review
of order summarily dismissing the
appeal under O 41 R. 11 was based

Order 41 Rule 13—Note 2

1 (1863) 11 South W R 215 (219)

- 3, time allowed and may deposit his *talabana* and cause service of the notices any time within the period limited. Where the appellant is denied this liberty by the lower Court he ought to come before the High Court with a substantial application for orders.²

When the record has been lost at the time of the determination of an appeal, the appeal should be retried when the record is found again.³

3 Form

For form of notice to the lower Court of the admission of an appeal, see Appendix G, Form No 5

4

R. 14. [S 553] (1) Notice of the day fixed under Rule 12

Publication and service of notice of day for hearing appeal

shall be *affixed* in the Appellate Court-house and a like notice shall be sent by the Appellate Court to the Court *from* whose decree the appeal is *preferred*, and shall be served on the

respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appeal and answer, and all the provisions applicable to such summons and to proceedings with reference to the service thereof, shall apply to the service of such notice

(2) Instead of sending the notice to the Court *from* whose decree the appeal is *preferred* the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above referred to

Appellate Court may itself cause notice to be served

[1877—S 553, 1859—S 345]

Local Amendments

ALLAHABAD

add the following sub rule (8) —

- (8) Notwithstanding notice of any

a personimple

appeared and i

of a second appeal in the lower appellate Court or has appeared in the appeal

ary to serve

other than

less he has

or in the case

CALCUTTA

Insert the following as Clause (3) —

- (3) It shall be in the discretion of the appellate Court to make an order at any stage of the appeal whether on its own motion or *ex parte* dispensing with service of such notice on any respondent who did not appear either at the hearing in the Court whose decree is complained of or at any proceeding subsequent to the decree of that Court or on the legal representatives of any such respondent

Provided that—

- (a) The Court may require notice of the appeal to be published in any newspaper or newspapers as it may direct
(b) No such order shall preclude any such respondent or legal representative from appearing to contest the appeal

MADRAS

appeal is preferred

NAGPUR

Add the following sub rule —

- (3) The appellate Court may in its discretion dispense with notice to any respondent against whom the suit was heard *ex parte*

N W F P

Add the following proviso to sub rule (1) —

- Provided that with the permission of the Court no notice need be served upon a respondent who was a *pro forma* defendant in a suit which was decided *ex parte* against him "

POUDH

Add the following sub rule (3) —

- (3) Provided that in a case where a respondent was not apprehended during the hearing of the case in the Court from whose decree or order the appeal is preferred that any proceeding subsequent to that decree it shall only be necessary for the Court to make one attempt to effect personal service on such respondent or if such respondent is dead on his legal representative and, thereafter service may be effected by affixing a notice in some conspicuous place in the Court house of the District Judge within whose jurisdiction the suit is proceeding, was substituted along with one or other of the following methods, namely publication of the notice in a newspaper or affixing it to the wall or door of the *chitral* of the village where the respondent last resided or in other method as the Court may direct

RANGOON

Add the following sub rule (3) —

- (3) Nothing in the Rules requiring any notice to be served or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to an opposite party or respondent who did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court or on or to the legal representative of any such opposite party or respondent if deceased

SIND

Add the following sub-rule (3) —

- (3) The appellate Court may however, in its discretion dispense with the service of notice of the appeal or interlocutory application thereon on a respondent or opponent who has made no appearance at the trial Court

Synopsis.

	Note No		Note No
Service of notice	1	notices as not served	2
Dismissal of appeal after return of	Form		3

1 Service of notice

An appeal cannot be heard and decided without fixing a date for such hearing or without giving the respondent due notice of such date¹ But failure to give notice to an unnecessary respondent does not vitiate the appeal² It is the duty of the appellant to give the correct address of the respondent The latter is not bound to communicate his address to the Court or to the appellant and his omission to do so is not an abuse of the provisions of the Code³

The service of notice on the respondent should be in the manner provided for the service of summons on a defendant⁴

Order 41 Rule 14—Note 1

- 1 (1895) 1895 Pun Re No 10 p 21 (Rev)
This principle applies also to a Revenue Court
[See (1917) 1917 Lah 399 (400) 41 Ind Cas 889 (890) Appellate Court

decide an appeal *ex parte* when notice of appeal does not specify the date on which the appeal will be heard

- (1924) 11 Oudh L J 376 (376)
2 (1909) 1 Ind Cas 604 (606) 1909 Pun Re No 21
(1923) 1923 Cal 221 (223) 49 Cal 1013
3 (1917) 1917 Lah 399 (400) 41 Ind Cas 889 (890)

See the following cases —

- (1890) 1890 Pun Re No 8 p 11 (Rev)
(1916) 1916 Cal 513 (514) A Judge cannot

- 4 (1871) 15 South W R 31 (31) Respondent residing outside British territory—

- 4, Service of notice of appeal on the respondent's pleader is sufficient⁵ Where a guardian *ad litem* of a minor has been appointed by the Court, notice of the appeal may be served on the guardian⁶

2 Dismissal of appeal after return of notices as not served

Under O 9, R 5, if a summons is returned unserved and the plaintiff does not apply for fresh summons within three months thereafter, the suit must be dismissed unless within those three months, the plaintiff satisfies the Court that there is a sufficient cause for extending the period for applying for fresh summons. Thus Rule does not apply to appeals. Hence, although the appellant has applied neither for fresh notices nor for extension of time within the time allowable under O 9 R 5, the appeal need not be dismissed and the Court can excuse the delay and order fresh notices to issue¹. Conversely, the appellant cannot claim to be entitled, as of right, to apply for fresh notices within the period allowed under O 9, R 5. If the appellant fails to take out fresh notices within the time ordered by the Court, the appeal can be disposed of under O 17 R 3 notwithstanding that the period allowable under O 9, R 5 has not expired². If after the return of a notice of appeal as not served the appellant makes undue delay in applying for fresh notices the appellate Court may refuse to issue fresh notice³. Where an appeal against a decree for joint possession of land is dismissed as against some of the respondents for failure to serve notice of appeal on them, the appeal cannot proceed even as against the others⁴. See Note 5 to O 9 R 5.

3 Form

For form of notice to respondent see Appendix G Form No 6

Notice may be served by being sent by registered post.

- (1909) 1 Ind. Cav. 158 (161) 36 Cal 226
Respondent living in England—Best way would be to make over notice to appellant's pleader for service on respondent through an agent in England to be appointed for the purpose.
(1873) 20 Suth. W. R. 62 (62) Affixing on outer door of respondent's house when his address is known is illegal.
(1888) 15 Cal 681 (683) Person refusing registered letter is estopped from pleading ignorance of contents.
(1869) 11 Suth. W. R. 496 (496) When respondent is not found in the place where he resided at the commencement of the suit the substituted service may be ordered.
(1911) 1921 All 52 (52 53) 43 All 411

of his house—Substituted service should be applied for if respondent cannot be served personally.

- (1922) 1922 Oudh 263 (269)
(1903) 30 Cal 758 (760) Order in winding up of company under Companies Act—Appeal against order—Notice of appeal must be given within three weeks from the date of the order complained of.
(1879) 4 Cal 704 (704) (Do)
(1905) 27 All 509 (510) (Do)
5 (1912) 15 Suth. W. R. 290 (290)
6 (1926) 1926 Cal 1106 (1107) O 41 R 14 read with O 5 R 12 does not mean that the service must be on the minor himself and not on the guardian *ad litem*.

Note 2.

- 1 (1921) 1927 Bom 68 (69 70) 50 Bom 515
Single Judge of High Court can

fresh date and direct additional service by registered post.

- (1866) 6 Suth. W. R. 13 (14) Notice not served on respondent personally or on his recognised agent must be served by being affixed on the outer door

within the period specified in R 51

- 3 [See (1843) 20 Suth. W. R. 61 (63)]
4 (1915) 1915 Cal 786 (786)

Local Amendments

PATNA

O. 4

Add the following as R. 14-A.—

"14-A The appellate Court may, in its discretion, dispense with the service of notice hereinbefore required on a respondent, or on the legal representative of a deceased respondent, in a case where such respondent did not appear, either at any stage of the proceedings in the Court whose decree is appealed from or in any proceedings subsequent to the decree of that Court and no relief is claimed against such opposite party or respondent or his legal representative either in the original case or appeal"

SIND

Add the following as R. 14 A —

14 A Subject to the leave of the appellate Court nothing in these Rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent where such opposite party or respondent did not appear, either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court

R. 15. [S. 554] The notice to the respondent shall declare **O.**
that, if he does not appear in the Appellate
Court on the day so fixed, the appeal will be

Contents of notice

heard *ex parte*

[1877—S. 554; 1859—S. 345]

Synopsis

Contents of the notice

Note No. 1

1 Contents of notice

An appeal cannot be decided *ex parte* if the notice served on the respondent did not specify the date of hearing¹

PROCEDURE ON HEARING.

R. 16. [S. 555] (1) On the day fixed,⁵ or on any other **O.**
day to which the hearing may be adjourned,
the appellant shall be heard³ in support of the

Right to begin

appeal

(2) The Court shall then, if it does not dismiss the appeal
at once hear the respondent against the appeal, and in such case
the appellant shall be entitled to reply.

[1877—S. 555]

Synopsis

	Note No		Note No
Right to begin	1	absence of the other	4
Respondent's failure to appear on day specified in notice of appeal	2	Hearing of appeal before day fixed	5
"Shall be heard"	3	Effect of non compliance with the	
Hearing counsel of one party in the		Rules relating to appeals	6

Other Topics.

Failure to make necessary deposit for printing See Note 3, F N (1)

1 Right to begin

The mere fact that the respondent challenges the right of the appellant

16, to appeal does not give the respondent the right to begin¹ In the Calcutta High Court when the appellant's right to appeal is challenged, the practice is to require the respondent at the outset to indicate briefly the grounds upon which his objection is based²

In every appeal the burden is on the appellant to show that the judgment of the lower Court is wrong³ and thus is so notwithstanding the fact that the records of the suit have been destroyed⁴

Where there is a slip in the order in an appeal heard *ex parte*, the error will be attributed to the appellant⁵ Where an appeal is heard *ex parte*, it is the duty of the counsel for the appellant to bring to the notice of the Court all the authorities on the point, adverse as well as favourable⁶

2 Respondent's failure to appear on day specified in notice of appeal

A respondent who had not appeared on a date fixed for hearing but on which the appeal was not heard is not precluded from appearing on any subsequent day to which the hearing may stand adjourned¹

3 Shall be heard

An appellant is not entitled to be heard on the merits, if the appeal is liable to be dismissed on a preliminary ground¹ The appellate Court is bound to hear the respondent before determining an appeal unless it dismisses the appeal at once²

The Rule does not compel the Court to permit written arguments to be filed³

4 Hearing counsel of one party in the absence of the other

The Court cannot having regard to the provision contained in sub-rule (2) hear the arguments of the respondent's pleader alone in the absence of the appellant or his pleader and proceed to judgment without giving the latter an opportunity to reply If the Court does so it acts illegally and the judgment is not valid¹

5 Hearing of appeal before day fixed

Where, subsequent to the adjournment of an appeal the hearing of the appeal is advanced without notice to the respondent, and the appeal is decided *ex parte* before the date to which it was adjourned, the respondent

Cal 573 44

(Doubted)]

Note 3

1 (1916)

(1926) 1926 P C 77 (79) 4 Rang 518 (P C)

(1925) 1925 Oudh 221 (224) Equal possibility of judgment on either side being right is not enough.

(1926) 1926 Oudh 38 (39) Equal possibility of either view being right is not enough

(1921) 1921 P C 55 (56) 17 Nag L R 72 (P C) Some balance in appellant's favour must be established

[See also (1939) 137 Ind C 301 (Lah)]

4 (1898) 3 Cal W N 234

3

Note 4

1 (1921) 63 Ind Cas 915 (916) (Lah)

can have the *ex parte* decree set aside.¹ But the irregularity of deciding an appeal before the day fixed, will be condoned if the pleaders of both the parties were present and argued the case.²

If an appellate Court decides an appeal before the usual hour of commencing Court business and refuses to hear the appellant's counsel on his appearing in due time it acts with grave irregularity.³

6 Effect of non compliance with the Rules relating to appeals

If the Rules of the Court relating to appeals have not been complied with and no adequate excuse is offered the appeal should be dismissed.¹

R. 17. [S 556] (1) *Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear³ when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed²*

(2) *Where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte¹³*

[1877—S 556, 1859—S. 346]

Synopsis

	Note No		Note No
Legislative changes	1	<i>ex parte</i> decree	8
Dismissal for default of appearance	2	Effect of dismissal for default	9
'Appearance' Meaning of S Notes to O 3 R 1	3	Notice of date for hearing appeal	10
Dismissal on merits illegal	4	Restoration of appeal dismissed for default	11
Compromise after dismissal for default	5	Re hearing of appeal decided <i>ex parte</i>	12
Dismissal for default of prosecution	6	See R 21 below	13
Dismissal for default if affects cross objections See Notes under O 41 R 22	7	Hearing of appeal <i>ex parte</i> Sub R (2)	14
Dismissal for default of appeal from <i>ex parte</i> decree—Application to set aside		Appeal	15
		Letters Patent Appeal	16
		Revision	16

Other Topics

Amendment of decree after dismissal of appeal for default See Note 9 1 to (3) and (4) Limitation for restoring appeal dismissed for default See Note 9 to R 13 post

1 Legislative changes

The words "the Court may make an order that the appeal be dismissed" have been substituted for the words "the appeal shall be dismissed for default"

As to the effect of the change see Notes 4 and 14 *infra* Also Note 16 to S 556 sub S (2)

2 Dismissal for default of appearance

Under the old Code where the appellant did not appear when the appeal was called on for hearing the Court was bound to dismiss the appeal. Under the present Rule the Court is not *bound* to dismiss an appeal for default but *may* do so.¹ The Rule applies not only to the date originally fixed for hearing the appeal but also to any date to which the hearing may have been

Note 5

- (1928) 1926 Bom 424 (470)
- (1864) 1 South W R 216 (246)
- (1864) 1 South W R 216 (246)

Note 6

- (1889) 3 Bom II C R 63 (64)
Order 41 Rule 17—Note 2
- (1920) 1909 Rang 11 (12) 6 Rang 612

7. adjourned But it does not apply when the hearing has been completed and the case is merely adjourned for pronouncing judgment ^{1a}

An appeal cannot be dismissed for default, if the appellant is dead at the time because the Orders and Rules dealing with the case of the non-appearance of a suitor are not applicable to the situation which arises when the suitor is dead ²

Applicability of Rule to remanded appeal—The Rule applies also to a remanded appeal, and if the appellant fails to appear on the day fixed for the hearing of the appeal after remand, the appeal may be dismissed for default ³ But where the appellate Court remands a case for further enquiry and fixes a date for the return of the report, it cannot dismiss the appeal in default, before that date for non-appearance of the appellant in the *lower Court* on the date fixed for the enquiry ⁴ Where, however a case is remanded to the lower appellate Court for *disposal* that Court is entitled to dismiss the appeal for default if the appellant does not appear before it on the date fixed for the hearing ⁵

3 Appearance —Meaning of —See Notes to O 3 R 1

4 Dismissal on merits illegal

It was held under the former Code that the appellate Court had no power, in the absence of the appellant or his pleader, to dismiss the appeal on the merits but could only dismiss it for default ¹ In the present Rule, the words the Court *may* make an order that the appeal be *dismissed*² have been substituted for the words the appeal *shall* be *dismissed for default* which occurred in the corresponding section *viz*, S 556 of the former Code This change in the language of the Rule has given rise to a conflict of decisions as to the power of an appellate Court to dismiss an appeal on the *merits*, if the appellant does not appear at the time of hearing On the one hand it has

3 (1909) 4 Ind Cas 816 (817) U B R 1907 90
C P O p 27

4 (1926) 1926 Lah 574 (574)

(1895) 8 C P L R 69 (70)

5 (1874) 21 Suth W R 65 (65)

(1899) 2 C P L R 32 (33) Parties to a remanded appeal should apply to Court to which it has been remanded to fix a date for further hearing of the case

Note 4

1 (1881) 3 All 519 (520)

(1886) 8 All 277 (278 279)

(1873) 20 Suth W R 425 (426) Appeal though purporting to be dismissed on merits is to be considered as dismissed only for default

(1895) 18 J5 All W N 140 (140) Decision of Court dismissing on merits in such circumstances regarded as dismissal

L Jour 17 It is desirable to accommodate litigants to some extent if their pleaders happen to be absent in another Court and have a chance of attending within a short time so as not to disturb the business of the Court]

[See also (1927) 1927 Cal 98 (100) 53 Cal 827 Held that under the circumstances of the case the appellate Court was fully justified in dismissing the appeal for default]

1a (1894) 7 C P L R 1 (2)

(1900) 8 Oudh Cas 261 (263) Rule does not apply when arguments have been

96 Order of dismissal for default should be set aside on application of legal representative

been held by the High Courts of Allahabad,² Calcutta,³ Madras⁴ and Rangoon⁵ that the fact that the Court is not *bound* to dismiss an appeal for default does not enable it to dismiss the appeal on the merits, but only to adjourn it to another date. The High Court of Patna has, on the other hand, held that the powers of an appellate Court under the present Rule as altered in the new Code are wide enough to include the power to dismiss the appeal on the merits if the appellate Court should think fit to do so.⁶

5 Compromise after dismissal for default

An appeal was dismissed for default of both the parties. Subsequently the appellant applied to the Court for restoring the appeal and pending the disposal of the application both the parties filed a petition of compromise praying for a decree in terms of the compromise. The Court subsequently rejected the application for restoring the appeal. It was held that in the circumstances of the case the Court ought to have restored the case and given effect to the petition of compromise filed.¹

6 Dismissal for default of prosecution

Where the materials essential for the progress of an appeal such as supplying translations of vernacular documents preparation of Bench copies, etc. are wanting owing to the appellant's default the Court can dismiss the appeal for default of prosecution.¹

In the undermentioned case² the High Court of Madras has held that under R 105 of the Madras Appellate Side Rules, the High Court can dismiss a second appeal for failure to translate and print the necessary records. Such an order of dismissal is not *ultra vires* and does not contravene the provisions of this order.

7 Dismissal for default if affects cross objections—See Notes under O 41 R 22

8 Dismissal for default of appeal from *ex parte* decree—Application to set aside *ex parte* decree

The dismissal of an appeal for default is not a decree and therefore, the decree of the Court of first instance is not superseded by or merged in the order of the appellate Court. Hence after an appeal from an *ex parte* decree has been dismissed for default the first Court can allow an application to set aside the *ex parte* decree.¹ See Note 11 to O 9, R 13, *ante*.

9 Effect of dismissal for default

An order dismissing an appeal for default is not a decree and hence the decree of the lower Court is not superseded by or merged in it.¹ See Note 16 to S 2 sub S (2). It will follow from this that the decree to be executed in such a case is the decree of the lower Court.² (see Note 5 to S 38)

				(1896) 23 Cal 333 (346) Order dismissing appeal for failure to deposit cost of preparing paper book
				(1890) 17 Cal 299 (283) Failure to deliver copies to Registrar according to rules
			R 164	2 (1916) 1916 Mad 473 (474)
			Order treated as one for dismissal for default though purporting to be one of dismissal on merits	Note 8
6	(1911) 1921 Pat 325 (3.5)		Note 5	1 (1917) 1917 All 392 (393) 39 All 393
1	(1923) 1923 Cal 319 (319)		Note 6	
1	(1919) 1919 L B 139 (140)	9 L B R 206		

It will also follow that an application for amendment of the decree must be made to the lower Court and not to the appellate Court.³ A contrary view has, however, been expressed by the High Court of Madras in the undermentioned case.⁴ It is submitted that the view is not correct. On the dismissal of an appeal for default a fresh appeal from the same decree may be entertained, provided the period of limitation has not expired.⁵

The decision of the lower Court operates as *res judicata* although the appeal against it has been dismissed, not on the merits, but for default.⁶

10 Notice of date for hearing appeal

The appellant must have due notice of the date of hearing.¹ Where no date has been fixed for the hearing of an appeal the appellate Court has no power to dismiss the appeal for default. (See R 12 *infra*).² Where an appeal has been remanded for hearing, it is the duty of the parties to apply to the Court to fix a date for the hearing of the appeal or to ascertain from the Court what date has been fixed therefor.³ An appeal may be taken up and disposed of before the appointed day if the pleaders of the parties are present and argue the case without objection.⁴ Notice of the date of hearing must be given to the respondent before the appeal can be decided *ex parte*. (See R 14 *ante*).⁵

11 Restoration of appeal dismissed for default See R 19 *post*

12 Re hearing of appeal decided *ex parte*—See R 21 *below*

13 Hearing of appeal *ex parte*—sub rule (2)

The absence of the respondent on the date fixed for hearing is not by itself a ground for deciding the appeal in appellant's favour. The Court must go into the merits of the case and record a judgment.¹

14 Appeal

Under the Former Code there was a conflict of decisions as to whether an appeal lay against an order dismissing an appeal for default, some cases holding that such an order was a decree and as such appealable¹ while other

- 3 (1917) 1917 Nag 24 (24)
4 (1911) 10 Ind Cas 96 (97) (Mad)
5 (1923) 1923 Pat 514 (514) 2 Pat 730
6 (1923) 1923 Nag 1 (2)

Note 10

- 1 (1866) 5 South W R 215 (22)
(1919) 1919 Cal 1038 (1039) Appeal transferred to another Court without notice to any party—Appellants misled—Appeal dismissed for default—Appeal should be restored
(1915) 30 Ind Cas 139 (200) (Oudh) Appeal adjourned—Notice of date to which appeal was adjourned not properly served on appellant—Appellant not appearing—Appeal not to be dismissed for default
(1916) 1916 All 326 (327) Date of hearing postponed—Date not communicated—Dismissal of appeal for default—Held that there was sufficient cause for appellant's absence and that appeal should be restored
[See also (1865) 3 South W R 467 (164) For holiday intervening—Case on list but not taken up be-

- fore the holidays—New date to be fixed for hearing after the holidays]
2 (1924) 1924 Lah 979 (280)
(1865) 2 South W R 254 (254)
[See also (1934) 1934 Lah 984 (984)
On date of hearing judge absent and clerk of Court adjourning appeal—Dismissal of appeal for default on the adjourned day—Dismissal is not proper]
3 (1889) 2 C P L R 32 (33)
(1908) 4 Nag L R 166 (166)
4 [See (1864) 1 South W R 216 (216)]
5 (1917) 1917 Lah 399 (400) Appellant must give correct address of respondent—Respondent not bound to communicate his address

Note 13

- 1 (1920) 26 Ind Cas 986 (986) (U P B R) Failure to do so is an irregularity within S 21 of U P Land Revenue Act

Note 14

- 1 (1903) 30 Cal 660 (665) (11) Overruling (1896) 23 Cal 827 (827) and (1896) 23 Cal 111 (117)

cases holding contrary view ² The definition of a decree in S 2 (2) in the present Code expressly provides that an order of dismissal for default does not amount to a decree Also, in the present Rule the words 'the Court may make an *order*' that the appeal be dismissed have been substituted for the words 'the appeal shall be dismissed for default' which occurred in the old section Reading S 2 (2) and O. 41, R 17 together, it is clear that an order dismissing an appeal for default is not a decree Nor is it one of the appealable orders referred to in S 104 Hence no appeal lies from such an order ³ The proper procedure to set aside the order is to apply under R 19, *infra*

Where an appeal is dismissed on the merits, the order is a *decree* and is appealable as such notwithstanding that the Court *ought to have* dismissed the appeal for default and not on the merits ⁴ But in some old decisions it was held that in such cases, the order, though dismissing the appeal on the merits, must nevertheless be regarded as an order dismissing the appeal for default ⁵

An appeal was dismissed as against some of the respondents on the ground of want of proper service of notice on them When the appeal came on for hearing against the other respondents it was dismissed on the ground that it was not maintainable against them alone *Held* that in an appeal against the decree of dismissal the previous order dismissing the appeal against some of the respondents could be attacked under S 105 ⁶

An order dismissing an appeal for failure to pay the deficiency in the stamp for the appeal is an order of rejection of the appeal and as such constitutes a decree ⁷ See S 2 (2) It has been held by the Oudh Judicial Commissioner's Court ⁸ that when an appeal is dismissed under an erroneous impression as to procedural law, an appeal lies from the order of dismissal because the effect in such case is that of dismissal on a preliminary point (See Notes under R 11 *supra*)

See also Note 12 to S 96, *ante*

15 Letters Patent Appeal

No appeal lies under the Letters Patent from an order dismissing an

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|---|--|
| (1900) 93 Cal 51 (83) | 1907 09 Civ Pro Code page 27 |
| (1897) 16 Lom 23 (20) | (1913) 20 Ind Cas 1 (1) (Cal) An order dismissing suit for default—No appeal lies from order—The fact that a decree was drawn up cannot alter the nature |
| [See also (1864) 1864 South W R 170 (171)] | |
| 2 (1893) 10 All 30 (63) | |
| (1881) 3 All 519 (270) | |
| (1881) 3 All 397 (393) | |
| (1878-80) 2 All 616 (617) | |
| (1892) 1892 All W N 2 (2) | |
| (1879) 1879 Lun Re No 113 page 319 | |
| (1907) 31 Mad 157 (160) | |
| (1897) 10 C P L R 32 (32) | |
| (1900 1907) 1 L B R 183 (181) | |
| (189, 1901) 2 U B R 206 | |
| [See also (1898) 22 Mad 221 (223) | R 8) although it was erroneously passed as one of dismissal for default] |
| Decision dismissing suit in default of appearance by plaintiff is an order and not a decree and there is no first or second appeal therefrom] | |
| 3 (1916) 1916 All 376 (326) | 5 (183) 20 South W R 425 (426) |
| (1912) 14 Ind Cas 823 (823) | (1811) 15 South W R 143 (143) |
| (1925) 1925 Nag 276 (238) | (1895) 1895 All W N 140 (140) |
| (1909) 4 Ind Cas 816 (817) | (1884) 1884 All W N 16; (167) |
| Lip Bur R | 6 (1929) 1929 Pat 609 (610 611) |
| C P C 333 & 334 | 7 (1922) 1922 Pat 281 (282) 6 Pat L Jour C 5 |
| | 8 (1914) 1914 Oudh 303 (304) |

17, It will also follow that an application for amendment of the decree must be made to the lower Court and not to the appellate Court³ A contrary view has, however, been expressed by the High Court of Madras in the undermentioned case⁴ It is submitted that the view is not correct On the dismissal of an appeal for default a fresh appeal from the same decree may be entertained, provided the period of limitation has not expired⁵

The decision of the lower Court operates as *res judicata* although the appeal against it has been dismissed not on the merits, but for default⁶

10 Notice of date for hearing appeal

The appellant must have due notice of the date of hearing¹ Where no date has been fixed for the hearing of an appeal the appellate Court has no power to dismiss the appeal for default (*See R 12 infra*)² Where an appeal has been remanded for hearing it is the duty of the parties to apply to the Court to fix a date for the hearing of the appeal or to ascertain from the Court what date has been fixed therefor³ An appeal may be taken up and disposed of before the appointed day if the pleaders of the parties are present and argue the case without objection⁴ Notice of the date of hearing must be given to the respondent before the appeal can be decided *ex parte* (*See R 14 ante*)⁵

11 Restoration of appeal dismissed for default *See R 19 post*

12 Re hearing of appeal decided *ex parte* — *See R 21 below*

13 Hearing of appeal *ex parte*—sub rule (2)

The absence of the respondent on the date fixed for hearing is not by itself a ground for deciding the appeal in appellant's favour The Court must go into the merits of the case and record a judgment¹

14 Appeal

Under the Former Code there was a conflict of decisions as to whether an appeal lay against an order dismissing an appeal for default some cases holding that such an order was a decree and as such appealable¹ while other

- 3 (1917) 1917 Nag 24 (24)
- 4 (1911) 10 Ind Cas 96 (97) (Mad)
- 5 (1923) 1923 Pat 514 (514) 21 AL 730
- 6 (1923) 1923 Nag 1 (2)

Note 10

- 1 (1886) 5 Suth W R 416 22 (22)
- (1910) 1919 Cal 1038 (1039) Appeal transferred to another Court without notice to any party — Appellants misled — Appeal dismissed for default — Appeal should be restored
- (1915) 30 Ind Cas 199 (200) (Oudh) Appeal adjourned — Notice of date to which appeal was adjourned not properly served on appellant — Appellant not appearing — Appeal not to be dismissed for default
- (1916) 1916 All 326 (327) Date of hearing postponed — Date not communicated — Dismissal of appeal for default — *Held* that there was sufficient cause for appellant's absence and that appeal should be restored
- (See also (1885) 7 Suth W R 467 17 (17) Long holiday intervening — Case on list but not taken up before the 101 days — New date to be fixed for hearing after the holiday)

- 2 (1924) 1924 Lah 279 (280)
- (1865) 2 Suth W R 254 (254)
- [See also (1934) 1334 Lah 984 (984) On date of hearing judge absent w clerk of Court adjourning appeal — Dismissal of appeal for default on the adjourned day — Dismissal not proper]
- 3 (1880) 2 Cal L R 32 (33)
- (1908) 4 Nag L R 164 (165)
- 4 [See (1864) 1 Suth W R 246 (246)]
- 5 (1917) 1917 Lah 399 (400) Appellant must give correct address of residence — Respondent not bound to communicate his address

Note 13

- 1 (1920) 56 Ind Cas 386 (386) (U P F R) Failure to do so is an irregularity within S 21 of I I Civil Rule no Act

Note 14

- 1 (1903) 30 Cal 600 (66) (11) Overruled (1896) 23 Cal 927 (927) and (1906) 33 Cal 115 (115 117)

cases hold, contrary view ² The definition of a decree in S 2 (2) in the present Code expressly provides that an order of dismissal for default does not amount to a decree Also in the present Rule the words the Court may make an *order* that the appeal be dismissed have been substituted for the words the appeal shall be dismissed for default which occurred in the old section Reading S 2 (2) and O 41 R 17 together it is clear that an order dismissing an appeal for default is not a decree Nor is it one of the appealable orders referred to in S 104 Hence no appeal lies from such an order ³ The proper procedure to set aside the order is to apply under R 19 *infra*

Where an appeal is dismissed on the merits, the order is a *decree* and is appealable as such notwithstanding that the Court *ought to have* dismissed the appeal for default and not on the merits ⁴ But in some old decisions it was held that in such cases, the order, though dismissing the appeal on the merits, must nevertheless be regarded as an order dismissing the appeal for default ⁵

An appeal was dismissed as against some of the respondents on the ground of want of proper service of notice on them When the appeal came on for hearing against the other respondents it was dismissed on the ground that it was not maintainable against them alone *Held* that in an appeal against the decree of dismissal the previous order dismissing the appeal against some of the respondents could be attacked under S 105 ⁶

An order dismissing an appeal for failure to pay the deficiency in the stamp for the appeal is an order of rejection of the appeal and as such constitutes a decree ⁷ See S 2 (2) It has been held by the Oudh Judicial Commissioners Court ⁸ that when an appeal is dismissed under an erroneous impression as to procedural law an appeal lies from the order of dismissal because the effect in such case is that of dismissal on a preliminary point (See Notes under R 11 *supra*)

See also Note 12 to S 96 *ante*

15 Letters Patent Appeal

No appeal lies under the Letters Patent from an order dismissing an

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| (1900) 28 Cal 81 (89) | 1907 09 Civ Pro Code page 27 |
| (1897) 16 Bom 3 (20) | (1913) 20 Ind Cas 1 (1) (Cal) An order dismissing suit for default—No appeal lies from order—The fact that a decree was drawn up cannot alter the nature of the order |
| [See also (1864) 1864 Suth W R 1 6 (1,)] | 4 (1924) 1924 All 144 (144) 44 All 603 [Conversely see (1899) 22 All 66 (77)] |
| 2 (1933) 15 All 350 (63) | |
| (1851) 3 All 19 (20) | |
| (1851) 3 All 252 (283) | |
| (18 8 80) 9 All 616 (614) | |
| (1892) 1892 All W N 1 (2) | |
| (18 9) 1899 Lun Re No 113 page 319 | |
| (1907) 31 Mad 157 (160) | |
| (1897) 10 C P L R 32 (32) | |
| (1900 1907) 1 L B R 183 (181) | |
| (1897) 1 01) 2 U B R 206 | |
| [See also (1898) 22 M d 221 (223) Decision dismissing suit in default of appearance by plaintiff is an order and not a decree and there is no first or second appeal therefrom] | R 8) although it was erroneously passed as one of dismissal for default] |
| 3 (1916) 1916 All 326 (326) | 5 (18 3) 20 Suth W R 425 (476) |
| (1912) 14 Ind Cas 823 (823) 39 Cal 311 | (18 1) 15 Suth W R 143 (143) |
| (1920) 1925 Nag 786 (238) | (1890) 1890 All W N 140 (140) |
| (1909) 4 Ind Cas 816 (814) Ulp Bur R | (1884) 1884 All W N 167 (16) |
| C P C 333 & 331 | 6 (1929) 1929 Pat 609 (610 611) |
| | 7 (1922) 1922 Pat 261 (232) 6 Pat L Jour 675 |
| | 8 (1914) 1914 Oudh 303 (301) |

7 appeal for default ¹

16 Revision

An application for revision may lie against an order dismissing an appeal for default ¹

R. 18. [S 557] *Where on the day fixed,² or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that the appeal be dismissed*

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing

[1877—S 557, 1861—S 5]

Local Amendment

MADRAS

after the words cost of serving the notice insert the words or if the notice is returned unserved to deposit within any subsequent period fixed the sum required to defray the cost of any further attempt to serve the notice

Synopsis

	Note No		Note No
Dismissal for default in depositing cost of notice	1	Dismissal for failure to supply identifier	4
Appeal cannot be dismissed before day fixed for hearing	2	Re-admission of appeal dismissed	See
Effect of dismissal of appeal against one of several respondents	3	R 19 below	5
		Appeal	6
		Revision	7

1 Dismissal for default in depositing cost of notice

This Rule enables the appellate Court to dismiss an appeal only when the process fees for service of notice on the respondent have not been deposited. But it does not warrant the dismissal of an appeal merely because the appellant has not filed the notice required to be filed by the circular orders in the Court for the purpose of issuing process ¹ An appeal is liable to be dismissed for default in depositing the cost of notice although the default was committed by an ignorant business agent of the appellant ²

An order of dismissal cannot be made under this Rule unless the appellate Court has fixed a date by which the cost of notice is to be paid ³

Note 15

- 1 (1893) 15 All 359 (363)
(1892) 14 All 361 (361)

Note 16

- 1 (1924) 192 J. Ag 236 (223)
(1896) 18 All 119 (120)

Order 41 Rule 18—Note 1

- 1 (1912) 13 Ind Cas 694 (694) (Cil)
2 (1869) 11 South W R 417 (418)
3 (1919) 1919 Lch 203 (203) 1919 Lch: Re No 163
(1880) 18 Old Lch Re No 13 p 29
[See also (1869) 11 South W R 230 (290)]

2 Appeal cannot be dismissed before day fixed for hearing

An order of dismissal cannot be made under the Rule before the day fixed for hearing, merely because the appellant has failed to deposit the cost of notice within the time fixed by the Court¹

3 Effect of dismissal of appeal against one of several respondents

Where a decree for joint possession is passed in favour of three respondents, and the appeal from the decree is dismissed as against one of them for failure to serve notice on him the appeal cannot proceed against the other two respondents the reason is that even if the decree is set aside in the appeal against them the entire decree which is a joint one, can be executed by the other respondent so as to nullify the decree of the appellate Court¹

4 Dismissal for failure to supply identifier

The default referred to in the Rule is default in paying the cost of notice before the time fixed. Hence an appeal cannot be dismissed under the Rule on account of the appellant's failure to supply an identifier for identifying the respondent to the process server¹

5 Re admission of appeal dismissed—See R 19 below**6 Appeal**

No appeal lies against an order under this Rule. The proper remedy is under R 19¹

7 Revision

Before an appellate Court can dismiss an appeal under this Rule it must fix a date by which the process-fees are to be paid. If it does not do so, its order of dismissal can be set aside in revision. Where, however, the appellant fails to pay the process-fees even on the date of the hearing of the appeal and also omits to plead that the non payment was due to the fact that he had not been directed to pay by any fixed date, the order of the appellate Court will not be interfered with in revision¹

R. 19. [S 558] Where an appeal is dismissed under

Rule 11, sub-rule (2) or Rule 17 or Rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal, and where it is proved that he was prevented by any sufficient

Re admission of appeal dismissed for default

cause³ from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit² the appeal on such terms as to costs or otherwise as it thinks fit

[1877—S 558; 1859—S 347]

Note 2

1 (1904) 95 Cal 535 (537)

Note 3

1 (1915) 1915 Cal 766 (766)

[See also (1930) 1930 Cal 346 (347) suit for possession against five defendants—Suit dismissed—Appeal by plaintiff—Service on respondents 4 and 5 not proved and hence appeal dismissed as against them—Respondents 4 and 5 were necessary parties and hence whole appeal stood dis-

missed]

Note 4

1 (1923) 1923 Pat 114 (115)

[See also (1929) 1929 Pat 609 (610) Failure to file identifier as evidence—O 41 R 18 does not apply]

Note 6

1 (1919) 1919 Lah 203 (203) 52 Ind Cas 179 (171) 1919 Pun Re No 169

Note 7

1 (1919) 1919 Lah 203 (204) 1919 Pun Re No 169

MADRAS

Local Amendment

t 1908 shall apply to

Synopsis

Scope and applicability of Rule	1	paper book or to pay Court fees	6
'Shall re admit the appeal	2	Inherent power to restore appeal dis	
Sufficient cause	3	missed for default See S 151 Note 2	7
Court to which application for re		Other remedy	8
stitution is to be made	4	Limitation	9
Notice	5	Appeal	10
Dismissal for failure to deposit cost of			

Other Topics

Summary rejection of application to restore—If proper See Note 3 It (1)

1 Scope and applicability of Rule

This rule applies only where an appeal has been dismissed under any of the rules specified therein¹ O 41 R 17 does not apply when the arguments have been heard Hence the dismissal of an appeal in default when the arguments have been heard is not covered by Rule 17 and thus rule does not therefore apply to such a case²

2 Shall re admit the appeal

The expression used in the corresponding section of the former Code, viz S 558 was may re admit the appeal Nevertheless it was held by the Madras High Court under the old Code that the Court was *bound* to restore the appeal if sufficient cause was established¹ In the present rule legislative effect is given to this view²

3 Sufficient Cause—See Notes to O 9 R 9 ante

When an application is made to restore an appeal dismissed for default the Court should not reject the application summarily, but should give the applicant an opportunity to substantiate his allegations, as to sufficient cause A summary rejection without enquiry is improper¹

Order 41 Rule 19—Note 1

- 1 [S c (1868) 10 Suth W R 400 (451)]
 [See also (1915) 1915 Cal 622 (623)
 Consent decree passed due to appeal
 but s fraud—Re hearing of appeal—
 R 19 does not apply]
 (1898) 1898 All W N 155 (156) Dismissal

Note 3

- 1 (1927) 1927 Cal 898 (899)
 (1935) 1935 Lesh 110 (110)
 (1928) 1928 Cal 102 (102)
 (1925) 1925 Cal 500 (501)
 (1925) 1925 Cal 269 (269)
 (1920) 1920 Cal 663 (663)
 (1871) 15 Suth W R 80 (80) Judge refused

Application to re admit stamped
 with Court fee of Rs 2—Application
 is entertainable under O 41 R 19
 read with S 151 and is sufficiently
 stamped]

- 2 (1900) 8 Oudh C 18 261 (262)

Note 2

- 1 (1900) 26 Mad 599 (GG1)
 2 [See (1912) 15 Ind C 353 (353) (L B)]

able or not

[See also (1931) 1881 All W N 27 (27)
 Before dismissing application for re
 admission of appeal Court should
 enquire into the applicant's allea
 tions]

- (1900) 132 Ind C 5 (5) (Lah)
 (1919) 1919 Lah 2 6 (27)
 (1903) 1903 Lat 123 (123)

As to what amounts to "sufficient cause," see the undermentioned cases ²

4 Court to which application for restoration is to be made

The application must be made to the Court which dismissed the appeal for default ¹

5 Notice

Order 9, R 9 lays down, that notice must be given to the defendant before a suit dismissed for default of plaintiff's appearance is restored. In the undermentioned case¹ it was held by the Allahabad High Court that even if O 9, R 9 be held to apply to appeals by force of S 107 sub-S (2), notice is not necessary for the restoration of an appeal dismissed for default owing to the absence of *both the parties*. But the propriety of an *ex parte* order setting aside an order of dismissal for default may be questioned at the hearing of the appeal ² The dismissal of an appeal for failure to pay the deficit Court-fee on the memorandum of appeal is not a dismissal for default. An application for restoration in such a case is not covered by this rule but is an application for review under O 47 and notice to the opposite party is necessary ³

2 Absence of pleader in another Court— Miscalculation of time—May be sufficient cause —

(1932) 1932 Lah 65 (65)

(1926) 1926 Cal 1231 (1231)

(1929) 79 Ind Cas 504 (2) (505) (Lah) Counsel turning up immediately and satisfying that his failure to appear was unintentional

[But see (1923) 1923 Lah 97 (97)]

(1914) 1914 Cal 763 (764)

(1925) 1925 Oudh 234 (234 235)

Appeal unexpectedly called earlier than expected is sufficient cause —

(1932) 1932 Lah 357 (358)

[But see (1924) 1924 Lah 189]

(1907) 1907 Pun W R 69

(1926) 1926 Rang 109 (110) 4 Rang 18

[But see (1908) 31 Mad 157 (159)]

Appeal taken up at an earlier date but ample notice given—Not a sufficient cause]

court

—

218

ling

to inform party of transfer of appeal to another Court

Other cases in which it was held there was sufficient cause —

(1910) 8 Ind Cas 226 (227) (Lah) The pleader's absence in a case need not be satisfactorily explained if the appellant can give a reasonable excuse for his own absence

(1908) 35 Cal 739 (802 806) Pleader being ill had transferred his brief to another pleader whom the Judge declined to hear as his name did not appear in the talalatnama

(1930) 1930 All 217 (218) 52 All 536 Appeal

appeals

nature

mistake

of the pleader as to date of hearing
(1889) 1889 All W N 125 (126) Illness of pleader

Illness of one of several appellants—Not a sufficient cause —

(1888) 1888 Pun Re No 83 page 94

Laches of advocate or carelessness of his

(1933) 1933 Lah 1043 (1043) Failure of counsel to enquire what cases he has

r 65

(See also (1910) 5 Ind Cas 120 (121)

(All))

(1926) 1926 Cal 1152 (1152) Pleader arriving late owing to rain—Not a sufficient cause

Note 4

1 (1864) 1864 Suth W R 315 (316) District Judge can not restore appeal dismissed in default by Subordinate Judge

(1890) 15 Bom 107 (109) Appeal transferred by District Judge to Assistant Judge under S 17 of Bombay Civil Courts Act for trial—Assistant Judge dismissing appeal for default—Application for re-admission of appeal to be made to him and not to District Judge

Note 5

1 (1912) 17 Ind Cas 292 (293) (All)

2 (1900) 1920 Sind 31 (35) 14 Sind L R 239

3 (1922) 1922 Pat 281 (283) 6 Pat L Jour 625

19

6 Dismissal for failure to deposit cost of paper book or to pay Court fees

This Rule applies, as has been stated in Note 1 above only where the dismissal has been under any of the rules specified therein. Hence the Rule does not apply where an appeal has been dismissed under the High Court rules for failure to deposit the cost of preparing the paper book. The remedy in such a case is not by an application under this rule but an application for review.¹ Similarly, where an appeal is dismissed for failure to pay deficit Court-fees within the time allowed by the Court, the appeal cannot be restored under this rule.²

7 Inherent power to restore appeal dismissed for default — See S 151 Note 2**8 Other remedy**

When an appeal is dismissed for default the applicant may present a fresh appeal provided the period of limitation for an appeal has not expired. He is not confined to his remedy under this rule.¹ An appellant whose appeal has been dismissed for default may also apply for review in a proper case. The Allahabad High Court has held that when the appellant has allowed his remedy under this rule to become time-barred, he cannot come by way of an application for review.² But the Punjab Chief Court has held a contrary view.³

In an application for restoration under this rule the only thing that the Court can consider is whether there was 'sufficient cause' for appellant's default. Questions as to the *legality* of the order of dismissal can only be raised in an application for review.⁴

9 Limitation

An application for restoration of an appeal under this rule is governed by Art. 168 of the Limitation Act¹ and must be filed within 30 days from the date of the dismissal of the appeal.² The Court has no power to enlarge the said period.³ Proceedings taken on an application filed after the period of limitation are invalid.⁴ An application for re-admission made not under

Note 6

ruling

(1921) 1921 Bom 20 (20) 45 Bom 618
(1867) 8 Suth W R 361 (361)
(1863) 10 Suth W R 437 (437) Under S 317 of Act VIII of 1859 also the period of limitation was 30 days

(474)

Order of dismissal in such a case is covered by R 11 or R 18 of O 41

[See however (1932) 1932 Cal 611
The application does not fall under O 47 R. 1—Court fee of Rs. 2 is sufficient for the application]

2 (1922) 1922 Pat 261 (262) 6 Pat L Jour 625
(1920) 1920 Pat 603 (609) 55 Ind Crs 502 (503)

(F B) that sea of 1 was based on the language of S 553 of the Code of 1877 and is not good law under the present Code
2 (1903) 31 Cal 150 (151) Notice that application would be made on further date does not prevent limitation
(1867) 4 Bom H C R (V C) 22 (22) Under S 317 of Act VIII of 1859 where appellant's elder had died and ap

Note 8

(1915) 1915 Mad 1111 (1111 1112) Question of competency of Judge to pass order under R 18 not to be raised in application under R 19

Note 9

1 (1933) 1933 Rang 96 (97)

2 (1934) 13 Rang 100

S 558 (O. 41, R. 19), but under the rules of the Court, is not governed by Art 168 and is not subject to any law of limitation.⁵

Where the order of dismissal is *ultra vires* Art. 168 does not apply.⁶ Thus, an appeal cannot be dismissed for default where the appellant is dead. Where an appeal is dismissed for default under such circumstances, the appellant's legal representatives need not apply for restoration within the period of 30 days allowed under Art. 168. The order of dismissal is no bar to the application of the legal representatives to be brought on the record and such an application is governed by Art. 176 of the Limitation Act.⁷ The provisions of S 5 of the Limitation Act⁸ or of S 6 of that Act⁹ do not apply to an application under this rule.

See, however, the amendments of this Rule by the High Court of Madras.

10 Appeal

No appeal lies against an order granting an application for restoration of an appeal under this rule.¹ An order *refusing* such an application is appealable under O 43 R 1 (f).² But no appeal lies against an order refusing an application for restoration to which this Rule does not apply.³

5 (1906) 23 Cal 339 (347)

(1920) 1920 Mad 974 (974) Even Art 181 does not apply to such a case

6 (1924) 1924 Lah 273 (280) Date of hearing not fixed—No notice of date of hearing—Order of dismissal for default—Appellants not informed of dismissal—Order of dismissal is *ultra vires* [But see (1930) 1930 Rang 225 (234) 8 Rang 380 (F B) Appeal dismissed under R 19 before date of hearing contrary to that rule Art 168 applied]

7 (1913) 19 Ind Cas 526 (527) 35 All 331 16 Oudh Cas 134 40 Ind App 151 (PC) (1919) 1913 Lah 447 (447) 1918 Pun R No 96

[But see (1920) 1920 Sind 34 (36) 14 Sind L R 239 It is submitted that an order of dismissal for default can be passed against an appellant's legal representatives before expiry of limitation for application to be brought on record is wrong]

8 (1879) 18 J L R 100 No 141 page 409 (1923) 1923 Rang 10 (94) Inherent powers cannot be invoked in such cases unless there would be sufficient cause had S 5 Limitation Act been made applicable

9 (1921) 1921 Bom 20 (20) 45 Bom 613

Note 10

1 (1902) 24 All 164 (165) (1880) 5 Cal 711 (712)

2 A right of appeal was given in such a case by the Codes of 1832 and 1877 also. See for instance the following cases—

(1890) 3 C P L R 166 (167) S 558 1832 Code (now O 41, R 19) applies to appeal from orders. S 558 gives a right of appeal against order refusing to restore appeal against in order of dis-

missal for default

(1879) 4 Cal 825 (828) Case under Code of 1877

(1879) 1879 Pun R No 141 page 409 Case under Code of 1877

There was a conflict of decision under the Code of 1859 regarding the applicability of an order refusing to restore an appeal dismissed for default. See for instance the following cases which held that no appeal lies—

(1868) 10 Suth W R 160 (162)

(1868) 10 Suth W R 29 (39)

(1867) 8 Suth W R 361 (361) Previous rulings allowing special appeal from order under S 347 Act VIII of 1859 corresponding to O 41 R 19 fol-

3 (1896) 18 All 119 (120) Order of dismissal not covered by R 17—R 19 does not apply—Order refusing to restore is not appealable

(1900) 27 Cal 529 (531) No default of appearance—Rr 17 and 19 do not

Court not having jurisdiction to pass order—R 19 does not apply—Order refusing to restore is not appealable

(1925) 1925 All 57 (58) 47 All 1 Application for review dismissed for default—Refusal to restore is not appealable

[See also (1917) 1917 All 397 (397) Application to set aside a decree—

An appeal lies against an order refusing to restore an insolvency appeal dismissed for default, because by virtue of S 5 of the Provincial Insolvency Act 1920 the general procedure applicable to insolvency cases is that laid down in this Code.⁴ Similarly, an order refusing to re-admit an appeal under S 109 A of the Bengal Tenancy Act which was dismissed for default is appealable.⁵

An order rejecting an application under this Rule is a Judgment within Cl 10 of the Letters Patent (Lahore) and is appealable as such.⁶

R. 20. [S 559] *Where it appears to the Court at the hearing² that any person who was a party to the suit³ in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal,⁴ the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent⁵*

[1877—S 559, 1859—S 73]

Synopsis

	Note No		Note No
Scope and applicability of the Rule	1	Adding party for the purpose of cross	
At the hearing	1a	objections—See Note 21 to O 41	7
Any person who was a party to the suit	2	R 22	8
Interested in the result of the appeal	3	Inherent power to add parties	
The Court may direct that such person be made a respondent	4	Power to pass decree against party—	9
Adding appellant	5	See R 4 ante and R 33 post	10
Adding respondent	6	Effect of non joinder	11
		Limitation	12
		Addition of parties in second appeal	

1 Scope and applicability of the Rule

This rule does not apply to the addition of fresh parties by the Court of first instance after the case is remanded to it by the appellate Court for re-trial.¹ (See also Note 4, *infra*)

1a At the hearing

The power to add parties under this rule is to be exercised *at the hearing* for, it is necessary that before acting under this rule the Court should have before it all the circumstances of the case.¹ The rule does not contemplate the addition of a party after the judgment has been pronounced.²

Dismissal of application—Application to restore it refused—Order of

above cited]
6 (1925) 1925 Lah 617 (614)
Order 41 Rule 20—Note 1
1 (1931) 1931 Bom 408 (409)

Note 1a

1 (1893) 1893 All W N 35 (36)
(1926) 19 G Cal 533 (535) 33 Cal 2 O
(1916) 1916 Cal 630 (630) Application to add parties made before that date is incompetent
(1912) 16 Ind Cas 903 (903) 40 Cal 323
2 (1911) 1911 Cal 334 (335)

d—1p

(5-2)

36 Cal 610 This decision is not referred to in the later decision

2. 'Any person who was a party to the suit'

The rule applies only when the proposed party respondent was a *party to the suit* in the Court from whose decree the appeal is preferred.¹ On the question whether, apart from R 20, the appellate Court has power to add as respondent to the appeal persons who were not parties to the suit in the Court below, there is a conflict of decisions. According to the High Courts of Calcutta² and Patna³ the appellate Court has such power independently of this Rule to add as respondents to the appeal persons who were not parties to the suit in the Court of first instance. The High Courts of Allahabad,⁴ Bombay⁵ and Lahore⁶ have, on the other hand, held that the appellate Court has no such power. The High Court of Rangoon also seems to be of the same view.⁷ It is submitted that the Calcutta and Patna view is correct. However, there is nothing to prevent the appellate Court, in a proper case, to remand the case to the lower Court with a direction to add the omitted parties.⁸ Further in a case where a person can be added as a respondent to an appeal by virtue of the provisions of O 22, R 10, there is no objection to his being so added though he was not a party to the suit in the lower Court.⁹ Persons who were parties to the suit in the lower Court originally but whose names were struck off before the passing of the decree are nevertheless parties to the suit within the meaning of R 20.¹⁰

The words "any person who was a party to the suit" include the representative of such a party.¹¹ (See also Note 12, below)

Note 2

- 1 (1912) 16 Ind Cas 903 (909) 40 Cal 323 (1927) 1923 Rang 114 (115) 4 Upp Lur R 150 (1935) 1330 Oudh 329 (331)
- 2 (1921) 1921 Cal 722 (724) Hrs inherent lower
(1910) 6 Ind Cas 912 (914) (Cal) (Do)
(1915) 1915 Cal 663 (609) Has power under O 1, R 10
(1903 04) 8 Cal W N 404 (404 406) (Do)
(1932) 1932 Cal 443 (443, 450) 53 Cal 329, (Do)
(1912) 16 Ind Cas 903 (909) 40 Cal 323, (Do)
[But see (1864) 9 South W R 259 (267)]
- 3 (1915) 1915 Pat 525 3 Pat L Jour 409
- 4 (1866) 18 All 332 (333)
(1925) 1225 All 769 (768) 47 All 853
[Compare (1978 80) 2 All 467 (469, 472) Party respondent can be added under O 1, R 10 read with S 107]
- 5 (1929) 1929 Bom 353 (354) 53 Bom 535

whom appeal has abated is not a person interested and Court has no jurisdiction to add him as party—Nor can Court act under R 33 *infra*

- (1934) 1934 Pat 589 (591) Plaintiff's claim dismissed against A but decreed against B—B appealed not joining A—Appeal allowed against plaintiff—Plaintiff appealed impleading A and B—Time for appeal against A

(1933)

off on application of plaintiff—Appeal against decree—Plaintiff cannot claim as against the person struck off or make him a respondent in appeal

- (1933) 1933 Nag 186 (186)
[See also (1898) 20 All 33 (39) In this case it was held that O 22, R 10 does not apply to an attaching creditor. But this case must be regarded as superseded by sub rule (2) of R 10 now]

- 10 (1916) 1916 Mad 499 (499)
[Compare (1920) 1926 Lah 499 (500) 8 Lah 161 Person party to suit but not party to decree and not interested in result of appeal—He cannot be added under R 10]

- 11 (1916) 1916 Cal 690 (690)
[Contrary 1923 Rang 114 (115)]

the order which the trial Judge should make when he tries the case in the presence of proper parties]

- 9 (1901) 23 All 331 (335)
(1935) 1935 Mad 175 (178) Person against

19,
)

An appeal lies against an order refusing to restore an insolvency appeal dismissed for default, because by virtue of S 5 of the Provincial Insolvency Act, 1920, the general procedure applicable to insolvency cases is that laid down in this Code⁴ Similarly, an order refusing to re-admit an appeal under S 109 A of the Bengal Tenancy Act which was dismissed for default is appealable⁵

An order rejecting an application under this Rule is a Judgment within Cl 10 of the Letters Patent (Lahore) and is appealable as such⁶

20

R. 20. [S 559] Where it appears to the Court at the

Power to adjourn hearing and direct persons appearing interested to be made respondents

hearing² that any person who was a party to the suit³ in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal,⁴ the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent⁵

[1877—S 559, 1859—S 73]

Synopsis

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This rule does not apply to the addition of fresh parties by the Court of first instance after the case is remanded to it by the appellate Court for re-trial¹ (See also Note 4, *infra*)

1a At the hearing

The power to add parties under this rule is to be exercised *at the hearing* for, it is necessary that before acting under this rule the Court should have before it all the circumstances of the case¹ The rule does not contemplate the addition of a party after the judgment has been pronounced²

Dismissal of application—Application to restore if refused—Order of

[above cited]
6 (1975) 1925 Lah 617 (617)
Order 41, Rule 20—Note 1
1 (1931) 1931 Bom 408 (409)

Note 1a

d—1p

1 (1893) 1893 All W N 35 (36)
(19 6) 19 6 Cal 533 (533) 53 Cal 2 0
(1916) 1916 Cal 690 (690) Application to
add parties made before that date
incompetent
(1912) 16 Ind Cas 903 (903) 40 Cal 3 3
2 (1921) 19 1 Cal 334 (335)

(3, 2)
56 Cal 510 This decision is not referred to in the later decision

2 Any person who was a party to the suit'

The rule applies only when the proposed party respondent was a *party to the suit* in the Court from whose decree the appeal is preferred¹ On the question whether, apart from R 20, the appellate Court has power to add as respondent to the appeal persons who were not parties to the suit in the Court below, there is a conflict of decisions According to the High Courts of Calcutta² and Patna³ the appellate Court has such power independently of this Rule to add as respondents to the appeal persons who were not parties to the suit in the Court of first instance The High Courts of Allahabad,⁴ Bombay⁵ and Lahore⁶ have, on the other hand, held that the appellate Court has no such power The High Court of Rangoon also seems to be of the same view⁷ It is submitted that the Calcutta and Patna view is correct However, there is nothing to prevent the appellate Court, in a proper case, to remand the case to the lower Court with a direction to add the omitted parties⁸ Further in a case where a person can be added as a respondent to an appeal by virtue of the provisions of O 22 R 10, there is no objection to his being so added though he was not a party to the suit in the lower Court⁹ Persons who were parties to the suit in the lower Court originally but whose names were struck off before the passing of the decree are nevertheless parties to the suit within the meaning of R 20¹⁰

The words 'any person who was a party to the suit' include the representative of such a party¹¹ (*See also* Note 12, *below*)

Note 2

- 1 (1912) 16 Ind Cas 905 (909) 40 Cal 323
(1913) 1923 Rang 114 (115) 4 Uip Bur R 150
(1935) 1935 Oudh 329 (331)

- 2 (1921) 1921 Cal 722 (724) Has inherent power

(1910) 6 Ind Cas 912 (915) (Cal) (Do)

(1916) 1918 Cal 668 (609) Has power under O 1 R 10

(1903 O4) 8 Cal W N 404 (404 405) (Do)

(1932) 1932 Cal 443 (443 450) 53 Cal 329, (Do)

(1912) 16 Ind Cas 903 (909) 40 Cal 323, (Do)

(But see (1865) 9 South W R 259 *infra*)

[Compare (1868 60) 2 All 457 (459 462) Party respondent can be added under O 1 R 10 read with S 107]

- 5 (1929) 1929 Bom 303 (354) 53 Bom 538

whom appeal has abated is not a person interested and Court has no jurisdiction to add him as party—Nor can Court act under R 33 *infra*

- (1934) 1934 Pat 589 (591) Plaintiff's claim dismissed against A but decreed against B—B appealed not joining in appeal allowed against Plaintiff—Plaintiff appealed unavailing A and B—Time for appeal against A having expired he cannot be added party—Moreover appeal against A is not permissible direct to High Court from decision of Sub Judge

- (1933) 1933 Nag 66 (67) Suit against two persons—Name of one of them struck off on application of plaintiff—Appeal against decree—Plaintiff can not sue as against the person struck off or make him a respondent in appeal

- (1933) 1933 Nag 186 (186) [See also (1895) 20 All 33 (39) In this case it was held that O 22, R 10 does not apply to an attaching creditor But this case must be regarded as superseded by sub rule (2) of P 10 now]

- 10 (1916) 1916 Mad 499 (499) [Compare (1916) 1926 Lab 499 (500) 8 Lab 161 Person party to suit but not party to decree and not interested in result of appeal—He cannot be added under R 20]

- 11 (1916) 1916 Cal 690 (690) [Contra 1923 Rang 114 (115)]

the order which the trial Judge should make when he tries the case in the presence of proper parties]

- 9 (1901) 23 All 331 (335)
(1935) 1935 Mad 175 (175) Person against

20, 3 Interested in the result of the appeal

Before the Privy Council decision in *Chokalingam v Seethar*¹ there was a conflict of decisions as to the meaning of these words. One set of decisions proceeded upon the view that the fact that the presence of the proposed party respondent before the Court was *necessary for the adequate disposal of the appeal or cross objections on the merits* was enough for making him a respondent under this Rule. Thus, it was held that where the constitution of an appeal was impeached on the ground that the necessary parties had not been impleaded, the defect could be cured by their being added under this Rule.² Similarly, where in a suit filed by *A* against *B* and *C*, a decree was passed against *B* but was dismissed against *C* and *B* appealed from the decree making *A* alone a respondent, and the appellate Court finds that *C* and not *B* is liable to *A*, it was held that the appellate Court could make *C* a respondent to the appeal under this Rule and that, in allowing *B*'s appeal, it can pass a decree against *C*.³ On the other hand it was held in another set of cases that the Rule was intended to protect parties to the suit who had not been made respondents in the appeal from being prejudiced by modifications made behind their backs in the decree under appeal, and that the party whom it was sought to bring on record must be shown to be interested in the result of the appeal before he is brought on the record. Hence where a defendant had been exonerated in the lower Court and no appeal was filed against him, it was held that he was not interested in the result of the appeal filed against other parties and could not be added as a respondent to such an appeal under this Rule unless it could be shown that the decree that might be passed in the appeal as framed might prejudice his interests in some way or other.⁴ According to this group of cases the mere fact that the presence of a party before the Court is necessary for the disposal of the appeal or cross objections on the merits was not sufficient justification for making him a party respondent under this Rule.

In this state of the authorities it was held by the Privy Council in

Note 3

- 1 (1927) 1927 L C 252 (255) 256) 55 Ind App 7 6 Rang 29 (P C)
 11 (1926) 1926 Cal 335 (336) Rule is ordinarily intended to apply to cases where the Court finds that it cannot proceed with the suit without the presence of a party who was not made a party to the appeal.
 (1912) 15 Ind Cas 295 (295) (All) Defect due to want of parties can be cured

Rule, as the an appeal against the exonerated defendant has expired.
 [See also (1901) 1901 Pun Re No 23 p 74]

(1927) 1927 Cal 391 (393) 54 Cal 430
 For instances of Interest in this

(1932) 15 Mad 362 (365) Decree against defendants 1 to 4—Defendant 1 appealing—Defendants 2 to 4 trying to come in subsequently—The decision of the appeal is filed by defendant No 1 would affect the interests of defendants 2 to 4—Last are interested.
 (1909) 26 Cal 114 (121) Suit decreed in part against several defendants—

*Chokalingam v. Seithai*⁴ that where a defendant had been exonerated in the lower Court and no appeal had been filed against him within the period of limitation, he was not interested in the result of the appeal filed by the plaintiff against other defendants, and that in any event, it was for the plaintiff appellant who sought to make him a respondent to show what was the nature of the interest he had in the appeal. Their Lordships reached this view in spite of the fact that the presence of the proposed party respondent was necessary to enable the Court to decide on their merits certain questions that arose in the appeal. This shows that in their Lordships' view the test for the addition of a party respondent under this Rule was not, whether his presence before the Court was necessary for the adequate disposal of the appeal on its merits, but whether the proposed party is one whose interests are likely to be prejudiced by the determination of the appeal as framed. So interpreted, their Lordships' judgment accords with latter of the two views set forth above. Hence the other view viz., that it is enough for the application of this Rule that the addition of the proposed party is necessary for the adequate disposal of the appeal on the merits should be regarded as no longer good law. It may be noted in this connection that their Lordships' judgment confirmed the judgment of the Rangoon High Court in the undermentioned case⁵ and that in this judgment the Rangoon High Court followed the Madras decision in *Subramanya v. Veerabhadra*⁶ which contains the clearest exposition of the second view referred to above so that the Privy Council may be taken to have adopted this view in preference to the other view.⁷ Some decisions of the High Courts⁸ though pronounced subsequent to the above Privy Council case have adopted the view overruled by the Privy Council and hence must be regarded as not correct. The decisions in the undermentioned cases⁹ accord with the view approved by the Privy Council and may be taken as correctly representing the law on the subject now.

But where a person can be added as a respondent under any other provision of law, his not being interested in the result of the appeal within the meaning of this Rule is no objection to his being so added¹⁰ (See Note 8, *infra*).

Appeal in this Rule includes also cross objection¹¹

4. The Court may direct that such person be made a respondent

The power given to the Court under this Rule is a discretionary one

Added by some alone—Cross objections by plaintiff—A suit likely to affect interests of other defendants—They are interested

4 (1921) 1927 P C 212 (255 256) C Ring 29 (P C)

5 (1925) 1925 Ring 103 (109 110) 2 Ring 541

6 (1903) 31 Mad 442 (444 445)

7 See *Notes of Indian Cases* 11 (1928) 34 Mad L Jour (V I C) 50

8 (1923) 1929 Cal 315 (317)

(1930) 1930 Lah 29 (296)

(1925) 1925 Lah 202 (205)

(1925) 1925 Lah 120 (120)

(1933) 1933 Nag 66 (67)

[See also (1932) 10 N S L J 173 (175 176)]

10 (1921) 1921 Mad 172 (174) 44 Mad 60 (F B) Party may be added under O 1 R 10 read with S 107

(1920) 1920 Mad 120 (120 121) Respondent may be added under O 1 R 10 read with S 107

(1912) 13 Ind Cas 906 (906) (Mad)

(1928) 1928 Pat 343 (345) 7 Pat 210 Respondent may be added in exercise of inherent power

[See also (1929) 1929 Mad 343 (344)]

(1921) 1921 Cal 722 (724)

(1882) 1842 Pun Re No 20 page 75

11 (1920) 1920 Mad 120 (120)

(1931) 1931 Cal 733 (740) 53 Cal 923.

to be exercised in view of all the circumstances of a case¹ Strong grounds are necessary to induce the Court to exercise its discretion in favour of an appellant who has failed to implead any party within the period of limitation.²

It will not be exercised in favour of an appellant where he has deliberately,³ or out of extreme negligence⁴ failed to implead any party. But where he has not been guilty of any neglect the appellate Court may very well exercise its power under this Rule in his favour.⁵

The power under this Rule cannot be exercised so as to negative the provisions of O 22. Hence, where a respondent has died and the appeal has *abated* as against him owing to his legal representatives not being brought on the record within the period of limitation, the legal representatives cannot be added under this Rule.⁶ Where, however, the legal representative was actually brought on the record in the suit, but was not impleaded in the appeal, he may be added under the provisions of this Rule.⁷ There is a conflict of opinion as to whether this Rule can be applied where a party who is necessary for the very constitution of the appeal is not impleaded in the appeal with the result that the period of limitation for an appeal against him has expired. According to the High Court of Patna and the Judicial Commissioner's Court of Peshawar the Court has no power to add the non-impleaded party, as a party to the appeal.⁸ The Lahore High Court has held that the Court has such power.⁹ The High

Note 4

- 1 (1926) 1926 Cal 893 (895) 53 Cal 752
(1934) 1934 Lah 402 (404) Attested copy of judgment omitting name of party though decree giving same—Party omitted in appeal by oversight—Court should add him as party

Application for addition of parties not to be arbitrarily refused]

[See also (1933) 1933 Lah 304 (304)]

- 2 (1926) 1928 Lah 947 (948)
(1929) 1929 Mad 479 (480)
(1932) 1932 Sind 220 (221) 26 Sind L R 362 Discretionary power should be refused if party is *deprived of his valuable right*
[See also (1927) 1927 P C 252 (253, 256) 6 Rang 29 (P C) The right of a decree holder against whom an appeal has not been filed within the period of limitation to hold the decree in his favour is a substantive right of a very valuable kind of which he should not lightly be deprived]
- 3 (1929) 1929 Sind 120 (120)
(1925) 1925 Oudh 606 (607) Omission to implead not due to oversight—Court refused to add respondent under R 20
- 4 (1920) 1920 Cal 264 (267)
(1927) 1927 Lah 189 (189, 190),
(1923) 1923 Lah 201 (204)
(1920) 1920 Lah 72 (73)

(1926) 1928 Lah 202 (206)
(1926) 1928 Lah 120 (120)
[See also (1921) 1921 Nag 12 (13). Certain parties omitted due to mistake of pleader—They may be added under R 20

- G (1926) 1926 Cal 335 (336)
(1935) 1935 Oudh 32J (331)
(1926) 1926 Cal 893 (894, 895) 53 Cal 752
(1927) 1927 Pat 23 (24) 5 Pat 755
(1931) 1931 Nag 184 (186) 27 Nag L R 220.
[But compare (1921) 1921 Cal 722

dent has acquired valuable right as against person sought to be impleaded

- 9 (1927) 1927 Lah 739 (739)

Court of Allahabad¹⁰ and the Judicial Commissioner's Court of Sind¹¹ seem to be of the same view. Where, however, the only person that could be impleaded in the appeal is not impleaded, and there is consequently no valid appeal at all, this Rule will not apply.¹²

The power under the Rule may be exercised by the Court on its own motion or on the application of any party.¹³ If the Court finds the presence of any party not already joined necessary it may direct the appellant to apply for bringing him on the record and if he fails to do so may dismiss the appeal.¹⁴

5 Adding Appellant

The present Rule provides only for the addition of a party as a *respondent*. On the question whether an *appellant* can be added or substituted under O 1 R 10 read with S 107 see S 107 Note 16 and O 1 R 10, Note 11.

6 Adding Respondent

An appellate Court can add a person as respondent who in the trial Court, was arrayed on the same side as the appellant.¹

7 Adding party for the purpose of cross objections. See Note 22 to O 41 R 2²

8 Inherent power to add parties

The power of an appellate Court to add party respondent is not confined to cases falling under O 41 R 20. In cases to which this Rule does not apply the appellate Court can under O 1, R 10 read with S 107 or by virtue of its inherent power, add parties respondents to the appeal.¹ Thus where owing to a *bona fide* mistake caused by a similarity of names of two persons who were parties in the lower Court the names of those persons were left out in the appeal, it was held that the appellate Court had power to correct the mistake and have the memorandum of appeal amended by inserting the proper name.² But the inherent powers of the Court should be invoked only in exceptional circumstances.³

9 Power to pass decree against party—See R 4 ante and R 33 post

10 Effect of non joinder

The principle of O 1, R 9 applies to appeals. No appeal should be made to fail merely on the ground of the non joinder of any party¹ but the Court may deal with the matters in controversy so far as the parties actually

10 (1890) 1433 All W N 35 (36). The application for an order was not under this Rule—It was contended that if it was under this Rule the necessary party might have been added.

11 (1929) 1079 Sind 120 (120). It was assumed that the Court had a discretion to add the party but was not exercised by reason of the deliberate omission of the appellant.

12 (1913) 19 Ind Cas 37 (39). 1913 Pun Ro No

by Court even in absence of application.

(1926) 1127 Cal 689 (690).

14 (1920) 1120 Mad 205 (206).

Note 6

1 (1891) 13 All 48 (87).
(1892) 15 Mad 352 (364).

Note 8

(1921) 1921 Mad 172 (174). 44 Mad 605.
(1920) 1920 Mad 120 (120, 121).

But see cases cited in Note 2 *supra*, foot notes (4) (5) and (6) and in Note 12 *infra* foot note (1).

2 (1929) 1979 Mad 343 (344).

3 (1923) 1923 Lah 470 (471).

Note 10

1 (1916) 1916 Cal 516 (518).

0, before it are concerned. In this connection, reference may be made to the difference between proper parties and necessary parties (*Vide* Notes under O 1, R 10). If the non-joinder is not of necessary parties, the appeal may proceed with reference to the parties actually before the Court.² But if necessary parties have not been joined, the effect of the non-joinder on the appeal is fatal to the appeal, because in such case there is no proper appeal before the Court at all.³ In such cases, the Court may in its discretion add the necessary parties under this Rule and then proceed with the appeal.⁴ (*See* Note 4, *ante* and O 1, R 10).

A person who is not joined as a party to an appeal is not bound by the decree passed in the appeal. But the assignee of a decree is, in the absence of fraud, bound by the decree of the appellate Court though he has not been made a party to the appeal against the decree.⁵

11 Limitation

The power of the Court under this Rule is not subject to the provisions of the Limitation Act and a party who is interested in the result of the appeal may be added as a respondent under this Rule though the period of limitation for an appeal by or against him may have expired.¹ The Privy Council decision in *Chokalingam v. Seetha*² does not affect the correctness of this proposition which is accepted as settled Law by all the High Courts. But the powers under this Rule should be exercised very cautiously inasmuch as a person in whose favour the lower Court has passed a decree against which an appeal is not filed within the period of limitation has a substantive right of a valuable kind which should not be lightly treated.³ Where a respondent is added, not under R 20, but under O 1, R 10 read with S 107, the provisions of Limitation Act will apply.⁴ But where a party is added in the exercise of the Court's inherent power to preserve the ends of justice from being defeated, it seems, no limita-

2 (1911) 1027 Cal 733 (735)
(1934) 1034 Cal 463 (469) 61 Cal 307
(1933) 1933 Lah 406 (401) Omission to bring on record representative of party in appeal who is not necessary party but only added in pro forma defendant is not fatal to hearing of

(1867) 8 South W R 367 (367)
(1906) 33 Cal 379 (337)
(1898) 25 Cal 565 (569)
(1883) 9 Cal 365 (362)
(1926) 1926 Lah 673 (680)
(1924) 1924 Lah 629 (629)
[See also (1923) 1923 Lah 503 (501)
(1920) 1920 Lah 72 (70)
(1914) 1914 Lah 157 (14) 1915 P R No 1
(1914) 1914 Lah 26 (218) 1914 P R No 7.
In this case however the appeal was held to be extremely irregular and the Court declined to add the new party after limitation.

(1921) 1921 Dig 12 (13)
(1915) 1915 Outh 103 (160) 13 Outh Ct 30

(1924) 1924 Pat 773 (774)
(1921) 1921 U B 13 (14) 4 L B R 97
(1912) 16 Ind Cas 771 (777) 6 Sind L J 74n

(1920) 1920 L B 61 (63) 10 L B R 191
See also cases cited in Note 3 *supra* note (2)

1 (1921) 1921 P C 202 (250) 6 Ring 29 (14)

2 (1921) 1921 P C 252 (255) 6 Ring 29 (14)
See also Note 4 *supra* for full effect (3-4)
(1) and (2)

3 (1860) 2 All 457 (457) 492

(1865) 2 South W R 255 (255)
(1874) 21 South W R 187 (187)
5 (1912) 17 Ind Cas 420 (421) 23 Mid 26

Note 11

1 (1892) 14 All 154 (155 156) (F P)
(1891) 13 All 78 (80)
(1893) 1893 All W N 35 (36)

tion will apply⁴

12 Addition of parties in second appeal

The Rule requires that the proposed party respondent must have been a party in the suit in the Court from whose decree the appeal is preferred. Suppose a person was a party to the suit in the Court of first instance but was not a party in the *first appellate Court*, has the High Court in second appeal power to make him a respondent? On this question there is a conflict of decisions the Allahabad High Court holding that he cannot be added as a respondent¹ and the High Courts of Calcutta² Lahore,³ Madras⁴ and Patna⁵ the Judicial Commissioner's Court of Oudh⁶ and the Chief Court of Lower Burma holding a contrary view.⁷ It is submitted the Allahabad view is not correct (See Notes 2 and 8 *supra* and also Note 11 to O 1, R 10).

The High Court in second appeal can remand the case to the lower Court with a direction to it to add fresh parties.⁸

R. 21. [S 560] Where an appeal is heard *ex parte* and

Re hearing on ap-
plication of respon-
dent against whom
ex parte decree made

judgment is pronounced against the respondent he may apply to the Appellate Court² to re-hear the appeal, and if he satisfies the Court that the notice³ was not duly served or that he was prevented by sufficient cause⁴ from *appearing*⁶ when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise⁹ as it thinks fit to impose upon him.

[1877—S 560]

Local Amendment

NAGPUR

(1) Existing r 21 shall be re numbered as sub r (1) and

(2) after sub-r (1) so re numbered the following shall be inserted as sub r (2) namely —

(2) The provisions of Section 5 of the Indian Limitation Act IX of 1908 shall apply to applications under sub-r (1)

Synopsis

	Note No		Note No
Scope and applicability of the Rule	1	O 9 R 13 Note 9 and S 96 Note 12	7
He may apply to the appellate Court	2	Re hearing pending an appeal from an	
Notice	3	<i>ex parte</i> decree—See O 9 R 13	
Sufficient cause	4	Note 10 and S 96 Note 12	8
Inherent power to order re hearing		On such terms as to costs or other	
—See S 101 Note 2	5	wise	
Appearance	6	Limitation	10
Remedies in case of <i>ex parte</i> decree—		Appeal	11
Remedies whether concurrent—See			

1 Scope and applicability of the Rule

This rule applies also to appeals under the Bengal Rent Recovery Act,

⁴ [See (1924) 1924 Pat 773 (174)]

Note 12

1 (1914) 1914 All 293 (203) 37 All 57
(1894) 10 All 5 (6)

2 (1919) 1919 Cal 173 (175)

3 (192) 1927 Lah 189 (189)

21, X of 1859¹ (See also Notes under O 9, R 13) The appellate Court has jurisdiction under this rule to entertain an application for re-hearing by a respondent notwithstanding the fact that another respondent had preferred a second appeal to the High Court which was dismissed under O 41, R 11²

2 He may apply to the appellate Court

An application for re hearing of an appeal heard and decreed *ex parte* by the High Court under this rule should be made to the same Bench which heard the appeal¹

3 Notice

Where a guardian *ad litem* has been appointed by the Court, service of notice of the appeal on such guardian is sufficient service¹

4 Sufficient cause

A respondent against whom an appeal is heard and decided *ex parte* is entitled to a re-hearing of the appeal provided he proves either that he had not been duly served, or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing¹ As to what constitutes sufficient cause, see O 9 R 9, Note 8 *ante* and the undermentioned cases²

5 Inherent power to order re hearing—See S 151 Note 2

6 Appearance —See O 3 R. 1 and the undermentioned case¹

7 Remedies in case of *ex parte* decree—Remedies whether concurrent—See O 9 R 13 Note 9 and S 96 Note 12

8 Re hearing pending an appeal from an *ex parte* decree—See O 9 R 13 Note 10 and S 96 Note 12

9 On such terms as to costs or otherwise

The words or otherwise authorise the Court to impose terms other than those relating to costs Hence an appellate Court may require the respondent to furnish security for the due performance of the decree that may be passed on re-hearing¹

Order 41 Rule 21—Note 1

1 (1908) 35 Cal 799 (800)

2 (1911) 10 Ind Cas 275 (216) (Cal)

Note 2

1 (1916) 1916 Cal 317 (317)

Note 3

1 (1926) 1926 Cal 1106 (1107)

Note 4

1 (1931) 6 Cal 548 (548)

(1933) 1933 Lah 797 (797) Service of notice on son in father's absence—Son not residing with father—Summon is not duly served on father

(1852) 11 Cal L Rep 164 (165)

(1851) 8 Cal L Rep 112 (112)

(1921) 1921 Rang 386 (386) Unreluctant oath of the respondent that he was not served—Held sufficient to open appeal

(1866) 6 South W R Mts 43 (43) Court bound to enquire as to the truth of the allegations in the application (See also (1930) 1935 All CGO (661) 155 Ind Cas 676 (677) Personal service on Irdana him told how to be effected

2 The following have been held to amount to sufficient cause —

(1921) 1921 All 264 (264) Inability of respondent's agent to attend and

clerk

respondent had taken away the papers

(1900) 1900 All W N 44 (44) Lapse of Plead—Plead refusing notice

Note 6

1 (1894) 11 Cal L Rep 527 (530) Plead filing vakalat but absent on date of hearing—Held there was no neglect and the decision *ex parte*

Note 9

1 (1850) 1850 Lun Re No 70

10 Limitation

The period of limitation for the re-hearing of an appeal heard *ex parte* is that prescribed by Art 169 of the Limitation Act 112, 30 days from the date of the appellate decree or where notice of the appeal was not duly served when the applicant has knowledge of the decree *See also* the undermentioned cases¹

11 Appeal.

An appeal lies under O 43 R 1 (e) from an order refusing an application for re hearing under this rule. But an application for re hearing cross objections decided *ex parte* cannot be treated as an application under this rule for the re hearing of an appeal heard *ex parte*. Hence an order dismissing the application for re hearing the cross-objections heard *ex parte* is not appealable but can be revised¹. An appeal against an order of the lower appellate Court refusing to re-hear an appeal heard *ex parte* from a decree in a rent suit under the Bengal Tenancy Act valued at less than Rs 100, is not maintainable as it is barred by S 153 of that Act².

R. 22. [S 561] (1) Any respondent though he may not

Upon hearing, respondent may object to decree as if he had preferred separate appeal

have appealed from any part of the decree may not only support the decree² on any of the grounds decided against him in the Court below but take any *cross-objection*³ to the decree which he could have taken by way of appeal,³ provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal,¹⁰ or within such further time as the Appellate Court may see fit to allow.

Form of objection and provisions applicable thereto

(2) Such *cross-objection* shall be in the form of a memorandum, and the provisions of Rule (1), so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Unless the respondent files with the objection a written acknowledgment from the *party who may be affected by such objection* or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on *such party* or his pleader at the expense of the respondent.

(4) *Where, in any case in which any respondent has under this Rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.*¹⁷

Note 10

1 (1908) 18 Mad L Jour 96 (97-98)

(1896) 19 M d 414 (415)

(1919) 1919 Lah 447 (44) 1918 Pun Re

No 4

(1895) 1885 Pun Re No 66 page 137

Note 11

1 (1919) 1919 Lah 32 (33)

2 (1914) 1914 Cal 614 (614)

22, (5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this Rule ¹²

[1877—S. 561; 1859—S. 348]

Synopsis

	Note No		Note No
Legislative changes	1	Against whom cross objections may be filed	13
Applicability of the Rule	1a	Cross objections against co respondent	14
Respondent may support decree without filing cross objections	2	Omission to file cross objections	15
What objections can be raised by way of cross objections and when	3	Grounds not raised in cross objections not to be raised at the hearing	16
Cross objections against findings not included in decree	4	Effect on cross objections of withdrawal of appeal or its dismissal for default	17
Which could have been taken by way of appeal	5	Effect on cross objections of abatement of appeal	18
Cross objections to order of remand	6	Limitation for cross objections	19
Cross objections in second appeal	7	Appeal filed out of time may be treated as cross objections	20
Cross objections in appeals from orders	8	Court fee on cross objections	21
Cross objections in Letters Patent Appeals	9	Adding party for purposes of cross objection	22
Cross objections in revision	10	Second appeal	23
Who may file cross objections	11		
Cross objections by pauper respondent	12		

1 Legislative changes

This Rule corresponds to S. 561 of the Code of 1882. The chief changes introduced are—

- 1 The words upon the hearing which occurred after the word may and before the words not only support the decree in sub rule (1) have been omitted. See Note 17 *infra*
- 2 The words the party who may be affected by such objection have been substituted for the words the appellant in sub rule (3). See Note 13 *infra*
- 3 Sub-R. (4) is new. See Note 17 *infra*.

1a Applicability of the Rule

The provisions of this Rule apply also to appeals under the Chota Nagpur Tenancy Act VI of 1908 from the decisions of the Deputy Commissioner or of a Revenue Officer. As regards the applicability of sub rule (1) to proceedings under the Agra Tenancy Act III of 1926, see List II No 16 of the Second Schedule of that Act.

2 Respondent may support decree without filing cross objections

A respondent may support the decree appealed from, not only on any of the grounds decided in his favour¹ but also on grounds decided against him, and for this purpose, it is not necessary for him to file any cross objections.^{1a} There is a conflict of views as to whether this Rule will enable a res-

Order 41 Rule 22—Note 2

1 [See however (1903) 26 All 215 (217)]

1a (1890) 17 Cal 809 (813 814) 17 Ind App 51 (P C)

(1919) 1919 All 420 (422) 40 All 536

(1917) 1917 All 158 (158) Decree entirely in respondent's favour—He cannot take cross objections—He can only support the decree by attacking any findings against him—If he files any objections they are not cross objections

(1910) 7 Ind Cas 484 (484) (All)

(1898) 1898 All W N 109 (110)

(1887) 1887 All W N 44 (44) 9 All 593

(1889) 13 Lom 75 (77)

preclude respondent from objecting in second appeal

pendent to attack any portion of the decree passed *against* him so long as he does not ask for a variation of the decree. According to the High Courts of Calcutta,⁷ Madras³ Lahore,⁴ and Rangoon^{4a} and the Judicial Commissioners Court of Nagpur^{4b} the respondent cannot do so. Thus the respondent cannot make out a case for a decree for the same amount by attacking the decree in respect of a right decided against him. The High Court of Patna⁵ and the Judicial Commissioners Court of Oudh⁶ have, on the other hand held, that the expression 'support the decree' does not merely mean support the *decision* but permits the respondent to show by reference to a ground decided against him, that the appellant has at least secured by the decree as much as, if not more than he is entitled to.

A point taken in the lower Court but not decided by it may be urged in support of the decree under appeal.⁷ But as a general rule a respondent cannot take a point not taken by him in the lower Court.⁸ Similarly, the rule does not apply to a finding which does not affect the point at issue as the respondent cannot support the decree with reference to such a finding.⁹ An appellate Court will not of itself raise a point which the respondent does not raise.^{4c}

3 What objections can be raised by way of cross objections and when

The test to determine whether any particular objection can be taken by way of cross objections under this rule is to see whether if the respondent had *appealed* against that portion of the decree which is against him he could have raised such objection in his memorandum of appeal. If he could,

(1918) 1918 Lah 129 (130)
(1917) 1917 Lah 59 (60)
(1911) 11 Ind Cas 41 (40) (Lah) Appellate Court not considering respondent's objections acts with material irregularity

(1885) 1885 Pun Re No 127 page 313
(1886) 1886 I un Re No 59 page 174
(1921) 1921 Mad 172 (174) 41 Mad 605

However this was a case under the Code of 1859 under which it was not necessary to file cross objections in any case.

(1927) 1927 Mad 801 (804) 50 Mad 806
Decree in R 92 does not refer to the *quantity* of the decree but to the *decision* of the lower Court

(1931) 1931 Mad 513 (517)
4 (1909) 1929 Lah 684 (685)
(1894) 1897 I un Re No 90 page 127
[But see (1918) 1918 Lah 129 (130)]

(1921) 1921 Lah 318 (319)
4a (1933) 1933 Rang 120 (121)
4b (1933) 1933 Nag 310 (311)
5 (1932) 1932 Pat 134 (138)
6 (1923) 1923 Oudh 123 (126 129 135) 25 Oudh Ca 349 Respondent suggesting a *different mode of taking accounts*—*Hell* he was entitled to do so

corrective — In it no reference is made to R 77]

(1897) 1897 Pun Re No 25 page 56 In a suit by a reversioner to set aside a sale by a widow where the sale was held to be for necessary purposes and

[But see (1915) 1915 Lah 267 (268) 31 Ind Cas 40 (741) 1916 I un Re No 45]

(1914) 1914 Oudh 149 (157) 17 Oudh Cas 103 When all facts are before appellate Court—Respondent can support lower Court's judgment even on ground not taken in Court below

J (1925) 1925 Cal 518 (520)
10. (1914) 1914 Cal 639 (641)

2

— Plaintiff appealing — Defendant cannot in resisting the appeal attack the frame of the suit

(1933) 1933 Cal 105 (169)
[See also (1862 64) 1862 64 Suth W R Special Number 48 (49) (F B)]

22, then he could also raise it by way of cross-objections^{1a} An objection as to any error, defect or irregularity in any order affecting the decision of the case, which may be taken in an appeal against the decree under S 105 of the Code can, therefore, be taken by way of cross-objections also Thus where an *ex parte* decree is passed against a defendant for a portion only of the claim made by the plaintiff and the plaintiff appeals against the portion disallowed, the defendant-respondent can file cross-objections in respect of the portion decreed and may therein contend that the order placing him *ex parte* in the suit was wrong¹ It was held by the Oudh Chief Court in the under-mentioned case² that in an appeal against a decree, the respondent cannot raise, by way of cross-objections the plea that an order granting a review of the judgment originally passed was wrong The same Court has held in another case^{2a} that a respondent cannot, by way of cross-objections, attack a non-appealable order It is submitted that the said decisions are not correct

Where a party could not have appealed from a decree he cannot file any cross-objections in respect of it^{2b} Thus where a decree is *wholly in favour of a party* he cannot file any cross-objections against it by way of criticism of the judgment, though he can *support the decree* on any of the grounds decided against him³ But where a decree is partly in favour of, and partly against a party, he can take any cross objections to it which he could have taken by way of appeal⁴

The cross-objections must be directed against the *particular decree* under appeal^{4a} though they need not be confined to the particular portion of the decree appealed against but may refer to any part of the decree and it need not also be confined to the subject-matter of the appeal⁵ See also Note 7, Pt (3), *infra*

A respondent in an appeal under the Provincial Insolvency Act has

Note 3

1a (1934) 1934 All 543 (546) 56 All 912 Defendant's plea of set off—Decree omitting to give any relief—It can be made subject of cross objections

(1933) 1933 Rang 377 (378) Respondent cannot take a point in cross objection unless he could have filed appeal himself on such point

1 (1924) 1924 Mad 107 (103) S 100 was how ever not admissible in this case

2 (1928) 1928 Oudh 400 (400)

2a (1927) 1927 Oudh 218 (219)

2b (1900) 29 Mad 229 (231)

(1929) 1929 Nag 361 (362) *Pro forma* respondent against whom nothing has been decided and who could not have filed an independent appeal cannot file cross objections

3 (1917) 1917 All 159 (159)

(1933) 1933 1st C 90 (622)

(1887) 1887 All W N 44 (44)

(1887) 7 All 600 (610)

(1887) 4 All 491 (422)

(111) 111 C S 41 (42) (Lab)

(11) 1922 1st 433 (481) 1 Pat 2 9

4 (1898) 1933 Lab 221 (221) Appellate Court

cannot deprive him of this right (1897) 1897 Pun Re No 31 page 144

(1864) 1864 Suth W R Crp 231 (232)

(1911) 10 Ind Cas 207 (208) 1912 Pun Re No 11 Appellate Court has no power to reject cross objections on the merits without hearing the respondent

(1914) 1914 Lah 62 (62) 23 Ind Cas 410 (411)

(1860) 2 Suth W R 45 (45) Case under Code of 1800

4a (1922) 1922 Mad 413 (415) One judgment and two decrees in first appeal—Second appeal against one decree—Respondents cannot object to other decree under O 41 R 2³

(1923) 1923 Lab 114 (115)

(1929) 1929 Sind 32 (36)

5 (1919) 1919 Mad 827 (829 829)

(1897) 1897 Pun Re No 31 page 144

(1884) 8 Bom 263 (30)

[It is a (1931) 1931 Vol 133 (134) 135] Appeal in lower Court was dismissed for default and on that ground cross objections were allowed dismissed The cross objector appealed Held that the appellate

a right to file a memorandum of objections⁶ Similarly, in an appeal under S 43 of Bombay Act, IV of 1898 from the award of the Collector under the Land Acquisition Act, the respondent is entitled to file cross-objections⁷ But having regard to S 76 of the Madras Rent Recovery Act VIII of 1865 no memorandum of objections lies against the findings of the Court of first instance in cases under that Act⁸ The cross-objections under this rule can be filed only in a *pending* appeal and not after the appeal has been decided⁹

4 Cross objections against findings not included in decree — See Note 3

5 Which could have been taken by way of appeal — See Note 3 *ante*

6 Cross objections to order of remand

Under S 105 sub-S (2) where a party who is aggrieved by an order of remand from which an appeal lies does not appeal against it, he will be precluded from disputing its correctness, in an appeal from the decree after remand It follows that he cannot by way of cross-objections, attack such an order in an appeal by the other party from the decree The decision in the case cited below¹ was under the Code of 1859 and is in view of S 105, sub-S (2) no longer good law

7 Cross objections in second appeal

Cross objections may be filed in second appeals as well as in first appeals¹ (*Vide* O 42 R 1) But the grounds taken in cross objections filed in second appeals must comply with the provisions of S 100 as the respondent can only take such cross objections as he could have taken by way of appeal²

A files a suit against *B* It is partly decreed in favour of *A* and partly dismissed Both *A* and *B* file separate appeals *A*'s appeal is allowed partially and *B*'s appeal is dismissed *in toto* *A*, thereupon files a second appeal *B* does not file any appeal but only files cross-objections in *A*'s second appeal He can by means of such cross objections, merely attack whatever may be unfavourable to him in the decree in *A*'s appeal to the lower appellate Court, because cross-objections must relate to the particular decree from which the appeal has been preferred (*See* Note 3 above) It is not open to *B* to attack the decree passed in his appeal to the lower Court by means of cross-objections

party could not attack the dismissal of his appeal in lower Court for default]

6 (1913) 1913 Mad 784 (100 791) 41 Mad 904 (1 B)

7 (1905) 23 Bom 514 (52")

8 (1 04) 2 Mad 513 (545 546)

9 (1924) 1924 All 667 (668)

(1914) 1917 All 293 (293 300) 39 Ind Cas 947 (948) (All)

(1882) 1882 All W N 29 (29)

(1866) 9 South W R 375 (376)

(1924) 1924 1st 775 (776)

Note 6

1 (1867) 8 South W R 208 (209)

Note 7

1 (1899) 21 All 297 (300)

But under the Code of 1859 there was a conflict of decisions on this point As the matter is now made clear by O 42 R 1 the following decisions under the Code of

1859 are of *only* of academic interest —

(1866 67) 3 Mad H C R 216 (216)

(1869) 1862 South W R 48 (49) (F B) Cross objections allowed in second appeal

(1862 63) 1 Mad H C R 102 (102) Cross objections not allowed in second appeal

(1935) 1935 All 404 (405) Appeal by defendant and cross objection by plaintiff—Latter partly allowed—Plaintiff appealing from decree—Defendant can either file cross appeal or file cross objection to plaintiff's appeal—In either case appellate Court can dispose of entire suit

[See (1935) 1935 Oudh 68 (69) In Oudh where an appellant is entitled to file a second appeal only after obtaining a declaration that it is a fit case for appeal the cross objection

22, then he could also raise it by way of cross-objections^{1a}. An objection as to any error, defect or irregularity in any order affecting the decision of the case, which may be taken in an appeal against the decree under S 105 of the Code can, therefore, be taken by way of cross-objections also. Thus where an *ex parte* decree is passed against a defendant for a portion only of the claim made by the plaintiff and the plaintiff appeals against the portion disallowed, the defendant-respondent can file cross-objections in respect of the portion decreed and may therein contend that the order placing him *ex parte* in the suit was wrong¹. It was held by the Oudh Chief Court in the under-mentioned case² that in an appeal against a decree the respondent cannot raise, by way of cross-objections, the plea that an order granting a review of the judgment originally passed was wrong. The same Court has held in another case^{2a} that a respondent cannot, by way of cross-objections, attack a non-appealable order. It is submitted that the said decisions are not correct.

Where a party could not have appealed from a decree he cannot file any cross-objections in respect of it^{2b}. Thus where a decree is *wholly in favour of a party* he cannot file any cross objections against it by way of criticism of the judgment, though he can *support the decree* on any of the grounds decided against him³. But where a decree is partly in favour of, and partly against a party, he can take any cross objections to it which he could have taken by way of appeal⁴.

The cross-objections must be directed against the *particular decree* under appeal^{4a} though they need not be confined to the particular portion of the decree appealed against but may refer to any part of the decree and it need not also be confined to the subject-matter of the appeal⁵. See also Note 7, Pt (3), *infra*.

A respondent in an appeal under the Provincial Insolvency Act has

Note 3

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| <p>1a (1934) 1934 All 543 (546) 56 All 912 Defendant's plea of set off—Decree omitting to give any relief—It can be made subject of cross objections</p> <p>(1933) 1933 Rang 377 (378) Respondent bjee filed</p> <p>10w</p> <p>2 (1928) 1928 Oudh 400 (400)</p> <p>2a (1927) 1927 Oudh 218 (219)</p> <p>2b (1900) 23 Mad 229 (231)</p> <p>(1929) 1929 Nag 361 (362) <i>Pro forma</i> respondent against whom nothing has been decided and who could not have filed an independent appeal cannot file cross objections</p> <p>3 (1917) 1917 All 1 9 (153)</p> <p>(1913) 1913 1st COO (612)</p> <p>(1885) 1885 All W N 44 (44)</p> <p>(1887) 7 All COO (610)</p> <p>(1887) 4 All 491 (492)</p> <p>(1881) 11 Ind Cas 41 (42) (Lah)</p> <p>(1882) 12 Ind Cas 483 (484) 1 Pat 203</p> <p>4 (1899) 1923 Lah 21 (221) Appellate Court</p> | <p>cannot deprive him of this right</p> <p>(1897) 1897 Pun Re No 31 page 144</p> <p>(1864) 1864 Suth W R Gap 231 (232)</p> <p>(1911) 10 Ind Cas 207 (208) 1912 Pun Re No 11 Appellate Court has no power to reject cross objections on the merits without hearing the respondent</p> <p>(1914) 1914 Lah 62 (62) 23 Ind Cas 410 (411)</p> <p>(1860) 2 Suth W R 45 (45) Case under Code of 1859</p> <p>4a (1922) 1922 Mad 413 (410) One judgment and two decrees in first appeal—Second appeal against one decree—Respondents cannot object to other decree under O 41 R 2</p> <p>(1923) 1923 Lah 514 (515)</p> <p>(1929) 1929 Sind 22 (36)</p> <p>5 (1919) 1919 Mal 827 (829 830)</p> <p>(1837) 1837 Pun Re No 31 page 144</p> <p>(1854) 8 Bom 363 (370)</p> <p>[But see (1931) 1931 Mad 173 (134 135) Appeal in lower Court was dismissed for default and on that ground cross objections were also dismissed. The cross objectioner appealed. Held that the appeal is</p> |
|--|--|

a right to file a memorandum of objections.⁶ Similarly, in an appeal under S 48 of Bombay Act, IV of 1898, from the award of the Collector under the Land Acquisition Act, the respondent is entitled to file cross objections.⁷ But having regard to S 76 of the Madras Rent Recovery Act, VIII of 1865, no memorandum of objections lies against the findings of the Court of first instance in cases under that Act.⁸ The cross-objections under this rule can be filed only in a *pending* appeal and not after the appeal has been decided.⁹

4 Cross objections against findings not included in decree—*See* Note 3

5 Which could have been taken by way of appeal—*See* Note 3 *ante*

6 Cross objections to order of remand

Under S 105, sub-S (2) where a party who is aggrieved by an order of remand from which an appeal lies, does not appeal against it, he will be precluded from disputing its correctness, in an appeal from the decree after remand. It follows that he cannot, by way of cross-objections, attack such an order in an appeal by the other party from the decree. The decision in the case cited below¹ was under the Code of 1859 and is in view of S 105, sub-S (2), no longer good law.

7 Cross objections in second appeal

Cross objections may be filed in second appeals as well as in first appeals.¹ (*Vide* O 42 R 1.) But the grounds taken in cross-objections filed in second appeals must comply with the provisions of S 100 as the respondent can only take such cross-objections as he could have taken by way of appeal.²

A files a suit against *B*. It is partly decreed in favour of *A* and partly dismissed. Both *A* and *B* file separate appeals. *A*'s appeal is allowed partially and *B*'s appeal is dismissed *in toto*. *A*, thereupon files a second appeal. *B* does not file any appeal but only files cross-objections in *A*'s second appeal. He can, by means of such cross-objections, merely attack whatever may be unfavourable to him in the decree in *A*'s appeal to the lower appellate Court, because cross-objections must relate to the *particular decree* from which the appeal has been preferred (*See* Note 3 above.) It is not open to *B* to attack the decree passed in his appeal to the lower Court by means of cross-objections

party could not attack the dismissal of his appeal in lower Court for default]

6 (1914) 131J Mad 784 (1907) 41 Mad 904 (I B)

7 (1905) 23 Bom 514 (297)

8 (1904) 27 Mad 513 (545-546)

9 (1924) 1321 All 867 (668)

(1917) 1917 All 299 (299-300) 39 Ind Cas 947 (948) (All)

(1862) 1882 All W N 29 (29)

(1868) 9 Suth W R 375 (376)

(1924) 1924 Lat 775 (770)

Note 6

1 (1867) 8 Suth W R 208 (209)

Note 7

1 (1899) 21 All 297 (300)

But under the Code of 1859 there was a conflict of decisions on this point. As the matter is now made clear by O 42 R 1, the following decisions under the Code of

1859 are *only of academic interest*—

(1866-67) 3 Mad H C R 216 (216)

(1862) 1862 Suth W R 48 (49) (I B) Cross objections allowed in second appeal

(1862-63) 1 Mad H C R 102 (102) Cross objections not allowed in second appeal

(1935) 1935 All 404 (405) Appeal by defendant and cross objection by plaintiff—Latter partly allowed—Plaintiff appealing from decree—Defendant can either file cross appeal or file cross objection to plaintiff's appeal—In either case appellate Court can dispose of entire suit

[*See* (1935) 1935 Oudh 68 (89) In Oudh where an appellant is entitled to file a second appeal only after obtaining a declaration that it is a fit case for appeal the cross objector also should obtain such a declaration before filing objections]

2 (1903) 7 Oudh Cas 49 (50)

2, in the appeal preferred against another decree of that Court³ Nor can he attack the decree of the *first Court* in such circumstances,⁴ unless the first Court's decree is incorporated in the decree of the first appellate Court⁵

8 Cross objections in appeals from orders

Cross objections can be taken also in appeals from orders¹ See O 43, R 2

9 Cross objections in Letters Patent Appeals

It has been held by the High Courts of Allahabad¹ and Calcutta² that this rule does not apply to appeals under the Letters Patent But a Full Bench of the Madras High Court has held that, in view of the Privy Council decision in *Sabitri v Savi*³ this view is wrong and that this order applies also to Letters Patent Appeals⁴ It is submitted that the Madras view is correct

10 Cross objections in revision

This rule does not apply to Civil revision petitions¹ But the High Court's powers of revision may be exercised even without any application by an aggrieved party and when a case is already before it, and the necessary parties are also before it it has ample powers to entertain any questions that may be raised by the respondent²

11 Who may file cross objections

As has been seen in Note 3 *ante* this rule provides that any respondent may take any cross objection to the decree which he could have taken by way of appeal It follows that a person cannot file cross-objections unless he is a respondent to the appeal¹ and unless he could have taken such an objection by way of an appeal²

Does the mere fact that a respondent has filed an appeal against the same decree, preclude him from taking cross-objections against it in the appeal filed by the opposite party? The answer to the question depends upon the further question whether the appeal so filed by the respondent had been

3 (1926) 1926 All 582 (581)
(1922) 1922 Mad 413 (415)

Note 9
1 (1930) 124 Ind Cas 763 (2) (764) (All)

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second appeal by one party other
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the fact that the appellate Court's
decree incorporated the decree of the
first Court was apparently not
brought to the notice of their Lord
ships of the Allahabad High Court

Note 8

Note 10
1 (1912) 14 Ind Cas 562 (563) (Lah)
[Contra (1904) 17 Mad L Jour 62
(63)]
(1933) 1933 Lah 832 (832)
(1928) 1928 Mad 794 (796)
2. (1928) 1928 Mad 794 (796)
(1907) 17 Mad L Jour 62 (63)

Note 11

1 (1919) 1919 Mad 1026 (1027)
(1864) 1 South W R 341 (342)
[See also (1865) 2 South W R 227
(228)]
[See also (1862) 2 South W R 23
(233)]
2 (1929) 1929 Nag 361 (362)

decided, at the time of the hearing of the cross-objections. If it had been decided, then he cannot be heard on his cross-objections under this rule.³ He would, in fact, be barred by the principle of *res judicata*.^{3a} But where his appeal had not been decided on the date of the hearing of the cross-objections, he is entitled to be heard on his objections.⁴ In this view, the decision of the Lahore High Court in the undermentioned case⁵ where it was held broadly that a respondent who has preferred an appeal cannot file cross objections under R 22 seems to state the proposition too widely.

12 Cross objections by pauper respondent

Sub-Rule (5) expressly provides for the filing of cross-objections in *forma pauperis*.¹ This supersedes the following decisions under the previous Codes.²

13 Against whom cross objections may be filed

The principle that no decree can be passed against a person who is not a party to the proceedings applies to cross objections also and hence cross-objections cannot be allowed against a person who is not a party to the appeal.¹ But in the undermentioned case² where it was impossible to give relief against the appellant without giving relief against the absent party also the Bombay High Court held that the decision on the respondent's cross-objections bound the non-party also as, otherwise in all such cases coming under O 41 R 4 one of several defeated parties can appeal on behalf of all and defeat the respondent's rights under this rule. It is submitted that this decision is not correct. The respondent could have preferred an appeal against all if he was dissatisfied with the decree. Further the appellate Court has power to add parties to the appeal under R 20 above, whenever it considers it necessary to do so, and the difficulty mentioned by the Bombay High Court can thus be obviated (*See* O 41 R 20 and the notes thereunder and also O 1, R 10 and S 151).

(1933) 1933 Rang 311 (315)

(1914) 1914 Mad 226 (230) 33 Mad 556. In this case the decree was held to affect the respondent adversely although another person was also similarly affected.

3 (1925) 1925 Cal 882 (885)

(1924) 1924 All 567 (568)

(1903) 25 All 628 (629)

[See also (1867) 8 South W R 314]

(1950) But where the respondents

Note 12

- 1 (1910) 7 Ind Cas 118 (122) (Cal)
(1933) 1933 Rang 158 (159) 29 Nag L R 225
Overruling (1905) 1 Nag L R 33 (35)
- 2 (1901, 1908) 4 L B R 262 (263)
(1815 77) 1 Bom 75 (79)
(1885) 11 Cal 735 (737)
(1868) 9 South W R 356 (356 357)
(1885) 8 Mad 214 (217)
(1905) 1 Nag L R 33 (35)

Note 13

3a [See (1918) 1918 Lah 201 (202) 1918 Ind L R
Re No 20]

1 cross
draft

vered—

appeal

—Cross objections on different grounds filed by appellant in cross-appeal are not barred by *res judicata*.

2 (1887) 11 Bom 596 (598)

[See also (1934) 1934 Oudh 131 (132)]

(1924) 1924 All 840 (840)

5 (1925) 1925 Lah 2 (5)

22, 14 Cross objections against co respondent

1 It has been held by the High Courts of Allahabad,¹ Bombay,² Calcutta³ and Patna⁴ and the Judicial Commissioner's Court of Upper Burma⁵ that as a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellants, and it is only by way of exception to this general rule that one respondent may urge cross-objections as against the other respondents, the exception holding good among other cases, in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents. Thus when the questions raised by the cross-objections are common both to the appellant and co-respondent the cross-objections may be entertained as against both.⁶ *P* sues *Q* and *R* for Rs 10,000 alleged to be his share of the profits of certain lands. A decree is passed against *Q* and *R* for Rs 7,000. *Q* appeals from the decree making *P* and *R* respondents. In such a case, *P* may prefer cross-objections not only against *Q* but also against *R* with reference to the Rs 3,000 in respect of which his claim was dismissed by the lower Court.⁷ Similarly in suits for dissolution of partnership and for accounts, accounts are taken as between all the partners and not as between the plaintiff on the one hand and the defendants on the other. Hence the appeal of one of the partners opens out the whole case and cross-objections can be urged not only against the appellant but also against co-respondents.⁸ According to the High Court of Madras cross-objections may be allowed to be taken against co-respondents in *all* cases.⁹ Opinion is divided in Lahore, Nagpur and Oudh, some cases favouring the view first mentioned above¹⁰ and others

Note 14

1 (1906) 28 All 95 (97)

(1864) 1864 South W R Gap 234 (295)

(1864) 1864 South W R Gap 3 (2) (4)

4 (1924) 1924 Pat 200 (203)

(1934) 1934 Pat 134 (140 141) One respondent not entitled to urge cross objection against another as a matter of right

(1920) 1920 Pat 77 (81 82) 5 Pat L Jour 328

(1901) 23 All 93 (94)

(See however (1924) 1924 All 605 (608) In this case it was held that the respondent can be transposed as appellant)

2 (1930) 1930 Bom 1 (a)

(1913) 21 Ind Cas 7 (8) 37 Bom 511

(1896) 1896 Bom P J 742

(1899) 6 Cal 114 (121 122)

(1871) 15 South W R 96 (26)

(1869) 11 South W R 435 (436)

(1868) 10 South W R 326 (328)

(1868) 9 South W R 78 (79)

(1867) 7 South W R 32 (533)

(1867) 7 South W R 360 (366)

(1867) 7 South W R 49 (49)

(1867) 7 South W R 39 (1) (39)

(1864) 1 South W R 224 (200)

(1887) 1887 Pun Re No 7 Page 13

(1901) 14 C P L R 46 (48)

(1836) 9 C P L R 62 (64)

(1923) 1923 Oudh 103 (109) 23 Oudh Cas

200

(1921) 1921 Oudh 176 (180)

(1919) 1919 Oudh 324 (331)

following the Madras view ¹¹

15 Omission to file cross objections

A party in whose favour a decree has been passed has a substantive right of a valuable kind which should not be lightly interfered with ¹ Hence, as an ordinary rule, in the absence of a cross-appeal or cross-objections by a respondent, the appellate Court has no power to disturb the decree of the lower Court as far as it is in the appellant's favour ² and cannot grant any relief to the respondent except in so far as such relief is incidental to the relief granted to the appellant ³ This Rule, however, is only a general rule and the power of the appellate Court to pass any order or decree that may be necessary in the interests of justice is now expressly saved by O 41, R 33⁴ and was recognised by the following decisions⁵ under the former Code. The general rule mentioned above applies also in cases where the decree of the lower Court is such that a demand by the appellate Court is necessary ^{5a} It follows from

- (1900) 11 Oudh Cas 13 (14)
11 (1923) 1223 Lah 21 (40)
(1910) 6 Ind Cas 430 (431) (Nag)
(1919) 1919 Oudh 60 (11)

Note 15

- 1 (1927) 1227 P C 252 (253) 6 Rang 20 (P C)
2 (1870) 2 N W P H C R 44 (45)
(1933) 1933 Mad 463 (465)
(1863) 1863 Marsh 332
(1857) 1801 2 U B R 306
(1888) 1888 Pun Re No 127, page 343
(1881) 1881 All W N 68 (83)
(1875 75) 1 All 545 (547)
(1883) 11 All 35 (38)
(1880) 4 Bom 223 (224)
(1920) 1920 Oudh 145 (146) 23 Oudh Cas 110
(1925) 1925 Cal 94 (95)
(1921) 1921 Lah 318 (319)
(1918) 1918 Lah 129 (130)
(1918) 1918 Cal 169 (169)
(1916) 1916 P C 148 (149) (P C)
— (1916) 1916 Lah 283 (287)
(1916) 1916 Cal 250 (251) 32 Ind Cas 494

- (1875) 24 Suth W R 179 (181)
(1912) 31 All 32 (34, 35)

- 3 (1907) 3 Nag L R 85 (89) *Held*, in this case the relief claimed by the respondent was not incidental to the relief granted to the appellant and hence could not be granted
(1892) 1892 Pun Re No 46, page 109
(1908) 30 All 48 (49)

written objections to the decree if it meant to attack the same in the appeal of the opposite party. But the practice under that Code also was to insist on written objections being filed before the hearing. See the following cases —
(1867)

the Court's rule of practice
[See also (1870) 1870 Pun Re No 78
(1866) 6 Suth W R Vis 102 (102) No objection to respondent filing notice with the Registrar
[But see (1864) 1864 Suth W R Gap 299 (300) Written notice not necessary]

- 4 (1917) 1917 Oudh 399 (400)
(1917) 1917 Lah 423 (426)
(1910) 8 Ind Cas 337 (338) (Mad)
[See also (1927) 1927 All 453 (454) 49 All 224 97 Ind Cas 65
5 (1894) 18 Bom 520 (521, 522) *A v B and C* — Suit decreed against *B* dismissed against *C* — Appeal by *B* against *A* and *C* — Appellate Court can vary decree both against *B* and *C* making each liable to extent of half

pealing against *B* — Appellate Court may add *B* as respondent and pass decree against him, setting aside decree against *C*

- (1904) 31 Cal 643 (645) (F B)
[See also (1878) 1 Cal L Rep 144 (146)]

- 5a (1907) 34 Cal 906 (938)
(1911) 11 Ind Cas 640 (641) (All) (F B)
[But compare (1881) 3 All 643 (646) In this case *Stuart, C J* took opposite view but *Oldfield, J* took the view stated above]

Section 348 of the Code of 1859 did not expressly require the respondent to file any

22, what has been said above that the appellate Court cannot as a general rule dispose of the appeal on a point not raised by either party⁶ (See however O 41, R 2) Where, however, the case is such that the respondent could not have filed an appeal or cross-objections, the appellate Court can grant him the necessary relief without any cross-objections. Thus where the suit in first Court was for either of two reliefs in the alternative and the first Court passed a decree granting him one of the reliefs, the plaintiff having got what he asked for, can neither appeal nor file cross-objections. But if on the appeal of the opposite party the appellate Court considers that the plaintiff was not entitled to the relief granted by the decree it may, while setting aside the decree of the lower Court, pass a decree in favour of the plaintiff granting him the other relief⁷. Similarly, where the trial Court has not dealt with the respondent's claim to set off at all the absence of cross-objections by the respondent is no bar to the entertainment of the point in appeal⁸.

16 Grounds not raised in cross objections not to be raised at the hearing

The respondent cannot urge at the hearing of the appeal, grounds not set forth in the memorandum of objections, except with the permission of the Court¹ (See O 41, R 2)

17 Effect on cross objections of withdrawal of appeal or its dismissal for default.

S 561 of the former Code provided that a respondent may *upon the hearing*, take any objection to the decree which he could have taken by way of appeal if he had filed cross-objections. Hence, it was held that if the appeal was withdrawn before the hearing, the respondent could not prosecute his cross-objections¹ but that once the hearing had commenced the appellant could not withdraw the appeal so as to prevent the respondent from urging his cross-objections². Similarly it was held that if the appeal was dismissed for default the cross-objections could not be heard³. Under the present Rule the words 'upon the hearing' in sub-R 1 have been omitted and sub-R (4) has been added, making it clear that the withdrawal of an appeal⁴ or the dismissal of an appeal for default⁵ does not affect the hearing of the respondent on his cross-objections.

6 (1925) 1925 Cal 518 (520)

(1871) 15 Suth W R 227 (227)

7 (1913) 13 Mad L Jour 586 (587)

8 (1904) 30 Bom 173 (189)

Note 16

1 (1913) 19 Ind Cas 98 (113) (Bom).

Note 17

1 (1895) 17 All 518 (519)

(1893) 1893 All W N 65 (65)

(1896) 8 All 551 (552)

(1866) 1 Agra H C R 23 (24)

(1873) 10 Bom H C R 397 (398)

(1875) 23 Suth W R 223 (229)

(1870) 14 Suth W R 210 (210)

(1868) 9 Suth W R 328 (323)

(1909) 4 Ind Cas 1076 (1077) (Mad)

The following cases dealing with the question of whether in such cases the Court might treat the cross objections as an appeal and dispose of it as such are only of academic interest now in view of the clear provisions of sub rule (4) of R 22—
(1922) 16 Bom 219 (253).

(1839) 23 Bom 692 (695)

(1883) 9 Cal 738 (740)

[See also (1834) 10 Cal 415 (479 480)]

2 (1901) 23 All 130 (133)

(1885) 9 Bom 23 (30)

4 (1925) 1925 Mad 725 (725)

[See (1934) 1934 Lah 136 (136) Court is not bound to hear cross objections]

(1932) 1932 Mad 722 (723) 55 Mad 220
But if the appeal itself is not validly filed then the memorandum of objection should not be heard

5 (1921) 1921 Mad 405 (405 406) 44 Mad 523

(1911) 9 Ind Cas 572 (1) (572) (Mad).

Dismissal of appeal as time-barred—Under the former Code it was held by the Allahabad High Court that the entertainment of the cross-objections was contingent and dependent upon the hearing of the appeal and when the appeal was dismissed as being time-barred the cross objections could not be heard.⁶ The same view has been held under the present Code also by the High Courts of Lahore⁷ and Madras⁸ notwithstanding the omission in sub R (1) of the words upon the hearing which occurred in the former section.

Dismissal of appeal for failure to pay Court fees—Effect—Under the former Code where an appeal was dismissed for failure to pay Court-fees it was held that there being no hearing of the appeal the cross objections could not be heard.⁹ Even under the present Code it has been held by the Lahore¹⁰ and Rangoon¹¹ High Courts and the Nagpur Judicial Commissioner's Court¹ that s. 22 (4) should be interpreted strictly and that on the dismissal of an appeal without a hearing on account of the appellant's failure to pay the requisite Court fees, the cross-objection cannot be heard. But it has been held by the High Court of Madras¹³ that the dismissal of an appeal for failure to pay Court fees is only a *dismissal for default* and does not affect the maintainability of the cross objections.

Dismissal of appeal for failure to pay Court fees—Effect—Under the former Code it was held by the Patna High Court that the dismissal of an appeal for failure to furnish security for costs is a dismissal for default and the respondent is entitled to have his cross objections heard and disposed of on the merits notwithstanding such dismissal.¹⁴ But the Oudh Court has taken a contrary view.¹⁵

Dismissal of appeal after hearing does not affect cross objections—The respondent is entitled to have his cross-objections heard and disposed of on the merits notwithstanding that the appeal is rejected on the ground that no appeal lies, because in such a case the appeal does not fail for an extraneous reason but fails *after hearing*.¹⁶ Similarly where an appeal is dismissed for failure to join the necessary parties, after hearing the appeal on the question of non joinder the cross objections may be heard.¹⁷

18 Effect on cross objections of abatement of appeal

Cross-objections cannot be heard when the appeal has *abated*.¹ The reason is that there is no dismissal for default or withdrawal of the appeal in such a case.

[But contr. (1914) 1914 Oudh 303 (304) This case is bad law as it is opposed to the plain language of the

14 (1919) 1919 Pat 219 (219)
15 (1923) 1923 Oudh 103 (103, 109) 20 Oudh Cas 280
16 (1912) 13 Ind Cas 19 (19) 34 All 140 (1884) 8 Bom 368 (370)
(1909) 4 Ind Cas 625 (626) (Lal)
[But compare (1905) 1905 Patn Re No 28 page 148]
17 (1903) 21 Mad 359 (353)

10 (1920) 1920 Lah 24 (24)
(1911) 10 Ind Cas 207 (209) 1912 Pun Re

(1921) 1921 Mad 400 (400, 406) 44 Mad 879

2. 19 Limitation for cross objections

Cross-objections must be filed within one month from the date of the service of notice of the date fixed for hearing the appeal¹ Otherwise they cannot be heard² The appellate Court has no power to hear the appeal before the expiry of this period of one month so as to deprive the respondent of his right of filing cross objections³ Where a respondent in a High Court appeal was merely served with a notice of the appeal in the usual form fixing a period of 25 days for *appearance* but was not served with any notice fixing the date of hearing, a memorandum of cross objections though filed long after one month from the receipt of the former notice, is not out of time⁴ A transferee from a respondent is bound by the same period of limitation as would have applied to his transferor and cannot file any cross-objections after the expiry of that period⁵ It has been held that the notice referred to in the Rule means only the notice of the *original day fixed*, and the fact that a subsequent notice is given of a postponed date does not give the respondent a fresh opportunity of filing a memorandum of cross objections⁶

When the period of one month expires on a holiday the cross-objections may be filed on the re-opening day⁷ (See S 4 of the Limitation Act) The appellate Court may, in its discretion, extend the period within which the cross-objections are to be filed,⁸ and this may be done even after the objections have been filed⁹ The extension of time may also be implied from the circumstances of the case¹⁰

Sub-R (1) of this Rule prescribes the period of limitation only for filing *cross objections* Limitation for filing a cross-appeal is governed by the Limitation Act¹¹

Note 19

- 1 (1871) 15 *Suth W R* 18 (1) (18) Under the Code of 1859 there was no period of limitation

(1883) 1853 *All W N* 237 (237)

Under the Code of 1877 and under that of 1882 prior to amendment in 1888 the cross objections were to be filed seven days prior to the date of the hearing See the following cases —

(1890) 13 *Mad* 492 (494) S 551 as amended by Act VII of 1888 allows one month

- 2 (1894) 1894 *All W N* 2 (2)

[See (1857) 11 *Bom* 698 (700) Purpose of the Rule is to give timely intimation of the proposed objections to the appellant

- 3 (1890) 13 *Mad* 492 (493)

(1902) 5 *Oudh Cas* 235 (237)

(1917) 1917 *I A* 408 (409)

(1916) 1916 *Mad* 734 (734) That the month in February does not affect the calculation

- 4 (1906) 1906 *Mad* 283 (284)

- 5 (1932) 1932 *All* 45 (47)

(1934) 1934 *I A* 653 (654)

- 6 (1934) 7 *C P L R* 85 (57)

[See also (1883) 4 *All* 248 (249) (F B) Case under Code of 1852 prior to amendment made in 1883 by which the present rule as to limitation was

introduced]

[But see (1887) 1887 *Bom P J* 177 Case prior to 1888 when the section required cross objections to be filed seven clear days before the day fixed for hearing.]

(1897) 11 *Bom* 698 (700) Day fixed for hearing includes day to which hearing may be adjourned

- 7 (1882) 4 *All* 430 (434)

[But see (1893) 1893 *All W N* 29 (229)]

- 8 (1905) 28 *Mad* 220 (235)

(1922) 1922 *Nag* 213 (216)

(1890) 14 *Bom* 111 (112) Where respondent in order to save costs delayed in

The following decisions prior to 1883 have been superseded in entire or in part in 1883 and repeated in the present Code —

(1882) 2 *All W N* 213 (213)

(1883) 9 *Cal* 631 (632)

(1881) 7 *Cal* 654 (655)

- 9 (1917) 1917 *L B* 37 (37)

- 10 (1902) 22 *All W N* 74 (74)

- 11 (1886) 5 *Suth W R* 31 (93)

Cross-objections in forma pauperis—Art 170 of the Limitation Act does not apply to cross-objections in *forma pauperis* and such cross-objections may be filed within the period indicated in Rule 22¹²

20 Appeal filed out of time may be treated as cross objections

An appeal filed beyond the period of limitation may be treated as cross-objections under this Rule¹

21 Court fee on cross objections

Under S 16 of the Court-fees Act the Court fee payable on a memorandum of cross-objections was the difference between the fee paid on the memorandum of appeal and that payable on it if it included the subject-matter of the cross objections¹ A memorandum of cross objections is now chargeable with Court-fee under Art 1 Sch I of the Court fees Act² That section has now been repealed and even where the appeal wherein the cross-objections are filed falls within the scope of Sch II Art 17 it is only Art 1 Sch 1 that applies to the cross-objections inasmuch as Sch II Art 17 refers only to *suits and memoranda of appeals* In such cases the valuation placed by the respondent on his cross-objections must be accepted if not unreasonable³

Where the decree is entirely in respondent's favour and he files objections against the findings but supporting the decree the objections are not cross objections and are not liable to stamp duty under Sch I Art 1⁴

Cross-objections as to costs—In *Kamal Kumare v Rangpur Bank*⁵ the Calcutta High Court has held that a memorandum of cross-objections as to costs alone requires to be stamped only as a petition under Sch 2 Art 1 and not *ad valorem* under Art 1 Sch 1 the reason given being that costs do not form the subject-matter of dispute within the meaning of Art 1 of Sch 1. The Patna High Court has, on the other hand, held that even if the cross-objections are as to costs only an *ad valorem* Court-fee should be paid⁶

Under the repealed S 16 of the Court-fees Act it was enough if the Court-fee on cross-objections was paid at any time *before the hearing*⁷ But now S 6 of the Court-fees Act applies to the case and the Court fees should be paid at the time of *filing the cross objections*

It has been held by the High Court of Allahabad that S 12 of the Court Fees Act does not apply to cross-objections⁸

12 (1929) 1929 Pat 31 (32) 7 Pat 827

Note 20

1 (1925) 1925 Lah 57 (57)

(1934) 1934 Lah 273 (273)

(1922) 1922 Lah 423 (424)

Note 21

1 (1918) 1918 All 185 (186) 40 All 93

(1919) 1919 Cal 620 (622) 46 Cal 100 No excuse merely because appellant has paid more than adequate Court fee on the appeal

(1919) 1919 Pat 494 (494) Where object of cross objection is to have a declaration in respect to a mortgage set aside proper value of cross objection for Court fees is the value of the mortgage

2 [See (1899) 2 Oudh Cas 87 (90)]
(1871) 15 Suth W R 511 (512)

[See (1867) 8 Suth W R 319 (330) Case before the Court fees Act]

(1905) 2 Cal L Jour 68. But in the case of a cross appeal Court fee was to be paid at the time of filing

8 (1933) 1893 All W R 55 (55)

22. **22 Adding party for purposes of cross objections**

It has been seen in the Notes under O 41, R 20 that since the Privy Council decision in *Chokkalingam v Seethai*, 1927 P C 252, the mere fact that the presence of a party before the Court is necessary for the complete disposal of the appeal or cross-objections is not enough to make him interested in the result of the appeal within the meaning of R 20 unless he stands to be prejudiced by the determination of the appeal as framed behind his back. Hence a party cannot be added as a respondent to an appeal under R 20 merely for the purpose of filing cross-objections against him.¹ As to the Court's power to add parties to an appeal apart from the provisions of R 20 see Notes under R 20. Assuming such power exists, the Court will not direct the addition of a party who is an unnecessary party for the appeal merely for the purpose of enabling a respondent to file cross objections against him.²

23 Second appeal

A decree of an appellate Court disallowing the cross objections of a respondent is a decree passed in appeal within the meaning of S 100 and a second appeal lies therefrom.³ But where the cross-objections are rejected *in limine*² as for instance, on the ground of the respondent's failure to pay the deficit Court-fees within the time ordered,³ the order does not amount to a decree and hence is not subject to a second appeal.

R. 23. [S 562] Where the Court from whose decree an appeal is preferred has disposed of the suit¹ upon a preliminary point² and the decree is reversed⁷ in appeal the Appellate Court may, if it thinks fit by order remand the case,⁸ and may further direct what issue or issues shall be tried in the case⁹ so remanded and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions be evidence during the trial after remand
[1877—S 562, 1859—S 351]

Local Amendment**MADRAS**

Substitute the following for Rule 23 —

23 Where the Court from whose decree in appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal or will be

Note 22

1 (1916) 1376 Cal 533 (385) 53 Cal 2 0

(1917) 1917 Mad 473 (480)

[See also (1887) 11 Bom 596 (598)]

In so far as the following decisions lay down the contrary proposition they should be regarded as obsolete —

(1898) 25 Cal 565 (568)

(1864) 1 South W R 229 (250)

(1900) 1900 Mad 120 (120 121)

(1916) 1916 Mad 1219 (1220)

(1922) 1922 Nag 213 (215 216).

2 (1912) 13 Ind Civ 306 (306) (Mad) Follow

119 13 Ind Civ 633 (Cid)

Note 23

1 (1887) 10 Mad 322 (35)

(1933) 1933 Lah 301 (301)

2. (1914) 1918 Lah 301 (302) 1918 PR No 0.

(1934) 1934 Lah 273 (4) 15 Lah 611

Application to treat time barred appeal as cross objections and appeal both dismissed by single judgment — Judgment so far as rejects application is not appealable and reversible.

3 (1904) 4 Nag LR 168 (175)

the appellate Court in reversing or setting aside the decree under appeal considers it necessary in the interests of justice to remand the case the appellate Court may by order remand the case and may further direct what issue or issues shall be tried in the case so remanded and shall send a copy of its judgment and Order to the Court from whose decree the appeal is preferred with directions to re-admit the suit under its original number in the register of civil suits and proceed to determine the suit and the evidence (if any) recorded during the original trial shall subject to all just exceptions be evidence during the trial after remand

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1 Legislative changes

The words "and the evidence remanded at the end of the Rule" are new. Section 562 was amended by Act VII of 1888 the section only applied where the lower Court had disposed of the suit on a preliminary point so as to exclude any evidence of fact which appears to the appellate Court essential to the determination of the rights of the parties. The words were omitted by Act VII of 1888 which also substituted the words "to determine the suit on the merits" for the words "investigate the suit on the merits" which occurred originally.

2 Distinction between Rules 23 and 25

This rule empowers the appellate Court to remand the case only when the lower Court has disposed of the suit upon a *preliminary point*. If the trial Court decides the suit on the *merits*, it is not open to the appellate Court to order a remand under this rule. It may, however, act under Rr 24 or 25 *infra* ¹

Order 41 Rule 23—Note 2

1 (1923) 1923 Cal 323 (324)

(1934) 1934 Lah 546 (579)

(1892) 19 Cal 336 (33-)

23,

infra

The following are the points of distinction between Rr 23 and 25,

- (1) Where an order of remand is made under this rule, the *whole case goes back for decision to the lower Court* (except on the point on which the appellate Court has reversed the finding of the lower Court) Whereas in the case of an order under R 25, the case is retained on the file of the appellate Court and only *issues are remitted* to the lower Court for findings ^{1a}
- (2) An order of remand under this rule is appealable but not an order under Rule 25
- (3) An order of remand under this rule is a *final* order which cannot be re-considered by the Court which passed it except on review whereas an order under R 25 is an *interlocutory* order which it is open to the Court to re consider ²

3 Preliminary point meaning of

A point can be said to be a preliminary point within the meaning of this rule, only where it is such that the decision thereon in a particular way is sufficient to dispose of the whole suit, without the necessity for a decision on the *other* points in the case ¹ The point may be one of fact or of law ^{1a} Thus a suit will be held to be disposed of on a preliminary point if it is disposed of on any of the following grounds —

- (1) That the suit is barred by *res judicata* ²
- (2) that the suit is barred by limitation³ or by any other rule of law,⁴
- (3) that the document on which the suit is based is inadmissible in evidence ⁵
- (4) that the plaintiff is estopped from proving his case ⁶

1a (1927) 1927 Cal 401 (402)
(1933) 1933 Lah 659 (659) Appellate Court framing new issues and remanding case to trial Court—Remand should be under O 41 R 25 and not under O 41 R 23

[See also (1925) 1925 Rang 303 (303)
The word remand should be used only when a case is returned for decision]

[See also (1935) 1935 Oudh 333 (334)]

2 (1922) 1922 Oudh 236 (248) 25 Oudh C 189

[See also Note 23 point 2]

Note 3

(1844) 10 All 289 (322 323 324 342)

(1857) 3 All 16 (1) O

(1905) 27 All 631 (634)

(1904) 1904 Linn Re No 2 1360 10

(1923) 10 Mad 207 (10)

(1924) 13 J M d 202 (10) 40 Mad 60

(F B)

(1930) 1930 Mad 1017 (1018)

(1929) 1929 Mad 205 (207)

(1928) 1928 Mad 991 (991 992)

(1928) 1928 Mad 430 (432)

(1927) 1927 Mad 1159 (1160)

(1889) 11 All 194 (223) (F B)

(1917) 1917 All 243 (243) 39 All 165.

(1923) 1923 Oudh 177 (179) 26 Oudh Cas 10

1a (1935) 1935 L at 49 (50)

(1934) 1934 Cal 49 (50)

2 (1866) 5 Suth W R 63 (66) (P C)

(1925) 1925 Mad 453 (484)

3 (1866) 5 Suth W R 63 (66) (P C)

(1902) 1 Ind C 185 (84) (Cal)

(1867) 5 Suth W R 331 (331)

4 (1868) 10 Suth W R 434 (439) Suit under S 230 of Act VIII of 1859—but dismissed on a point not arising in the settlement

- (5) that the plaintiff has no cause of action,⁷
- (6) that the suit is bad for defect in the description of the defendant,⁸
- (7) that the matter is concluded by a valid award,⁹
- (8) that the case raised at the hearing is different from that raised in the plaint,¹⁰
- (9) that the suit has abated.¹¹

There is a conflict of opinion, however, as to whether the point should be one not relating to the *merits* of the case. It has been held in one class of cases that a point is not a preliminary point where it relates to the *merits* of the case, although its decision may dispense with the necessity for a decision on the other points in the case.¹² Thus according to this view a suit cannot be said to have been disposed of on a preliminary point in the following cases —

- (1) Where in a suit for ejectment and damages, the Court finds that the plaintiff has failed to establish the title alleged by him and dismisses the suit ¹³
- (2) Where in a suit for mesne profits, the Court finds that the defendant was not in possession during the period in question and dismisses the suit ¹⁴
- (3) *See also* the undermentioned cases ¹⁵

According to another class of cases a point may be a preliminary point although it *relates to the merits* of the case. Thus, according to these decisions a preliminary point means some point either collateral to the merits which precluded their determination altogether, or some particular question which, though relating to the merits, precluded their general determination.¹⁰ Thus,

- 7 (1897) 20 Mad 25 (27)
[See also (1887) 9 All 26n (30)
Point that the suit is a bit of
wanton litigation and that there is
nothing tangible upon which the
claim is based is preliminary point]
[See also (1931) 1931 Cal 604 (606)
59 Cal 68 Application for prosecu-
tion under Criminal Procedure Code
- (1887) 1887 Pun Re No 109 page 250
(1920) 1920 Mad 898 (899)
13 (1905) 1905 All W N 157 (157)
14 (1897) 1 Cal W N 340 (340)
15 (1868) 10 Suth W R 411 (411) Suit for rent
—Question of plaintiff's title is not
a preliminary question
(1933) 1933 Lah 224 (224) Question of
factum of death of defendants—
- Court
ntitled
m and
other
23
- (1901) 4 Oudh Cas 23 (24) Suit by daugh-
ter for her share under Mahomedan
Law—Trial Court holding that by
custom she was excluded from in-
heritance and dismissing suit—Ap-
pellate Court reversing decision can
not remand as trial Court's decision
was not on a preliminary point
- 16 (1921) 1921 Mad 118 (118 119)
(1934) 1934 Cal 49 (50)
(1933) 1933 Rang 413 (414 415)
(1893) 16 Mad 207 (210)
(1892) 12 C P L R 45 (47).
(1905) 1905 Pun Re No 2 page 10 (F B)
[See also (1930) 1930 Mad 1017
(1018)]
- tiff at hearing was different from
that raised in his plaint
- 26 Bom
holding
- (1911) 9 Ind Cas 224 (224 225) (Cal) Per
Chitty J Cox J, contra
(1905) 1905 Pun L R No 49 page 187
(1903) 1903 Pun L R No 157 page 635
(1902) 1902 Pun Re No 99 page 445
- O P C 337 & 338

cording to this view, in a suit for damages for breach of contract, the question as to the *factum* of contract is a preliminary point although it relates to the merit of the case.¹⁷ Similarly, in a suit based on an award, the question of the validity of the award has been held to be a preliminary point.¹⁸ So also the question of the validity of the contract on which the suit is based.¹⁹ See also the following cases for other instances.²⁰

The question whether a point is a preliminary one does not depend on the degree of *importance* which it may assume during the hearing of the case.¹ Nor is it necessary that the suit should have been *dismissed* as a result of the finding on the preliminary point. A suit may also be *decreed* on a preliminary point. Thus where a decree is passed, not after trial on all the issues but on the basis of an award²² or on the consent of the parties²³ or on the basis of a commissioner's report,²⁴ the suit may be said to be disposed of on a preliminary point. See also the undermentioned cases.²⁵

Where the points left undecided in a suit are such that they would have arisen only after the suit is *disposed of*, it cannot be said to have been decided on a preliminary point.²⁶ Thus in a suit for possession and mesne

(1921) 1921 Mad 118 (118 119)	damages—Remand is under O 41
(1905) 27 All 691 (694)	
(1908) 30 All 63 (66)	
(See also (1917) 1917 Pat 577 (578))	
Suit based on lease—Dismissed on the ground that lease was obtained by undue influence—Other issues not considered—Appellate Court reversing decree can remand]	389) stition
(1927) 1927 Mad 1159 (1160) Suit for maintenance—Suit dismissed on the ground that plaintiff was not entitled to maintenance—Other issues not decided—Disposal is on a preliminary point	of referee appointed by agreement of both parties]
(1933) 1933 Oudh 560 (561) Suit by co-sharers for share of profits—Plea of	23 (1931) 1931 P C 107 (109) (P C)
	24 (1917) 1917 All 148 (149) In this case it was held that it was a little difficult to apply the provisions of Rule 23 after a preliminary decree had been passed but that they were applicable so far as they could be reasonably applied
	[Compare (1922) 1922 Mad 112 (113)
	25 (1930) 1930 Mad 1017 (1018)
	(1933) 1933 Oudh G (9) Decision of preliminary point—High Court not agreeing—Only course for it is to send case back for trial of other question arising in the case
mand held to be one under O 41 R 23	(1871) 18 South W R 109 (110) Suit decreed by lower Court on a certain view of law—Decision set aside—Case re
(1908) 1908 Pun Re No 56 page 283 Suit by reversioner to set aside a sale by a proprietor—Suit dismissed on the ground that plaintiff had no <i>locus standi</i> to sue as the vendor had adopted a son—Dismissal is on a preliminary point	26
(1915) 1915 Lah 449 (449) Redemption suit—Defendant's plea that there was a sale in his favour is a preliminary	
	of remand]
	(1908) 6 All L J 545 (546) Appellate Court sending down case for partition by metes and bounds—Appeal lies as from decree and not as from order of remand
	[Compare however (1901) 1901 O Mad 1017 (1018) suit for possession—Defendant claiming right to redeem—Trial Court finding against him
ing that willful neglect was proved and remanding on question of da	

profits in which a question of mesne profits would arise after the decree for possession is passed, the dismissal of the suit on the ground that the plaintiff was not entitled to possession, is not a decision on a preliminary point²⁷

A suit disposed of under O. 17, R. 3 cannot be said to be disposed of on a preliminary point²⁸

4 Where Court decides on all the issues

Where the Court has adjudicated on *all* the issues involved, the disposal cannot be said to be on a preliminary point¹ merely because one of the issues is of a preliminary nature and the suit has been dismissed on the basis of the decision thereon² or because it has decided the case with reference to the admissions made by both the parties without taking other evidence³ or because other points, which might have arisen if the suit had been differently framed, or if an amendment of the plaint had been allowed, have not been

and decreeing unconditional possession

payable by the defendant for redemption—*Held* that Rule 23 covered the case]

[Compare also (1917) 1917 All 148 (149) Where it was held that it was a little difficult to apply Rule 23 to a case where a preliminary decree had been passed but that the provisions should be applied, so far as it was reasonable to do so to a case where a final decree had been erroneously passed on the basis of the report of a commissioner who had been superseded]

27 (1922) 1922 Mad 112 (113 114) 45 Mad 449
28. (1935) 1935 Rang 123 (121)

(1869) 10 Suth W R Cr 389 (388)
(1932) 1932 Lah 443 (443)
(1930) 1930 Lah 181 (182)
(1927) 1927 Lah 618 (619)
(1927) 1927 Lah 42 (43)
(1926) 36 Ind Cas 786 (Lah)
(1926) 1926 Lah 537 (538)
(1926) 1926 Lah 184 (185)
(1923) 1923 Lah 171 (172)

(1896) 19 Mad 479 (481)
(1896) 19 Mad 157 (159)
(1929) 1929 Nag 63 (63)
(1923) 1923 Oudh 177 (179) 26 Oudh Cas 10
(1927) 1927 Pat 296 (297) 6 Pat 330 The decision in 1920 Pat 735 is in so far as it is against this decision can not be accepted as correct

(1898) 3 Cal W N 325 (328)
(1897) 1 Cal W N 234 (30)
(1892) 19 Cal 336 (338)
(1890) 17 Cal 168 (171)
(1876) 25 Suth W R Cr 294 (285)
(1874) 21 Suth W R 326 (326)
(1870) 13 Suth W R 107 (107, 108)

[Compare (1890) 13 All 386 (389 393) Where it was held that R 23 applied to a case which had been decided in accordance with the deposition of a referee appointed by agreement of both the parties under the provisions of the Oaths Act]

23, decided⁴ Hence, where the appellate Court allows an amendment of the plaint⁵ or directs the addition of certain parties⁶ and remands the suit, the remand is not under this rule.

But the mere fact that the Court has *recorded evidence on all the issues* does not make its decision other than a disposal on a preliminary point if it has, in fact, decided the suit with reference to its finding on a preliminary issue without deciding the other issues in the case⁷

5 Entire suit must have been disposed of on a preliminary point

In order to attract the application of this Rule the *entire* suit must have been disposed of on a preliminary point and not only a *portion* of it¹ A sues B for an injunction restraining B from interfering with A's enjoyment of his lands and for a declaration of his right of easement over B's land. The Court decrees the claim for injunction but dismisses the suit so far as the claim for easement is concerned on the ground that, on the face of the plaint, the statement of the easement claimed is so inadequate and unsatisfactory that it is impossible to enter into the question thereby raised. In such a case, only a *portion* of the suit having been disposed of on a preliminary point, this rule does not apply² Similarly where several questions have been raised and decided, the suit cannot be said to be disposed of on a preliminary point merely because one or more of the *issues* have not been decided on the merits but have been disposed of on a preliminary point³ Thus in a suit for recovery of arrears of rent and for ejectment from certain plots of lands, one of the

- 4 (1931) 1931 Mad 1 (2)
5 (1925) 1925 Mad 229 (229) 48 Mad 713
(1924) 1924 Lah 245 (246)
(1927) 1927 Mad 859 (860)
(1880) 2 All 669 (670 671)
(1894) 17 Mad 187 (188)
6 (1925) 1925 Rang 320 (320) 3 Rang 490
(1886) 10 Bom 338 (400)
(1926) 1926 Cal 1076 (1077)
(1910) 7 Ind Cas 75 (78 79) (Cal)
(1911) 11 Ind Cas 183 (184) (Cal)
(1916) 1916 Cal 283 (284) 43 Cal 938
(1920) 1920 Bom 85 (87)

to its amendment by Act II of 1889 a suit could not be remanded if the lower Court had recorded evidence on all the issues. The following cases bearing upon the section as it stood prior to the amendment are only of academic interest now —

- (1887) 3 All 29n (30)
(1886) 9 Mad 355 (356)
(1888) 10 All 289 (322)
(1884) 7 All 167 (170)
(1895) 17 All 112 (116) 22 Ind App 1 (P C)
(1868) 10 Suth W R Cr 411 (411)
(1868) 10 Suth W R Cr 378 (378)
(1868) 10 Suth W R Cr 374 (374)
(1873) 20 Suth W R Cr 143 (149)
(1874) 22 Suth W R Cr 224 (225)
(1882) 1882 All W N 5 (5)
(1882) 1882 All W N 45 (45)
(1903) 11 Oudh Cas 169 (170)

Note 5

- 1 (1892) 1892 All W N 11 (12)
(1932) 1932 Lah 219 (220)
(1902) 1902 Pun Re No 99 page 445

to be erroneous —

- (1927) 1927 Lah 196 (197)
(1924) 1924 Lah 33 (34) Death of one defendant brought to the notice of the Court but Court continuing suit and passing decree without legal representative held that lower Court must be taken to have disposed of case on a preliminary point. Remand under O 41 R 27 ordered for retrial after bringing the legal representative on record.

- 7 (1900) 20 All 61 (61)
(1900) 27 All 631 (634)
(1900) 1900 Pun W R No 27
(1900) 19 Mad 122 (122)
(1900) 16 Mad 207 (209 210)
Under S 602 of the Code of 1902 prior

to it—
(See however (1929) 12 C P L R 113 (122) If the decided and the undecided matter could be kept apart, then a remand under S 602 is not absolutely prohibited)

- 2 (1902) 11 All 443 (453)
3 (1900) 1900 Mad 83 (90)

questions was as to the amount payable by the plaintiff as the value of improvements effected by the defendant on the plaintiff's land. The trial Court held that the plaintiff should pay Rs 10,000 as decided in a prior litigation between the parties. On appeal the appellate Court held that the prior decision was not *res judicata* and remanded the case to assess the then value of the improvements. *Held* that this rule did not apply to the case as the decision of only *one of the issues in the case* and not of the whole suit was based on a preliminary point.⁴ In this view the undermentioned decision⁵ of the Patna High Court, seems to be open to question. In that case, the lower Court had superseded an award on the ground that it was submitted too late and had disposed of the suit on the merits. In appeal it was held that the suit had been disposed of on a preliminary point, because the result of the lower Court's decision had been that the award had not been considered on the merits.

Where a suit has not been disposed of on a preliminary point in the sense described above, no remand can be made under this rule.⁶ Thus no remand can be made under this rule merely because —

- (1) The lower Court has omitted to decide one or more issues or the appellate Court requires certain additional issues to be tried.⁷
- (2) The lower Court has wrongly rejected certain evidence⁸ or the taking of additional evidence is found to be necessary.⁹
- (3) The lower Court has not recorded the evidence properly.¹⁰
- (4) The lower Court admitted inadmissible evidence.¹¹

4 (1932) 1932 Lah 219 (270)
 5 (1916) 1916 Pat 21 (23)
 6 (1921) 1921 Bom 111 (112)
 7 (1890) 14 Bom 232 (734)
 (1892) 12 Cal L Rep 136 (138)
 (1864) 1864 Suth W R (Gap) 3-7 (3-8)
 (1932) 1932 Lah 219 (220)
 (1930) 1930 Lah 639 (640)
 (1923) 1923 Lah 171 (172)
 (1916) 1916 Lah 293 (299)
 (1903) 1903 Pun L R No 49 page 167

(1926) 1926 Mad 695 (697)
 (1925) 1925 Mad 171 (171)
 (1925) 1925 Mad 169 (170)
 (1923) 1923 Mad 331 (331)
 [See (1929) 1929 Nag 63 (63)]
 (1893) 6 C P L R 77 (77-78) Deciding a question of fact on insufficient grounds and disposing of a suit on a preliminary point are not con-

8 (1897) 1 Cal W N 801 (801)
 [See also (1861) 7 Suth W R 313 (313)]
 (1918) 1918 Oudh 170 (171)
 (1909) 1909 Sind 159 (160)
 (1899) 1 Bom L R 110 (117)
 9 (1916) 1916 All 258 (259)
 (1928) 1928 Cal 749 (750)
 [See (1926) 1926 Cal 912 (912)]
 (1920) 1920 Cal 374 (375)
 (1917) 1917 Cal 94 (94)
 (1899) 3 Cal W N 748 (750)
 10 (1896) 1896 Pun Re No 45, page 129
 11 (1895) 5 Mad L Jour 82 (84)

(1917) 1917 Cal 701 (702)
 (1905) 1905 J Cal W N 54 (56)
 (1863) 10 Suth W R Cr 469 (471)
 (1930) 1930 Lah 181 (187)
 (1926) 96 Ind Cas 44 (Lah)
 (1925) 1925 Lah 480 (480)
 (1919) 1919 Lah 102 (103) 1919 Pun Re No 27
 (1916) 1916 Lah 293 (293)
 (1902) 1902 Pun Re No 43 page 158

(5) The appellate Court is dissatisfied with the decision of the lower Court¹² or

(6) The suit was not properly tried¹³

As to the inherent power of the Court to remand in such cases *see* Note 10, *infra*

6 Order returning or rejecting plaint whether disposal on preliminary point

It has been held in some cases that an order returning a plaint for presentation to the proper Court under O 7, R 10 is not a disposal of the suit on a preliminary point within the meaning of O 41, R 23.¹ Similarly it has been held in some cases that the rejection of a plaint under O 7, R 11 does not amount to a disposal of the suit on a preliminary point.² The rationale of these cases would seem to be that a suit cannot be said to be disposed of when the decision in no way affects the rights of the parties.³ (*See* S 2 (2) Notes 6 and 13) But in the cases cited below⁴ it has been held that even when a plaint is rejected the suit can be said to be disposed of on a preliminary point. These cases proceed on the ground that as the rejection of the plaint precludes the Court from deciding the point arising in the case, the suit may be regarded as disposed of on a preliminary point.

7 Decision of lower Court must be reversed

No remand can be ordered under this Rule unless the decision of the lower Court on the preliminary point is *reversed* in appeal.¹ The decision of the lower Court must be definitely reversed. Where such is not the case it is not a good ground for ordering a remand under this Rule that the lower Court has decided the issue on a wrong view as to the burden of proof² or that the appellate Court is not able, on the materials before it, to agree with the findings

on preliminary point: *affirm* O 41 R 23 (1900) 1 Ind Cas 785 (80 5) (Cal) Case dismissed as barred by limitation after it was registered—Disposal is on preliminary point within R 23 if it had been rejected on presentation without being admitted thereon: *ibid*

(1870) 14 Suth W R 69 (70) Issues not properly settled by lower Court—No remand to be ordered under R 23

(1922) 1922 All 226 (228) 44 All 492

Note 6

179

(1900) 6 Cal L J 214 (216)

12 (1931) 1931 Lch 197 (491) Confirming (1929) 1929 Lah 83 (84) and following (1915) 1915 Lah 8 (5)

3. [*See* (1913) 90 Ind Cas 145 (145) 35 All 427 Order of dismissal of a suit for non appearance of parties—Order set aside by appellate Court—First Court directed to hear the case—Not a reversal and order—No appeal] [*See also* (1916) 1916 All 346 (326) 38 All 37]

See also S 13 of the Court fees Act which seems to treat rejection of plaint or memo of appeal as distinct from disposal

out entering into merits on the ground that plaintiff had no cause of action—Disposal is on preliminary point

Note 7

1 (1915) 1915 Bom 57 (59) 39 Bom 352 (1926) 1926 Lah 184 (184)

(1927) 1927 Lah 666 (666) Rule 23 did not apply because the appellate Court did not give its decision on the two issues that had been decided by the lower Court [*See also* (1861) 1 Suth W R 236 (347)]

(1870) 14 Suth W R 60 (60)

2 (1912) 17 Ind Cas 94 (94) 34 All 612

of the lower Court³ or that the appellate Court considers that the lower Court's finding is not supportable on the ground given by that Court but might be supported on another ground which requires investigation.⁴ But where the finding of the lower Court on a preliminary point is definitely reversed by the appellate Court, the suit may be remanded under this Rule notwithstanding that the decision of the appellate Court is made subject to a finding of fact which is left to be determined by the lower Court.⁵ Where the intention to reverse the decree is clear, the remand is not vitiated by the mere absence of a formal order setting aside the decree.⁶ Where the lower Court has decided the suit on several preliminary points, the appellate Court should reverse the decision on all of them before remanding under this Rule.⁷

Under this Rule it is not competent to the appellate Court to affirm the decision of the lower Court regarding one part of the suit and remand the suit regarding the other part, because, otherwise there would be two final judgments in the same case—a thing opposed to the provisions of the Code and because there is only a partial reversal of the lower Court's decree.⁸ The Rule contemplates that the whole case except as to the preliminary point, is remanded to the lower Court. Hence where the appellate Court not only reverses the decision of the lower Court on the preliminary point but also gives its findings on the other issues in the case excepting one, it should not remand the case under this Rule for the decision of that single issue but may remit it to the lower Court for a finding under R. 25.⁹

8 The appellate Court may, if it thinks fit by order remand the case

These words show that the appellate Court is not bound to remand a suit under R. 23 merely because the circumstances of a case fall within the provisions of the Rule: it may either do so or proceed under R. 24 or R. 25.¹ The question is one of discretion.² The appellate Court should not, however, rashly and without sufficient cause, order a retrial in any case in which this can possibly be avoided, a remand should not thus be made under this Rule in a case which could efficiently be dealt with under R. 25.³

9 And may direct what issue or issues shall be tried in the case

This Rule does not enable the appellate Court, while remanding the suit for trial *de novo* to direct that one of the essential issues in the case should

9 (1917) 1917 All 187 (187)

Note B

1 (1899) 1899 All W N 2 (3)

(1916) 1916 Oudh 257 (264)

2

In this case the remand was held to be unfair to the parties [See also (1935) 1935 Rang 34 (35) Appellant had not led his entire evidence—Remand ordered]

3 (1934) 1934 Cal 433 (434) All evidence adduced and no complaint of evidence being shut out—Appellate Court should dispose of case and not remand it

(1933) 1933 Pat 706 (707)

was barred on another ground—

[Held remand was not proper]

5 (1923) 1923 Bom 142 (145)

6 (1902) 6 Cal W N 326 (327)

7 (1925) 1925 Cal 716 (720) 62 Cal 753

(1884) 11 Bom 663 (665)

8 (1905) 27 All 163 (165)

(1904) 9 Bom L R 966 (967)

(1864) 8 Suth W R 303 (304)

(1892) 1892 Pun Re No 3 page 16

(1877) 1877 Pun Re No 82 page 216

be omitted ¹ for the Rule contemplates that the whole suit except with reference to the preliminary point should be remanded to the lower Court. But if any limits are imposed by the appellate Court in remanding a case, the lower Court has no power to travel beyond those limits. (See note 30, Point 4.) In an old case decided under the Code of 1859 it was held that an appellate Court cannot remand a case for retrial with instructions to *frame* new issues ² See also Note 27.

Where the appellate Court set aside the order of the trial Court and re-Court that in cases not falling within the scope of O 41, R 23 an appellate Court to take additional evidence on the issue, it was held that the order was illegal and not one under this Rule ³.

10 Inherent power of remand

It is now settled law in all the High Courts except the Allahabad High Court that in cases not falling within the scope of O 41, R 23 an appellate Court has an inherent power *ex debito justitiae* to remand a case for retrial ¹ In the Allahabad High Court, the point is unsettled ² Under the previous Code

Note 9

1 (1920) 1920 Cal 374 (375)

(See also (1973) 10

2 (1864) 1 Suth W R 69 (70)

3 (1935) 1935 Lah 161 (162)

Note 10

1 (1912) 17 Ind Cas 891 (89)

(1935) 1935 Bom 216 (217-218) But it has no power to remand disregarding method de

(1920) 1920 Mad 898 (899)

(1916) 1916 Mad 957 (958)

(1912) 15 Ind Cas 809 (860) 36 Mad 492

LR 341

184

83

(1917) 1917 Cal 44 (46-47-48) 44 Cal 929

(F B)

(191) 1917 Cal 556 (557)

its powers of superintendence than District Courts

(1911) 9 Ind Cas 306 (307) (Cal)

(But see (1914) 1914 Cal 163 (164) 20

Ind Cas 39 (40) 41 Cal 108)

2 (1972) 1922 All 47 (48) Inherent power exists

(1894) 17 All 29 (31-32-33) Inherent power exists

(1922) 1922 All 254 (256) 44 All 176 The

(1901)

c / when plaint is ordered to be amended or when new parties are added — But there is no power *ex debito justitiae* to order remand [See now the amendment by the Allahabad High Court to O 43 R 1 (u)]

there was a sect on, 1/2, S 564 which prohibited the appellate Court from making a remand except as provided by S 562 (O 41, R 23)³ This section was found to be extremely embarrassing in practice as for instance, when the appellate Court felt a remand to be urgently needed in view of the amendment of the plaint or the addition of new parties. The repeal of this section in the present Code leaves the way open for remand in such cases,⁴ although the Legislature has thought it safer not to formally enact that the appellate Court has power, in cases not covered by R 23 to remand⁵

But the inherent power of remand should not be exercised except when it is clearly necessary for the ends of justice to do so⁶ When there is any specific provision of the Code which would meet the necessities of the case⁷ or when the circumstances are such that the appellate Court can itself dispose of the case⁸ (See O 41 Rr 24 to 29) no remand should be ordered. A remand should not generally speaking be ordered when the defect in the proceedings has been due to the negligence or default of the party who asks for remand⁹

See the amendment of this Rule by the Madras High Court

- 3 (1895) 17 All 117 (190)
(1863) 6 Bom H C R 1 C 156 (183)
(1852) 8 Cal 973 (926)
(1873) 20 Suth W R 148 (149)
(1908) 1908 Pun Re No 138 page 632
(1890) 3 C P L R 131 (132)
- 4. (1912) 17 Ind Cas 591 (592) 37 Bom 289
- 5 See Notes on clauses report of the Select Committee
- 6 (1922) 1922 Cal 279 (279)
(1920) 1920 Pat 56 (58 59)
(1919) 1919 Cal 1017 (1018)
(1921) 64 Ind Cas 599 (601) (Cal)
(1918) 1918 Pat 505/506 3 Pat L Jour 253
(1917) 1917 Cal 44 (46, 47 48 49 50) 44 Cal 929
(1929) 1929 Nag 63 (64) 26 Nag L R 44
(1928) 1928 Lah 116 (116)
(1932) 1932 Lah 443 (443)
(1917) 1917 Cal 657 (658) 43 Cal 148
(1918) 1918 Cal 907 (908)
(1879) 4 Cal 190 (204 205) 5 Ind App 149 (P C)
- (1907) 6 Cal W N 698 (702) Suit for mesne profits for three years by one brother against another for enjoying certain lands including plaintiff's share in them—Court instead of deciding the amount of mesne profits deciding that enjoyment of whole property should be given to the plaintiff for the next three years. On appeal to Privy Council their Lordships refused to remand the case as substantial justice was done to the parties though somewhat in a rough way
(See (1912) 17 Ind Cas 591 (592) 37 Bom 289)

- (1926) 1926 Lih 537 (538) Case not to be remanded when appellate Court can follow the procedure laid down in Rr 24 to 29 of O 41
- (1919) 1919 Mad 561 (562) Case should not be remanded when appellate Court may follow the procedure laid down in Rr 24 to 29
- (1903) 4 Ind Cas 1062 (1062) (Mad)
- (1978) 1928 Cal 748 (748)
- (1900) 23 Mad 447 (448)
- (1912) 15 Ind Cas 3 (3) (All)
- (1864) 1 Suth W R 6 (7) Remand not allowable merely because Judge wanted further evidence
[See also (1916) 1916 Bom 275 (276)]
1 Hay 200

306

- (1919) 1919 Mad 561 (562)
- (1922) 1922 Mad 112 (114) 45 Mad 449

decree in accordance with that finding

- 9 (1924) 1924 Cal 396 (397)
- (1919) 1919 Cal 826 (836)
- (1865) 3 Suth W R 5 (6)
- (1920) 1920 Pat 56 (59)
- (1870) 14 Suth W R 195 (196) Deliberate undervaluation—Remand refused
- (1868) 10 Suth W R 207 (207) Suit under valued, case not remanded
- (1929) 1929 Lih 444 (446)
- (1923) 1923 Lah 645 (646) Remand in order to enable plaintiff (appellant) to ascertain whether or not a demand was made within three years of the

(1925) 1925 Cal 274 (275)

23, 11 Grounds of remand

Subject to the general principles stated in Note 10 *supra* Courts have an inherent power to remand in the following, among other cases:—

- (1) When the appellate Court directs an amendment of the plaint,¹ or the addition of fresh parties.²
- (2) When the appellate Court finds that the suit is bad for misjoinder of parties and causes of action. In such a case the appellate Court may remand the case and direct the lower Court to return the plaint for amendment.³
- (3) When the lower Court has dismissed a suit on the ground that the suit has been brought in the name of the wrong person as plaintiff⁴ or defendant.⁵
- (4) When the lower Court has misunderstood the whole case⁶ and when the suit has been disposed of on an erroneous issue.⁷
- (5) When the lower Court has failed to determine material issues in the case.⁸
- (6) Where a suit has been dismissed for default instead of being tried on the merits as it ought to have been.⁹

For other instances, see the following cases¹⁰

- Institution of the suit which would save limitation was refused
- (1921) 1921 Cal 651 (657) Prolonged trial—Remand merely for enquiring if there is any evidence is improper
- (1871) 17 Suth W R 409 (410)
- Note 11**
- 1 (1929) 116 Ind Cas 871 (All) Plaintiff was ordered to pay the costs incurred till then
- (1925) 1925 Mad 229 (229) 48 Mad 713
- (1916) 1916 Mad 957 (959)
- (1917) 1917 Cal 331 (331)
- (1931) 1931 Mad 1 (4) In this case an amendment altering the fundamental character of the suit was refused to be allowed
- (1903) 25 All 191 (195)
- [But see (1932) 23 Cal 60 (62) No appeal being open from an order of dismissal for default the appellate Court has no power of remand in such a case]
- 10 (1922) 1922 Bom 267 (270) 46 Bom 184 Erroneous refusal to grant adjournment—Case remanded
- (1932) 1932 Lsh 126 (126) Lower Court deciding case on an admission in a previous suit without considering other evidence
- (1912) 15 Ind Cas 859 (860) 36 Mad 492
- [But see (1930) 1930 All 863 (864) When the lower Court has tried the suit and dismissed it on the merits, it would be unfair to the defendants to direct a remand on the ground of misjoinder]
- 4 (1901) 23 All 167 (173)
- (1899) 1899 Pan R3 No 23, page 131 Suit on bond executed by defendant—Trial

12 Wrong onus of proof

Where the trial Court has thrown the burden of proof on the wrong party, the appellate Court may if necessary, remand the case for re-trial¹ But where the error in casting the burden of proof has not affected the evidence produced on either side and both parties have given all the evidence that they had, the question of burden of proof becomes immaterial and no remand can be ordered merely because the lower Court has wrongly cast the onus of proof²

13 Exclusion of evidence

An erroneous exclusion of evidence by the lower Court may be a good ground for remand under the inherent power of the Court¹ Similarly the failure to give a party an opportunity to produce evidence will be a good ground for remand² So also, where the appellate Court is unable, on the materials before

Court finding that defendant was not minor and *admission of litera* was not necessary—Case tried on other issues and suit dismissed—Appellate Court finding that defendant was minor and remanding case for trial after appointing guardian *ad litem*—*Held*, that under S 441 [O 32 R 5 (2)] appellate Court might set aside the proceedings and remand

(1872) 17 *Suth W R* 446 (447) Case remanded where suit was decided without the plaintiff being given fair opportunity of knowing the line of defence he had to meet

(1875) 24 *Suth W R* 232 (232) On account of the inefficiency of the legal advisor of the plaintiff, witnesses were not properly examined and oral evidence full short of the requirements of S 63 of Evidence Act—Case remanded

(1870) 2 *N W P H C R* 183 (184) Suit decided without framing any issues—Case remanded
[See (1876) 25 *Suth W R* 276 (276) Mere occasional obscurity in judgment of lower Court is not a proper ground for remand]

(1912) 14 *Ind Cas* 379 (380) (Lah) Order passed on an application without hearing objection of the other party

(1877 78) 3 *Cal Gls* (653) (P C) Lower Court had not considered the evidence on certain point—Privy Council, because of its imperfect acquaintance with the facts of the case, preferred to remand the whole case to framing issues itself

Note 12

- 1 (1926) 1926 *All* 453 (454)
- (1927) 1927 *Lah* 148 (149)
- (1924) 1924 *Mad* 770 (771)
- (1914) 1914 *Lah* 448 (450)
- (1917) 1917 *Mad* 872 (874), 40 *Mad* 654

2. (1910) 7 *Ind Cas* 986 (986, 987) (Bom)

[See also (1923) 1923 *Nag* 62 (63)]

(1859) 1859 *All W N* 2 (2) First Court laying onus of proof on defendant and decreeing suit as defendant

declined to produce any evidence—Appellate Court laying onus on plaintiff and dismissing suit—Appeal to High Court—High Court holding that onus was on defendant and setting aside decree dismissing suit—Defendant not entitled to remand as he had an opportunity of producing evidence and had declined to do so

(1920) 1920 *Pat* 291 (298)

Note 13

- *1 (1921) 1921 *Cal* 661 (672)

(1911) 10 *Ind Cas* 441 (441) (All) Evidence of defendant not taken—Case remanded

(1911) 12 *Ind Cas* 684 (686) (Cal) Important questions disallowed—Opportunity to produce evidence not given—Case may be remanded

(1926) 1926 *Mad* 991 (992) Court has inherent power to remand case for reception of evidence rejected by the trial Court

(1917) 1917 *Cal* 556 (557) Important questions disallowed—Case may be remanded

(1922) 1922 *Mad* 112 (114) 45 *Mad* 449 Where, owing to improper or defective enquiry in lower Court, relevant documents are not admitted

remand may be ordered under S 131 if necessary to meet ends of justice

[See (1867) 8 *Suth W R* 276 (277) Party probably misled by the action of the Court into not giving evidence fully—Case may be remanded]

[See also (1911) 10 *Ind Cas* 675 (676) (Mad) When ground on which an appellate Court declares a document admissible has arisen subsequently to disposal of the suit by lower Court, order of remand may be made under O 41, R 23 or 33 of the C P C of 1908]

2. (1874) 22 *Suth W R* 256 (256).

it, to decide the case, it may remand the case for re-trial after taking fresh evidence³

14 Basing decision on inadmissible evidence

Where the lower Court's judgment is vitiated by the admission of inadmissible evidence, the case may be remanded for re-trial under the inherent power of the Court¹ But a remand is not necessary if the finding of the lower Court is amply supported by the other evidence in the case²

15 New plea is not a ground of remand

As a general rule, a remand cannot be ordered to enable a new plea raised for the first time in appeal, to be tried¹ (See Notes under O 41, R1 1 and 2) But this may be done in exceptional cases²

16 Remand in cases under special and local laws

See the undermentioned cases¹

17 Remand in appeal from ex parte decree.

See S 96, Note 12 points 12, 13 and 14 and the following decisions¹

18 Remand in appeal from order refusing to set aside ex parte decree

Where an application to set aside an *ex parte* decree is dismissed on the preliminary ground that there was no want of 'appearance' on the part of the defendant and the question of 'sufficient cause' for non-appearance

(1918) 1918 All 375 (376) Trial Court refusing to grant time for the production of certified copies—Appellate Court may remand

(1874) 12 Suth W R 317 (318)

(1911) 12 Ind Cas 684 (680) (Cal) Trial Court refusing to summon witnesses—Case may be remanded

(1905) 27 All 167 (168 169)

(1894) 16 All 375 (378 379)

(1889) 11 All 31 (32)

examined]

3 (1930) 1930 Pat 7 (13)

(1927) 1927 Nag 192 (192)

[But see (1918) 1918 P O 3 (4) 45 Cal 748 45 Ind App 94 (P C)]

(1901) 4 Oudh Cts 261 (263)

(1898) 1 Oudh Cts 172 (174)

Note 17

1 Cases holding that the appellate Court has inherent power of remand in such

1 (1920) 1920 Pat 726 (726)

(1874) 21 Suth W R 257 (257)

2 (1924) 1924 Cal 370 (371)

Note 15

(368)

(Mad) *Quære* — Whether such power exists]

(1923) 1923 All 287 (290) 45 All 311 Appellate Court reversing *ex parte* decree

Note 16

1 Cases under *Agra Tenancy Act* —

decree]

Cases holding that there is no power of remand in such cases —

(1912) 28 All 293 (294)

(1901) 18 All 83 (84)

(1900) 23 Mad 260 (261)

(1893) 17 Bom 733 (734)

was therefore not gone into by the lower Court, the appellate Court, on reversing the decision of the lower Court on the preliminary point, can remand only the *application* to set aside the *ex parte* decree and cannot remand the *suit itself* for re-trial¹ But where the lower Court has refused an application to set aside an *ex parte* decree *on the merits*, there is no disposal on a preliminary point and the appellate Court cannot remand the application to the lower Court²

The appellate Court in an appeal from an order rejecting an application for setting aside an *ex parte* order can treat the appeal as one from the *ex parte* decree itself and decide the whole case finally³

19 Remand by consent

A case may be remanded with the consent of parties though a remand may not be permissible otherwise¹ Thus a case may be remanded on the agreement of parties for trial on issues not raised in the memorandum of appeal²

20 Remand in second appeal

O 41, R 23 applies also to second appeals (*See* S 108 and O 42, R 1) Hence, where a first appeal has been disposed of on a preliminary point the High Court may, in second appeal, remand the case if it reverses the decision on the preliminary point¹ or it may itself dispose of the appeal² But even if a case has not been disposed of on a preliminary point the High Court in second appeal may remand the case in the exercise of its *inherent* power to prevent the ends of justice from being defeated³ (*See* Note 10,

Note 18.

- 1 (1901) 23 All 220 (226) 23 Ind App 28 (P C)
- 2 (1903) 7 Cal L Jour 379 (380)
- 3 (1926) 1926 Cal 1232 (1233)

Note 19

- 1 (1914) 1914 Mad 15 (15)
(1905) 28 Mad 437 (440)
(1908) 12 Cal W N 500
(*See also* (1909) 3 Ind Cas 465 (465)
36 Cal 833 26 Ind App 221 (P C)
Additional evidence by consent of parties — They cannot subsequently complain about it)
- 2 (1907) 30 Mad 510 (513)

Note 20

- 1 (1882) 9 All 29n (31)
(1869) 11 South W R 228 (229)
(1887) 1887 Pun Re No 98 page 225
(1910) 5 Ind Cas 701 (703) 6 Nag L R 20
(1916) 1916 Oudh 257 (263)
(*See also* (1931) 1931 Cal 353 (355)
Lower appellate Court deciding appeal on preliminary point should decide

passing decree—District Judge (successor of former one) going into the merits and deciding case against the appellant—High Court again reversed this decree and remanded the case to District Judge to pass judgment in favour of appellant
[But see (1867) 8 South W R 503 (503)]

Lower Court misappreciating true controversy between the parties —

- (1875) 23 South W R 166 (167) Lower Court not examining evidence with reference to the right issues in the case—Case remanded
- (1927) 1927 Lah 480 (480 481) Case decided with reference to irrelevant issues—Case remanded
- (1923) 1923 Lah 206 (207) Lower Court misappreciating true controversy in the case—Case remanded
- (1921) 1921 All 335 (335) Lower Court misunderstanding the nature of the case—Case remanded

Failure to decide material issues—Case may be remanded —

- (1856) 6 South W R 262 (262)
- (1920) 1920 Lah 351 (352)
- (1923) 1923 Lah 308 (308)
- (1920) 1920 Pat 642 (643)
- (1906) 4 Cal L Jour 86 (87)
- (1870) 25 South W R 110 (141)
(*See also* (1876) 25 South W R 20 (26))

Decisions based on an incorrect view of the law applicable—Case remanded —
(1931) 1931 Mad 577 (579)

3 Lower appellate Court acting in excess of its powers —

- (1865) 3 Bom HCR AC 60 (62) District Judge reversing Munsif's decree but failing to pass decree in favour of successful appellant—High Court remanding to District Judge for

3. *supra*) But generally speaking, a case will not be remanded for re-hearing on an issue raised for the first time in second appeal.⁴ Further, unless it is absolutely necessary in the interests of justice, to remand a case, a remand will not be ordered under the inherent power of the Court.⁵ (*See* Note 10 *supra*)

Moreover, the powers of the High Court in second appeal are circumscribed by the provisions of S 100, and hence the High Court cannot in second appeal reverse a finding of *fact* of the lower appellate Court, however erroneous it may be, and cannot remand a case on the basis of such reversal, unless the finding is vitiated by any such illegality or defect as is mentioned in S 100.⁶ It should also be noted that the power of the High Court to decide questions of *fact* from the materials on record have been considerably extended by S 103 and the amendments to that section made by Act VI of 1926, and the High Court may itself decide such questions where it is in a position to do so satisfactorily from the materials on the record. For further information *see* S 103 and the notes thereto and also the following cases.⁷

(1938) 11 Oudh Cas 254 (266)

Improper admission of evidence—Case may be remanded —

(1927) 1927 Lah 45 (45)

(1916) 1916 Cal 691 (692)

Improper exclusion of evidence—Case may be remanded —

(1919) 1919 Cal 902 (903)

(1917) 1917 Cal 78 (79)

(1895) 17 All 20 (31 32)

(1874) 22 Suth W R 236 (296)

Lower appellate Court not complying with the provisions of O 41 R 31—Case may be remanded —

(1889) 1889 All W N 178 (179)

(1888) 1888 All W N 61 (62)

(1894) 9 All 26 (33)

(1896) 1896 All W N 285 (285 286)

(1896) 1896 All W N 171 (171 172)

(1894) 1894 All W N 99 (99)

(1917) 1917 Cal 233 (234)

(1909) 35 Cal 813 (816)

(1908) 81 Mad 463 (470 471) (F B)

(1916) 1916 Pat 262 (264) 2 Pat L Jour 8

Miscellaneous —

(1903) 8 Cal W N 800 Case decided without giving opportunity to prove case—

—Case remanded

(1923) 1923 Pat 174 (175) Lower appellate Court not deciding point with reference to the evidence bearing upon the point but with reference to the pleadings—Case may be remanded by the High Court

(1886) 12 Cal 93 (95) Finding based on no evidence—Case may be remanded

(1918) 1918 Cal 282 (283) Lower appellate Court not realising the legal effect of admission by the pleader of a party—Case to be remanded.

(1894) 1894 All W N 19 (19) Appeal disposed of on advanced date without notice

to it and will not remand the case for reconsideration by it]

[See also (1922) 1922 Oudh 268 (269)]

6 (1922) 1922 Pat 575 (577) 1 Pat 639 Where issue has been determined no remand merely because the issue was

cannot determine it itself but remand the case —

(1896) 23 Cal 170 (185 186)

(1881) 7 Cal 233 (296)

(1921) 1921 Pat 61 (63) 5 Pat L Jour 410

Finding of fact by lower appellate Court vitiated by illegality within the meaning of S 100—Cases after Act VI of 1926 showing that the High Court itself can determine question without a remand if the materials

21 Appeal against an order of remand under this Rule.

O 43, R 1 (a) gives a right of appeal against an order of remand under this rule if an appeal would lie from the decree of the appellate Court¹. An appeal will, therefore, lie from an order of remand only in those cases in which an appeal would lie against the decree, if the appellate Court, instead of making an order of remand, passed a decree on the strength of the adjudication on which the order of remand was based. The test is whether, in the circumstances, an appeal would lie if the order of remand were itself treated as a decree and not a mere order². Thus no appeal lies against an order of remand in a suit of a small cause nature whose value does not exceed Rs 500,³ as a second appeal would be barred by S 102 if the order of remand were treated as a decree. Similarly, an appeal against an order of remand is only maintainable on a question of law⁴.

on the record are sufficient —

(1931) 1931 Cal 123 (131 131)

(1930) 1930 Cal 235 (235)

(1924) 1929 Cal 606 (603)

Note 21

1 (1925) 1925 Mad 483 (2) (484)

(See (1921) 1921 Lah 154 (155) 2 Lah 252 Court of appeal confirming dismissal of a suit as to a part and

(Oudh) Order made virtually under R 23 but by a clerical mistake R 25 quoted—Order is appealable)

(1902) 6 Cal W N 346 (327) Remand under R 23—Appeal lies though the order is informal in that the decree of the lower Court is not formally declared as set aside

(See also (1912) 16 Ind Cas 834 (834) (Lah))

(But see (1913) 18 Ind Cas 525 (526) (All) Where party appealing accepted compensation for order of remand being made, appeal is not maintainable)

No appeal lies under O 43 R 1 (a) if the order is set and is not one under O 43 R 23—See the following cases —

(1912) 15 Ind Cas 367 (368) (Mad)

(1926) 92 Ind Cas 1045 (Mad)

(1926) 1926 Pat 514 (515)

(1926) 1926 Mad 695 (694)

(1932) 1932 Lah 538 (534) Appellate Court remanding suit to Court of proper pecuniary jurisdiction — Held, the remand is not under this Rule

(1909) 2 Ind Cas 572 (572) 36 Cal 510 Order of remand by special Judge exercising powers under S 109 A of the Bengal Tenancy Act—Not appealable

2 (1922) 1922 Lah 178 (181) 3 Lah 218 (FB) (1914) 1914 Lah 328 (329 330) 1914 Pun Re No 85

(1910) 8 Ind Cas 1157 (1157) 1910 Pun Re No 101

(1913) 20 Ind Cas 788 (789) (Lah)

(1914) 1914 Lah 503 (510) 1915 Pun Re No 8

(1930) 1930 All 122 (123)

The view taken in (1911) 11 Ind Cas 315 (316) 1911 Pun Re No 50 that an appeal would lie only if it could be stated with certainty that the decree which the appellate Court would have passed if it had decided the appeal on the merits would be appealable was overruled in (1922) 1922 Lah 178

(See also (1923) 1923 Lah 535 (536) No special appeal in Punjab against order of remand if it was based on finding as to custom)

3 (1921) 1921 All 55 (55) 43 All 403

(1919) 1919 All 6 (6) 42 All 200

(1916) 1916 All 125 (125)

(1918) 21 Ind Cas 638 (638) (All)

(1916) 1916 Cal 581 (581)

(See (1910) 8 Ind Cas 162 (162) 34 Mad 502 Suit for mesne profits not being of small cause nature order of remand in such a suit is appealable)

Section 568 Cl (28) (corresponding to O 43 R 1) of the former Code did not contain the condition as to an appeal being open from the decree. Hence it was held in the following cases that S 586 (now S 102) was no bar to an appeal from an order of remand though it would have bar-

(1909) 3 Ind Cas 283 (284) (Mad)

(1914) 1914 Lah 328 (331) 1914 Pun Re No. 85

3, S 104 sub-S (2) bars a second appeal from an order passed in an appeal from an order under S 104 or O 43, R 1. Hence, where an order of remand is made in an appeal against an order under O 43, R 1 no further appeal is competent.⁶

Can an order of remand be appealed from after it has been carried out and the lower Court has decided the suit on the merits in accordance with the order of remand? On this question there is a conflict of decisions. The High Courts of Allahabad⁶ and Rangoon,^{6a} the Chief Court of Punjab⁷ and the Judicial Commissioners' Courts of Nagpur⁸ and Oudh⁹ have held that an appeal is not barred under such circumstances and that if the order of remand is set aside in appeal the proceedings based on the order of remand fall to the ground. This view proceeds on the ground that there is nothing in the Code to limit the right of appeal against an order of remand under such circumstances. On the other hand, the Calcutta High Court has held that an appeal against an order of remand must be filed before the lower Court has decided the suit on the merits in accordance with the order of remand.¹⁰ The reason

(1919) 1919 Lah 292 (292) 1918 Pun Re No 109

(1914) 1914 Lah 509 (509) 1915 Pun Re No 8

[Contra (1910) 8 Ind Cas 246 (246) (Lah)]

Even under the former Code S 588 Cl (28) (now O 43 R 1 (u)) which did not contain the condition as to an appeal being competent from the decree of the appellate Court it was held in the following cases that question of fact could not be reopened in an appeal from an order of remand the reason given being that such an appeal was a second appeal —

(1898) 20 All 42 (45)

(1893) 15 All 413 (414)

(1882) 8 Cal 674 (675)

(1896) 19 Mad 422 (424)

But in some cases it was held that questions of fact might be reopened in an appeal from an order of remand as it was not a second appeal from a decree —

(1922) 1922 Lah 178 (181) 3 Lah 218 [See observations of Shadi Lal C J]

5 (1907) 1907 Pun Re No 120 page 547

(1896) 19 Mad 167 (168)

[See also (1906) 3 All L J 119 (123)

Order refusing review—Appeal—Remand in—Held that no appeal being competent from orders refusing review the appeal was not one under S 588 and hence the bar of the second para of S 588]

Appeal under O 43 R 1 (a) against an

10—

either

in Re

No 119

(1926) 1926 Mad 900 (900)

Appeal under O 43 R 1 (j)—Remand—

(1899) 21 All 291 (292)

Some of the decisions above cited will show that the law in this respect was the same under the former Code also —

6 (1908) 30 All 479 (482) (F B)

fore the remand order had been carried out by the lower Court]

The following decisions to the contrary should be regarded as overruled by the Full Bench decision already cited —

(1882) 1882 All W N 53 (53)

(1884) 1884 All W N 5 (5)

(1908) 30 All 191 (192)

(1907) 29 All 659 (660)

(1881) 1881 All W N 174 (174)

6a (1933) 1933 Rang 413 (415)

7 (1902) 1902 Pun Re No 37 page 139

(1900) 1900 Pun L R page 314

(1891) 1891 Pun Re No 89 page 431

(1887) 1887 Pun Re No 65 page 135

(1887) 1887 1 un Re No 40 page 86

But see the following decisions to the contrary —

(1881) 1881 Pun Re No 129

(1886) 1886 Pun Re No 117

(1886) 1886 Pun Re No 83

8 (1912) 14 Ind Cas 672 (673) 8 Nag L R 42

9 (1912) 15 Ind Cas 191 (191) 15 Oudh Cas 43

(1912) 15 Ind Cas 181 (182) 15 Oudh Cas

33

given is that an appeal against an interlocutory order cannot be filed after the decree in the case has been passed.

An appeal lies as to an order regarding costs in an order of remand¹¹ (*See also* the undermentioned case¹²)

An appeal against an order of remand should be filed as a *miscellaneous* appeal and not as second appeal¹³

22 Appeal from order of remand under inherent power

O 43, R 1 (u) gives a right of appeal only against an order of remand under O 41, R 23. Hence, there is no right of appeal against an order of remand under the inherent power of the Court.¹ But the right of appeal under O 43, R 1 (u) is not confined to cases which properly come within the scope of O 41, R 23 but extends also to cases in which the order of remand purports to be under Rule 23 although in reality the circumstances under which the order is passed may not fall within the purview of that rule.²

- 11 (1889) 1889 Pan Re No 89
12 (1922) 1922 All 16 (17) Ordinal in an appeal from an order of remand by appellate Court would not modify order without first issuing notice to the opposite party. But if the remand order has been modified without notice to the other party the order modifying the remand order though irregular is not *ultra vires* and without jurisdiction
13 (1933) 1933 Oudh 191 (192) 8 Luck 876

Note 22

- 1 (1921) 63 Ind Cas 858 (859) (All)
(1923) 1923 Pat 49 (51) Remand order under inherent power would be appealable only if order amounts to a decree
(1923) 1934 Pat 97 (98)
(1923) 1923 Cal 303 (305)
(1927) 1927 Cal 642 (644)
(1920) 1920 Cal 124 (124)
(1864) 1864 Suth W R Mts 39 (40)
(1922) 1932 Lah 311 (311)
(1932) 1932 Lah 219 (220)
(1931) 1931 Lah 302 (302)
(1920) 1920 Pat 738 (739)
(1924) 1924 Lah 487 (487)
(1924) 1924 Lah 245 (246)
(1910) 6 Ind Cas 491 (402) (Lah)
(1931) 1931 Mad 1 (2)
(1929) 1929 Mad 205 (207, 203)
(1928) 1928 Mad 931 (932)
(1928) 1928 Mad 984 (985)
(1927) 1927 Mad 859 (860)
(1927) 1927 Mad 335 (336)
(1926) 1926 Mad 1065 (1066)
(1926) 92 Ind Cas 1045 (Mad)
(1925) 1925 Mad 229 (229) 48 Mad 713
(1922) 1922 Mad 112 (113) 45 Mad 449
(1921) 1921 Mad 716 (716)
(1920) 1920 Mad 753 (760)
(1920) 1920 Mad 88 (90)
(1920) 1920 Mad 898 (899)
(1929) 1929 Nag 63 (63) 26 Nag L R 44
(1923) 1923 Oudh 177 (179) 25 Oudh Cas 10
(1927) 1927 Pat 296 (297) 6 Pat 350
(1926) 1926 Pat 516 (516)
(1920) 1920 Pat 666 (666)
(1918) 1918 Pat 505 (505) 3 Pat L Jour 253
(1923) 1923 Rang 320 (320) 3 Rang 490
(1924) 1924 Rang 177 (177) 1 Rang 656
See also the following cases —
(1917) 1917 Pat 100 (101) 3 Pat L Jour 99 Lower Court dismissing suit for possession—Appellate Court reverses
(1913) 20 Ind Cas 145 (145) 35 All 427 Order of dismissal of suit for non appearance of parties—Order set aside by appellate Court—First Court directed to hear the case—No appeal lies against the order
[See (1935) 1935 Lah 161 (161) Appellate Court setting aside lower Court's order and remanding suit to lower Court with issue re framed with directions to take additional evidence if required—Order is illegal and is not appealable—But High Court can set it aside in exercise of revisional power
But the Allahabad High Court has amended O 43 R 1 (u) so as to allow an appeal even when the remand is not under O 41 P 23
(1930) 1930 All 122 (123)
[See also the new R 23 substituted by the Madras High Court]
2 (1923) 1923 All 254 (256) 44 All 176
(1935) 1935 Cal 134 (136) Although remand not strictly under O 41, R 23 appeal lies
(1927) 1927 Cal 642 (644)
(1925) 1925 Cal 1253 (1259)
(1923) 1923 Cal 716 (717, 718) 52 Cal 783

This view proceeds on the reasoning that the right of appeal depends on what the Court purports to have done and not on what it ought to have done^{2a} It has been held in the undermentioned cases³ that where the order appealed from is silent as to whether it was passed under S 151 or under this rule, it should be held to have been passed under this rule and not under S 151 even though the circumstances of the case do not bring it within the scope of this rule The reasoning on which these cases proceed is this An order of remand can be passed under the Court's inherent power only in exceptional cases Therefore where the Court intends to remand a case under its inherent power it may be expected to show in its order that it considers the case to be of an exceptional nature and that it therefore applies the provisions of S 151 Where this is not done the order may be presumed to have been passed as under O 41, R 23 and not under S 151 If such a presumption is not to be made, many an illegal order of remand would be incapable of being appealed against It is submitted that this reasoning is not correct It involves a presumption that the appellate Court illegally applied the provisions of Rule 23 to a case to which it does not apply when it was legally open to it to achieve its object by applying S 151 The Madras

- (1922) 1922 Cal 456 (457)
 (1922) 1922 Cal 279 (279)
 (1920) 1920 Cal 124 (125)
 (1920) 1920 Cal 569 (570)
 (1930) 1930 Lah 221 (222)
 (1923) 1929 Lah 376 (377)
 (1928) 1928 Lah 753 (753)
 (1928) 1928 Lah 341 (341)
 (1928) 1928 Lah 116 (116)
 (1926) 1926 Lah 537 (538)
 (1928) 1928 Mad 1200 (1200)

But according to some decisions the question of appeal must depend on whether the conditions laid down in O 41 R 23 have been complied with and not on whether the appellate Court purported to act or did not purport to act under R 23—See the following cases —

- (1927) 1927 Cal 850 (852 853) 55 Cal 219
 Remarks were obiter in this case
 [See also observations in (1927) 1927 Cal 642 (643 644)]

- (1927) 1927 Mad 1193 (1190) Remand is not under R 23 though the appellate Court refers to the Rule in the judgment if R 23 does not really apply to the case
 [See also (1908) 5 All L J 545 (546) Partition suit—Remand not for decision on merits but for partition by metes and bounds — Order wrongly described as one under S 562 — Appeal must be as from a decree and not as from an order of remand and should bear stamp as an appeal from a decree]

(1908) 1908 Pun Re No 38 page 212

(1892) 1892 Pun Re No 6 page 25

One of the tests usually relied on for determining whether the order of remand was intended to be made under R 23 is to

see whether the Court fee was ordered to be refunded because under S 13 of Court fees Act an order for the refund of Court fee can be passed only in the case of a remand under R 23—See the following cases —

- (1925) 1925 Cal 716 (717 718)
 (1928) 1928 Lah 116 (116)
 (1926) 1926 Lah 537 (538)

[See (1932) 1932 Lah 311 (311) *Re refusal to order refund of Court fee* indicates that remand is not under R 23]

[But see (1929) 1929 Lah 175 (176) Mere omission to order refund of Court fee does not necessarily indicate intention not to make the order under O 41 R 23]

- (1932) 1932 Lah 219 (220) In this case it was held that the mere fact that refund of Court fee was ordered is not proof that remand was under R 23 as refund of Court fee can be ordered even if the remand is under inherent power This view it is submitted overlooks the express provisions of S 13 of the Court fees Act

- 2a [See (1932) 1932 Lah 311 (311) *Remand made under S 151—No appeal lies though it might have been validly made under O 41 R 23*]

- 3 (1922) 1922 All 254 (256) 44 All 176
 (1927) 1927 Cal 401 (402)
 (1928) 1928 Lah 753 (753)

Appellate Court not mentioning the provisions of law under which it remanded—

- (1928) 1928 Lah 116 (116)

given is that an appeal against an interlocutory order cannot be filed after the decree in the case has been passed

An appeal lies as to an order regarding costs in an order of remand ¹¹ (*See also* the undermentioned case ¹²)

An appeal against an order of remand should be filed as a *miscellaneous* appeal and not as second appeal ¹³

22 Appeal from order of remand under inherent power

O 43, R 1 (u) gives a right of appeal only against an order of remand under O 41 R 23. Hence, there is no right of appeal against an order of remand under the inherent power of the Court ¹. But the right of appeal under O 43, R 1 (u) is not confined to cases which properly come within the scope of O 41, R 23 but extends also to cases in which the order of remand *purports* to be under Rule 23 although in reality the circumstances under which the order is passed may not fall within the purview of that rule ²

11 (1889) 1889 Pun Re No 53

12 (1932) 1932 All 16 (17) Ordinarily in an appeal from an order of remand appellate Court would not modify order without first giving notice to the opposite party. But if the remand order has been modified without notice to the other party the order modifying the remand order though irregular is not *ultra vires* and without jurisdiction

13 (1933) 1933 Oudh 131 (193) 8 Luca 576

Note 22

1 (1921) 63 Ind Cas 858 (858) (All)

(1935) 1935 Pat 49 (51) Remand order under inherent power would be appealable only if order amounts to a decree

(1934) 1934 Pat 97 (98)

(1928) 1928 Cal 905 (905)

(1927) 1927 Cal 642 (644)

(1920) 1920 Cal 124 (124)

(1864) 1864 South W R Ms 30 (40)

(1932) 1932 Lah 311 (311)

(1932) 1932 Lah 219 (220)

(1931) 1931 Lah 302 (303)

(1920) 1920 Pat 758 (759)

(1924) 1924 Lah 487 (487)

(1924) 1924 Lah 245 (246)

(1910) 6 Ind Cas 491 (492) (Lah)

(1921) 1921 Mad 1 (2)

(1922) 1922 Mad 205 (207 208)

(1928) 1928 Mad 931 (932)

(1928) 1928 Mad 984 (985)

(1927) 1927 Mad 859 (860)

(1927) 1927 Mad 335 (336)

(1926) 1926 Mad 1065 (1066)

(1926) 92 Ind Cas 1045 (Mad)

(1925) 1925 Mad 229 (229)

(1922) 1922 Mad 112 (113) 45 Mad 449

(1921) 1921 Mad 716 (716)

(1920) 1920 Mad 759 (760)

(1920) 1920 Mad 83 (83)

(1920) 1920 Mad 898 (899)

(1929) 1929 Nag 63 (63) 26 Nag L R 44

(1923) 1923 Oudh 177 (179) 26 Oudh G.L.

(1927) 1927 Pat 296 (297) 6 Pat 330

(1926) 1926 Pat 516 (516)

(1920) 1920 Pat 606 (606)

(1918) 1918 Pat 505 (505) 3 Pat L Jour 253

(1925) 1925 Rang 320 (320) 3 Rang 490

(1924) 1924 Rang 177 (177) 1 Rang 656

See also the following cases —

(1917) 1917 Pat 100 (101) 3 Pat L Jour

99 Lower Court dismissing suit for possession—Appellate Court reversing and remanding for ascertainment of mesne profits—No appeal lies

(1908) 5 All L J 545 (546) Partition suit—Appellate Court remanding suit not for decision on merits but for division by metes and bounds—No appeal lies

(1913) 20 Ind Cas 145 (145) 35 All 427

Order of dismissal of suit for non-appearance of parties—Order set aside by appellate Court—First Court directed to hear the case—No appeal lies against the order

[*See* (1935) 1935 Lah 161 (161) Appellate Court setting aside lower Court's order and remanding suit to lower Court with issue re framed with directions to take additional evidence if required—Order is illegal and is not appealable—But High Court can set it aside in exercise of revisional power

Let the Allahabad High Court has a remanded O 43 R 1 (u) so as to allow an appeal even when the remand is not under O 41 P 23

(1920) 1920 All 122 (123)

[*See also* the new R 23 substituted by the Madras High Court]

2 (1922) 1922 All 254 (256) 44 All 176

(1935) 1935 Cal 184 (186) Although remand not strictly under O 41, R 23 appeal lies

(1927) 1927 Cal 642 (644)

(1925) 1925 Cal 1253 (1259)

(1923) 1923 Cal 716 (717, 718) 52 Cal 793.

This view proceeds on the reasoning that the right of appeal depends on what the Court purports to have done and not on what it ought to have done^{2a} It has been held in the undermentioned cases³ that where the order appealed from is silent as to whether it was passed under S 151 or under this rule, it should be held to have been passed under this rule and not under S 151 even though the circumstances of the case do not bring it within the scope of this rule The reasoning on which these cases proceed is this An order of remand can be passed under the Court's inherent power only in exceptional cases Therefore where the Court intends to remand a case under its inherent power it may be expected to show in its order that it considers the case to be of an exceptional nature and that it therefore applies the provisions of S 151 Where this is not done the order may be presumed to have been passed as under O 41, R 23 and not under S 151 If such a presumption is not to be made, many an illegal order of remand would be incapable of being appealed against It is submitted that this reasoning is not correct It involves a presumption that the appellate Court illegally applied the provisions of Rule 23 to a case to which it does not apply when it was legally open to it to achieve its object by applying S 151 The Madras

- (1922) 1922 Cal 456 (457)
 (1922) 1922 Cal 279 (279)
 (1920) 1920 Cal 121 (125)
 (1920) 1920 Cal 569 (570)
 (1930) 1930 Lah 221 (222)
 (1923) 1929 Lah 376 (377)
 (1928) 1928 Lah 753 (758)
 (1928) 1928 Lah 341 (341)
 (1928) 1928 Lah 116 (116)
 (1926) 1926 Lah 537 (538)
 (1928) 1928 Mad 1200 (1200)

But according to some decisions the question of appeal must depend on whether the conditions laid down in O 41, R 23 have been complied with and not on, whether the appellate Court purported to act or did not purport to act under R 23—See the following cases —

- (1927) 1927 Cal 850 (852, 853) 55 Cal 219
 Remarks were obiter in this case
 [See also observations in (1927) 1927 Cal 642 (643 644)]

- (1927) 1927 Mad 1190 (1190) Remand is not under R 23 though the appellate Court refers to the Rule in the judgment, if R 23 does not really apply to the case

[See also (1908) 5 All LJ 545 (546) Partition suit—Remand not for decision on merits but for partition by metes and bounds — Order wrongly described as one under S 502 — Appeal must be as from a decree and not as from an order of remand and should bear stamp as an appeal from a decree]

(1908) 1908 Pun Re No 38, page 212

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One of the tests usually relied on for determining whether the order of remand was intended to be made under R 23 is to

see whether the Court fee was ordered to be refunded, because under S 13 of Court fees Act an order for the refund of Court fee can be passed only in the case of a remand under R 23—See the following cases —

- (1925) 1925 Cal 716 (717 718)
 (1928) 1928 Lah 116 (116)
 (1926) 1926 Lah 537 (538)

[See (1932) 1932 Lah 311 (311) Re refusal to order refund of Court fee indicates that remand is not under R 23]

[But see (1929) 1929 Lah 175 (176) Mere omission to order refund of Court fee does not necessarily indicate intention not to make the order under O 41, R 23]

- (1932) 1932 Lah 219 (220) In this case it was held that the mere fact that refund of Court fee was ordered is not proof that remand was under R 23 as refund of Court fee can be ordered even if the remand is under inherent power This view, it is submitted overlooks the express provisions of S 13 of the Court fees Act

2. [See (1932) 1932 Lah 311 (311) Remand made under S 151—No appeal lies though it might have been validly made under O 41, R 23]

- 3 (1922) 1922 All 254 (256) 44 All 176
 (1927) 1927 Cal 401 (402)

High Court has in the case cited below,⁴ refused to make any such presumption. It has also been held by the Judicial Commissioners Court of Sind that when the order of remand is silent as to the rule under which it purports to have been made, the onus is on the appellant to satisfy the Court that the order complained against is an order falling within the purview of this Rule.^{4a} Where several issues were left undecided in the first Court, the disposal of the case must be held to have been on a preliminary point and the order of remand consequently to be under this Rule.^{4b} Where an order of remand under the Courts inherent powers amounts to an adjudication under S 2, sub-S (2), it will be appealable as a *decree* under S 96⁵ (*See also* S 151, Note 9). As to whether an appeal lies from an order of remand under the Court's inherent powers, by virtue of the amendment in Oudh of O 43, R 1 (*u*), *see* the cases cited below.⁶

22a Order of remand—When will amount to decree

See S 2 (2) Note 6 and the cases cited therein and also under-mentioned cases.¹

23 Letters Patent Appeal

An order of remand by a Single Judge of the High Court is a "judgment" within the meaning of Cl 15 of the Letters Patent and is appealable as such.¹ (*See also* for fuller information S 104 Note 6.)

24 Privy Council Appeal

See S 109 Note 4 and the undermentioned cases.¹

- (1925) 1925 Cal 1157 (1158)
 4 (1920) 1920 Mad 898 (899) 53 Ind Cas 417
 (419)
 4a (1933) 1933 Sind 279 (280) (F B)
 4b (1934) 1934 Mad 643 (643)

under inherent powers is appealable
 —But order under R 25 *infra* is
 not order of remand and is not ap-
 pealable

Note 22a

- 1 (1934) 1934 Pat 13 (14) Order of remand
 not deciding rights of parties—Not a
 decree
 (1935) 1935 Pat 49 (51)

Note 23

- 1 *Remand under O 41 R 23*—
 (1909) 4 Ind Cas 329 (330) (Cil)
 (1933) 1933 All 262 (263 264)
 (1908) 35 Cal 1096 (1098)
Remand under inherent power—
 (1899) 21 All 178 (180)
 (1918) 1918 Pat 680 (682) 2 Pat L Jour 663
 (1922) 1922 Pat 384 (385) 1 Pat 246 Dis
 tringuish 1920 Pat 86

Note 24

- 1 Order of remand is not final order
 within S 109 unless it decides some cardinal
 iss in the case —

rights of parties as to the matter in con-
 troversy, it will not be a decree—*See the*
following cases—

- (1926) 1926 Pat 457 (459) Dissenting from
 1920 Pat 738
 (1927) 1927 Cal 850 (851) 55 Cal 219
 (1929) 1929 Nag 63 (63) 26 Nag L R 44
 6 (1930) 1930 Oudh 366 (368)
 (1935) 1935 Oudh 333 (334) Order of remand

25 Powers of High Court in appeal from order of remand

In an appeal from an order of remand under this rule the High Court may not only consider whether the lower appellate Court's order satisfies the requirements of this rule but may also enter into the merits of the decision of the first Court on the preliminary point¹ and if possible, may dispose of the case itself^{1a}. Similarly, in an appeal from an order of remand *purporting* to be under Rule 23 (though that rule did not apply to the case), the High Court may enter into the merits of the lower Court's decision in respect of which the order of remand was made² and may either dispose of the case itself or remand it to the lower appellate Court according to the necessities of the case³. But the High Court has no power in an appeal from an order of remand, to go into any questions unconnected with the correctness of the order of remand⁴.

26 To what Court remand could be made

Ordinarily the case should be remanded to the Court from whose decree the appeal is preferred and to no other Court.¹ But if the appellate Court has power to transfer a case from one Court to another there is nothing illegal in remanding the case to a Court to which the case could have been transferred². But a remand cannot be made to a person who has no jurisdiction to decide the case³ (See also Note 30, *infra* and S. 24, *ante*).

27 Effect of order of remand

An order of remand implies a reversal of the decision of the lower

N. 27

instead of remitting issues — High Court cannot deal with it as if it can lower the

177)
Order of High Court on appeal from the order of remand, setting aside the order of remand, being merely of an interlocutory kind cannot have the effect of *res judicata* upon any point that may be urged in appeal on the merits]

[See also (1898) 21 Mad 234 (236)

Note 26

Failure in a marked manner to do justice between the parties—Case was sent to

ness of the decision on the preliminary point^{1a}, in second appeal if any preferred from the decree after remand — (Subramania Ayyar, J,

as 33

3 (1935) 7 All 136 (139 140) Lower appellate Court remanding whole case

for trial] 3 (1933) 1933 Mad 471 (475)

High Court has in the case cited below,⁴ refused to make any such presumption. It has also been held by the Judicial Commissioner's Court of Sind that when the order of remand is silent as to the rule under which it purports to have been made, the onus is on the appellant to satisfy the Court that the order complained against is an order falling within the purview of this Rule.⁴ Where several issues were left undecided in the first Court, the disposal of the case must be held to have been on a preliminary point and the order of remand consequently to be under this Rule.^{4b} Where an order of remand under the Court's inherent powers amounts to an adjudication under S 2 sub-S (2), it will be appealable as a *decree* under S 96⁵ (*See also* S 151, Note 9). As to whether an appeal lies from an order of remand under the Court's inherent powers, by virtue of the amendment in Oudh of O 43, R 1 (a), *see* the cases cited below.⁶

22a Order of remand—When will amount to decree

See S 2 (2) Note 6 and the cases cited therein and also undermentioned cases.¹

23 Letters Patent Appeal

An order of remand by a Single Judge of the High Court is a "judgment" within the meaning of Cl 15 of the Letters Patent and is appealable as such.¹ (*See also* for fuller information, S 104 Note 6.)

24 Privy Council Appeal

See S 109, Note 4 and the undermentioned cases.¹

(1925) 1925 Cal 1157 (1158)

4 (1920) 1920 Mad 893 (899) 53 Ind Cas 117 (419)

4a (1933) 1933 Sind 279 (290) (F B)

4b (1934) 1934 Mad 643 (643)

5 (1923) 1923 Cal 605 (607)

(1925) 1925 Cal 716 (717 718) 52 Cal 703

(1928) 1928 Cal 218 (219)

(1864) 1864 Suth W R Grp 367 (364)

[*See also* (1924) 1924 Rang 177 (178)

1 Rang 106 Remand under inherent

under inherent powers is appealable—But order under R 25 *infra* is not order of remand and is not appealable

Note 22a

1 (1934) 1934 Pat 13 (14) Order of remand not deciding rights of parties—Not a decree

(1935) 1935 Pat 49 (51)

Note 23

1 Remand under O 41 R 23—

(1909) 4 Ind Cas 329 (330) (Cal)

(1933) 1933 All 262 (263 264)

(1908) 35 Cal 1096 (1098)

Remand under inherent power—

(1899) 21 All 178 (180)

(1918) 1918 Pat 680 (682) 2 Pat L Jour 663

(1922) 1922 Pat 381 (383) 1 Pat 246 Distinguishing 1920 Pat 86

Note 24

(1925)

force of a decree and is appealable as such

(1922) 1922 Mad 112 (115) 45 Mad 449 Remand—Rights of parties adjudicated upon—Appeal lies

Where the order does not decide on the rights of parties as to the matter in controversy it will not be a decree—*See the following cases—*

(1926) 1926 Pat 457 (459) Dissenting from 1920 Pat 738

(1927) 1927 Cal 850 (851) 55 Cal 219

(1929) 1929 Nag 63 (63) 26 Nag L R 44

6 (1930) 1930 Oudh 366 (368)

(1935) 1935 Oudh 333 (334) Order of remand

On the Patents 1920 & 1921

23. 25 Powers of High Court in appeal from order of remand

In an appeal from an order of remand under this rule the High Court may not only consider whether the lower appellate Court's order satisfies the requirements of this rule but may also enter into the merits of the decision of the first Court on the preliminary point¹ and if possible, may dispose of the case itself^{1a}. Similarly, in an appeal from an order of remand *purporting* to be under Rule 23 (though that rule did not apply to the case), the High Court may enter into the merits of the lower Court's decision in respect of which the order of remand was made² and may either dispose of the case itself or remand it to the lower appellate Court according to the necessities of the case³. But the High Court has no power in an appeal from an order of remand, to go into any questions unconnected with the correctness of the order of remand⁴.

26 To what Court remand could be made

Ordinarily the case should be remanded to the Court from whose decree the appeal is preferred and to no other Court¹. But if the appellate Court has power to transfer a case from one Court to another there is nothing illegal in remanding the case to a Court to which the case could have been transferred². But a remand cannot be made to a person who has no jurisdiction to decide the case³. (See also Note 30, *infra* and S 24, *ante*)

27 Effect of order of remand

An order of remand implies a reversal of the decision of the lower

Note 25

- 1 (1881) 3 All 675 (680) (F B)
- (1889) 13 Bom 14 (17)
- (1881) 17 Cal 168 (170)
- (1890) 5 Cal 144 (146)

instead of remitting issues — High Court cannot deal with it as if it was first appeal from decree — It can only rectify the procedure of lower Court and direct it to decide the case itself on the merits

- 4 (1923) 1923 Mad 430 (432)
- (1902) 1902 Pun Re No 28 page 111
- [See also (1886) 8 All 172 (176 177)
- Order of High Court on appeal from

the effect of *res judicata* upon any point that may be urged in appeal on the merits]

[See also (1898) 21 Mad 231 (236)
Appeal against Order of lower appellate Court returning plaint for presentation to proper Court — High

Note 26

Failure in a marked manner to do justice between the parties — Case was sent to another Court

ness of the decision on the preliminary point is, in second appeal if any preferred from the decree after remand — (Subramania Iyar, J,

R 115
courts

been

4 file suit

- 3 (1833) 7 All 126 (133, 140) Lower appellate Court remanding whole case

- 3 (1933) 1933 Mad 471 (475) for trial]

Court¹ and re-opens the whole case for re-trial by the lower Court except in regard to matters decided by the order of remand² There is a difference of opinion as to whether where a suit is remanded the lower Court can raise *another* preliminary point which was not the subject-matter of the appeal, and decide the case thereon According to the High Courts of Allahabad³ and Bombay⁴ it cannot According to these decisions such points might and ought to have been raised before the remand The High Court of Madras has held that it can⁵ The High Court of Calcutta has expressed conflicting views⁶ Where a party did not take any part in the proceedings of the lower Court and did not appeal against the order of the lower Court, it was held by the High Court of Lahore that he could not, after remand in an appeal by other objectors in *crimine* as an objector on remand^{6a}

After a suit has been remanded the appellate Court is not competent to pass any order in it unless and until the case comes before it again in

Note 27

(1869) 12 Suth W R 112 (112 113)

(1867) 7 Suth W R 396 (374)

[See also (1832) 1832 All 553 (355)]

[See also (1706) 3 Cal L Jour 181

(182) When decree is set aside in appeal and case is remanded under this rule the appellant is entitled to restitution of the property taken possession of in execution of the decree so set aside although an appeal has been preferred against the order of remand]

[See also (1810) 14 Suth W R 380 (381) But evidence taken on the previous occasion may be considered—See words newly added to the present Rule]

2 (184) 21 Suth W R 7 (8)

(1916) 1916 Cal 77 (78)

(1928) 1928 Mad 14 (14)

(1868) 10 Suth W R 339 (340)

(1869) 11 Suth W R 227 (227 228) If law is altered by Full Bench ruling since the case was remanded the trying Court should take it into consideration

(1919) 1919 Mad 140 (158) Whole case is re opened even in respect of those who did not appeal

[See also (1867 69) 12 Moo Ind App 495 (502 503) (P C) Remand of whole case cures defects in original trial]

(1868) 10 Suth W R 385 (386) A fresh appeal lies from the decision after remand

Whole case is re opened—Judge in lower Court can come to conclusions different from those arrived at by himself or his predecessor previously in respect of matters not touched by order of remand—

(1920) 1920 Cal 350 (351)

(1912) 13 Ind Cas 813 (814) 14 Oudh Cas 321

(1869) 12 Suth W R 112 (112 113)

(1932) 1932 Oudh 123 (126)

[See also (1925) 1925 All 369 (370)

Where at stage of second appeal the case is remanded for decision on a certain issue and the case comes back after remand the parties having had full opportunity to meet the case it cannot be urged that the Court should not have allowed a new case to be set up]

[But see (1916) 1916 Cal 77 (78) A High Court in the exercise of its power of supervision under the Charter can assume in certain cases an authority to limit the scope of certain appeals remanded to the lower Courts without keeping them in its own file]

[See also (1929) 1929 Bom 202 (204) Suit in Court of Second class Sub-

notice—Case remanded to Second Class Sub Judge—No plaint being in existence suit could not be proceeded with—Plaintiff's remedy was by appeal against rejection of plaint by First Class Sub Judge]

3 (1916) 1916 All 213 (215)

[But see (1897) 1897 All W N 103 (109)]

4 (1868 69) 5 Bom H O R (A C) 137 (138)

(1884) 8 Bom 535 (537)

(1877 78) 2 Bom 120 (130 131)

5 (1922) 1922 Mad 514 (516 517) In this case it was held that the point could be raised and decided but that the lower Court acted improperly in disposing of the suit on a preliminary point

23, appeal⁷ (See also Notes 2 and 30)

28 Effect of improper order of remand

Where an order of remand is passed in circumstances which do not warrant it, the defect involved in the order is one of procedure and not of substantive law and comes within the purview of S 99 of the Code. But the question arises whether such an order is one affecting the jurisdiction of the Court within the meaning of S 99. On this question there is a conflict of opinion. According to the High Courts of Bombay¹ and Calcutta² such an order is not one passed without jurisdiction and hence, does not, in itself, affect the jurisdiction of the Court and neither the order of remand nor the subsequent proceedings based thereon can be interfered with unless the decision of the case on the merits or the jurisdiction of the Court in any other respect has been affected. But according to the High Courts of Allahabad,³ Madras⁴ and Patna^{4a} such an order of remand is one made *without jurisdiction*, the term 'jurisdiction' being understood not in the sense of the power to deal with a certain matter but in the sense of the power to pass a given kind of order in such matter, and therefore the order of remand and the subsequent proceedings based thereon may be set aside although the decision of the case on the merits or the jurisdiction of the Court in any other respect has not been affected.

If an appellate Court passes an order of remand in a matter over which it has no jurisdiction, the order is *ultra vires*⁵

As to the effect of setting aside an order of remand, see the following cases⁶

29 Matters decided by order of remand finally of

Section 105, sub section (2) of the present Code provides that if the party aggrieved by an order of remand from which an appeal lies does not appeal therefrom he cannot subsequently question the correctness of the order of remand (See S 105, Note 8 and the following cases¹) But even apart

7 (1883) 1883 All W N 171 (172)

[See also (1932) 1932 P C 146 (150) (P C) Appellate Court remanding a case for addition of a necessary party and trial—Before that party to be added is heard, appellate Court should not indicate the order which should be passed by the lower Court]

Note 28

1 (1900) 14 Bom 232 (235 236)

2 (1923) 1923 Cal 355 (386)

(1914) 1914 Cal 163 (164) 20 Ind Cas 39 (40) 41 Cal 108

(1904) 11 Cal W N 340 (356)

(1907) 5 Cal L Jour 328 (333)

(1907) 5 Cal L Jour 71 (74)

(1905) 2 Cal L Jour 496 (497)

(1901) 23 Cal 324 (333)

(1873) 20 South W R 188 (189)

(1872) 17 South W R 465 (466)

(1860) 13 South W R 231 (235)

(1867) 8 South W R 207 (207)

(1865) 2 South W R 181 (182)

[See however (1886) 12 Cal 15 (47)]

(1864) 1 South W R 315 (316)

(1906) 6 South W R 47 (47)

R 193

(1906)]

(1874) 6 N W P H C R 114 (118)

(1874) 6 N W P H C R 101 (103)

4 (1908) 32 Mad 93 (85)

(1896) 19 Mad 419 (491)

(1895) 18 Mad 421 (422)

4a (1920) 1920 Pat 56 (57 83)

5 (1889) 11 All 35 (37 40)

(1903) 1 Ind Cas 460 (461) (Lah)

6 (1922) 1922 All 35 (37) 44 All 211 Remand order—Set aside—Subsequent proceedings based on it also fall with it (1902) 5 Oudh Cas 301 (303) Remand order set aside—Decree of original Court is restored—Limitation for execution runs from appellate order

Note 29

1 (1920) 1920 Lah 153 (191) Order of remand

Court¹ and re-opens the whole case for re-trial by the lower Court except in regard to matters decided by the order of remand² There is a difference of opinion as to whether where a suit is remanded the lower Court can raise *another* preliminary point which was not the subject-matter of the appeal, and decide the case thereon According to the High Courts of Allahabad³ and Bombay⁴ it cannot According to these decisions such points might and ought to have been raised before the remand The High Court of Madras has held that it can⁵ The High Court of Calcutta has expressed conflicting views⁶ Where a party did not take any part in the proceedings of the lower Court and did not appeal against the order of the lower Court, it was held by the High Court of Lahore that he could not, after remand in an appeal by other objectors in evidence as an objector on remand^{6a}

After a suit has been remanded the appellate Court is not competent to pass any order in it unless and until the case comes before it again in

Note 27

(1867) 12 Suth W R 112 (112, 113)

(1867) 7 Suth W R 326 (327)

[See also (1832) 1832 All 353 (355)]

[See also (1906) 3 Cal L Jour 181

(182) When decree is set aside in appeal and case is remanded under this rule the appellant is entitled to restitution of the property taken possession of in execution of the decree so set aside although an appeal has been preferred against the order of remand]

[See also (1870) 14 Suth W R 380 (391) But evidence taken on the previous occasion may be considered—See words newly added to the present Rule]

2 (1874) 21 Suth W R 7 (8)

(1916) 1916 Cal 77 (78)

(1925) 1925 Mad 14 (14)

(1868) 10 Suth W R 339 (340)

(1869) 11 Suth W R 227 (227, 228) If law is altered by Full Bench ruling since the case was remanded, the trying Court should take it into consideration

(1919) 1919 Mad 150 (153) Whole case is re opened even in respect of those who did not appeal

[See also (1867) 69 12 Moo Ind App 495 (502, 503) (P C) Remand of whole case cures defects in original trial]

(1868) 10 Suth W R 335 (336) A fresh appeal lies from the decision after remand

Whole case is re opened—Judge in lower Court can come to conclusions different from those arrived at by himself or his predecessor previously in respect of matters not touched by order of remand—

(1920) 1920 Cal 350 (351)

(1912) 13 Ind Cas 813 (814) 14 Oudh Cas 321

(1869) 12 Suth W R 112 (112, 113)

(1932) 1932 Oudh 123 (126)

[See also (1925) 1925 All 369 (370)

Where at stage of second appeal the case is remanded for decision on a certain issue and the case comes back after remand the parties having had full opportunity to meet the case it cannot be urged that the Court should not have allowed a *ne v* case to be set up]

[But see (1916) 1916 Cal 77 (78) A High Court in the exercise of its power of supervision under the Charter can assume in certain cases an authority to limit the scope of certain appeals remanded to the lower Courts without keeping them in its own file]

[See also (1929) 1929 Bom 202 (204) Suit in Court of Second class Sub-

notice—Case remanded to Second Class Sub Judge—No plaint being in existence suit could not be proceeded with—Plaintiff's remedy was by appeal against rejection of plaint by First Class Sub Judge]

3 (1916) 1916 All 213 (215)

[But see (1897) 1897 All W N 103 (107)]

4 (1868) 69 5 Bom H C R (A C) 137 (138)

(1884) 8 Bom 535 (537)

(1877) 78 2 Bom 120 (130, 131)

5 (1922) 1922 Mad 514 (516, 517) In this case it was held that the point could be raised and decided but that the lower Court acted improperly in disposing of the suit on a preliminary point again after remand without giving its findings on the other issues

6 (1875) 24 Suth W R 333 (333) (Cannot)

(1905) 2 Cal L Jour 403 (405, 407) (Do)

(1865) 3 Suth W R Act N 153 (159) (It can)

(1870) 14 Suth W R 370 (371) (Do)

(1907) 11 Cal W N 350 (356) (Do)

6a (1933) 1933 Lah 948 (949)

appeal⁷ (See also Notes 2 and 30)

28 Effect of improper order of remand

Where an order of remand is passed in circumstances which do not warrant it, the defect involved in the order is one of procedure and not of substantive law and comes within the purview of S 99 of the Code. But the question arises whether such an order is one affecting the jurisdiction of the Court within the meaning of S 99. On this question there is a conflict of opinion. According to the High Courts of Bombay¹ and Calcutta² such an order is not one passed without jurisdiction and hence, does not, in itself, affect the jurisdiction of the Court and neither the order of remand nor the subsequent proceedings based thereon can be interfered with unless the decision of the case on the merits or the jurisdiction of the Court in any other respect has been affected. But according to the High Courts of Allahabad,³ Madras⁴ and Patna⁵ such an order of remand is one made *without jurisdiction*, the term 'jurisdiction' being understood not in the sense of the power to deal with a certain matter but in the sense of the power to pass a given kind of order in such matter and therefore the order of remand and the subsequent proceedings based thereon may be set aside although the decision of the case on the merits or the jurisdiction of the Court in any other respect has not been affected.

If an appellate Court passes an order of remand in a matter over which it has no jurisdiction the order is *ultra vires*⁵

As to the effect of setting aside an order of remand see the following cases⁶

29 Matters decided by order of remand finality of

Section 105 sub section (2) of the present Code provides that if the party aggrieved by an order of remand from which an appeal lies does not appeal therefrom he cannot subsequently question the correctness of the order of remand (See S 105, Note 8 and the following cases¹) But even apart

7 (1853) 1853 All W N 171 (172)

(1866) 6 Suth W R 47 (47)

[See also (1932) 1932 P C 146 (150) (P C) Appellate Court remanding a case for addition of a necessary party and trial—Before that party to be added is heard appellate Court should not indicate the order which should be passed by the lower Court]

R 193

N 10 29

order—Set aside—Subsequent proceedings based on it also fall with it (1907) 5 Oudh Cas 301 (303) Remand order set aside—In case of original Court is restored—Limitation for execution runs from appellate order

Note 29

L (1900) 1900 Lah 193 (194) Order of remand

from the said provisions an order of remand under this Rule as contrasted with an order remitting issues for findings under R 25, is, as regards the Court passing the order, conclusive on all points decided thereby and they cannot be re-opened in that Court before the same judge or his successor, in appeal from the decision of the lower Court on remand² Nor can the Court to which the case is remanded go behind the order of remand³

The High Court of Allahabad has, however, held in the undermentioned case^{3a} that notwithstanding the fact that an order of remand if not appealed against, the Court is bound to take notice of a subsequent event which renders the order of remand nugatory. Thus where a Revenue Court dismisses the suit on the ground that the plaintiff has no title to the property and the District Judge remands the suit in appeal under this Rule, and the trial Court, after remand, decrees the suit but before the hearing of the appeal after remand, the defendant obtains a declaration from the civil Court that he was the owner, it has been held, that the Court is bound to take notice of the Civil Court's decree and act accordingly.

from which appeal lies not appealed from—Its propriety cannot be questioned in an appeal on the merits from the final decree

But a person not adversely affected by an order of remand is under no obligation to appeal against it and may challenge it in an appeal from the first decree after remand—

{See (1931) 1931 Oudh 242 (243)}

Similarly a point can be raised by the appellate Court suo motu under O 44, I 2—

(1926) 1926 Nag 147 (148)

Cases under the old Code which proceeded

(1863 66) 10 Moo Ind App 340 (359, 360) (P C)

1908 of Oudh 120 (120) 120, 121 in this case order of remand was not of such a character as precluded the

² ordered on review—Decision of question on review cannot be re-opened]
2 (1923) 1923 Pat 226 (228)
(1921) 1921 All 276 (277) 43 All 377

(1922) 1922 Oudh 236 (248) 25 Oudh Cas

52)]
254

[But see (1920) 1920 Pat 86 (86)]
If the remand was under R 25 the remanding Court can reconsider its opinion—

(1929) 1929 Mad 391 (392)
(1912) 14 Ind Cas 16 (17) (Lah)
(1912) 17 Ind Cas 224 (226) (Cal)
(1913) 21 Ind Cas 700 (701) (Cal)
(1914) 1914 P C 153 (155) 17 Oudh Cas 33 (P C)

{See also (1892) 14 All 141 (143 144)}

[But see (1912) 15 Ind Cas 39 (41) (Cal) Judge is not bound to reconsider]

[But see (1917) 1917 Cal 701 (703 704) Court not bound to reconsider]

³ [See (1916) 1916 Mad 421 (421, 422)]
(1876) 25 Suth W R P C 157 (160) (P C)
[See also (1921) 1921 Nag 129 (130)]
3a (1927) 1927 All 694 (695)

- 3, But an order of remand does not preclude the determination of points not conclusively decided by it ⁴

30 Jurisdiction after remand depends upon the order of remand

Where a case is remanded to a particular Court, it is only that Court and no other Court can try it ¹ But if a case is remanded to a District Court that Court can, under S. 24 of the Code, transfer the case to any other Court subordinate to it which is competent to try it ² An order of remand cannot confer on the lower Court to which the case is remanded jurisdiction which it would not have possessed but for the order of remand ³ Where the order of remand lays down any limits for the enquiry to be made by the lower Court, that Court has no jurisdiction to enter into questions which fall outside those limits ⁴

31 Right of parties after remand — See Notes 27, 29 and 32

32 Procedure after remand

When a case is remanded for re-trial the whole case is re-opened and the Court is to proceed *de novo* and is entitled to take evidence again even of those witnesses who had already been examined ¹ But if the remand is only to enable the Judge in the lower Court to record his reasons for his judgment, a trial *de novo* is *ultra vires* ² When the lower Court has not properly carried out the order of remand, the case may be again remanded to it ³

Where a case is remanded to the lower Court for re-trial the parties are, according to the practice of the Nagpur Judicial Commissioners Court, not entitled as of right to notice of the date fixed for re-hearing ⁴ Nor are they entitled to notice of the receipt of records by the lower Court ⁵ They are, how-

- ¹ (1875) 24 Suth W R 316 (317)
(1911) 11 Ind Cas 6 (7) (Cal)
(1928) 1928 Bom 201 (202)
(1925) 1925 Oudh 527 (528)
(1912) 13 Ind Cas 813 (814) 14 Oudh Cas 321

Note 30

- ¹ (1923) 1923 Mad 351 (352)
² (1922) 1922 All 35 (36) 41 All 211
[See also (1914) 1914 Cal 638 (639)
640) 23 Ind Cas 69 (70)
(1909) 1 Ind Cas 913 (917) 916) 36 Cal 193

The following decisions to the contrary under the former Code should be regarded as no longer good law in view of the amendment of S. 24 in the new Code —

- (1910) 6 Ind Cas 400 (401) (All)
(1900) 10 Mad L Jour 238 (239)
(1899) 21 All 230 (232)
(1871) 15 Suth W R 574 (575)
³ (1929) 1929 Lah 534 (535) Order of remand cannot confer jurisdiction which the lower Court would not have had but for the order of remand
(1913) 39 Mad 195 (203) (F B)
⁴ (1881) 7 Cal L Rep 103 (106) 35 Cal 176
(1875) 24 Suth W R 330 (330)
(1874) 22 Suth W R 207 (208)
(1865) 3 Suth W R 193 (193)
[See also (1916) 1916 Cal 722 (726)
Remand order to find whether a person has a title includes an enquiry as to whether he has lost the title or whether he is precluded from re-

living upon the title]

Note 32

- ¹ (1867) 8 Suth W R 280 (287)
(1868) 10 Suth W R 491 (492)
(1874) 21 Suth W R 7 (8) Plaintiff may prove his case in any way he can
² (1866) 2 Suth W R 275 (276)
(1866) 1 Ind Jur N S 101
(1866) 5 Suth W R 124 (124)
³ [See (1864) 1864 Suth W R Mis 39 (40) In remanding a second time Court should point out the manner in which the carrying out of the previous order seemed defective]
[But see (1867) 8 Suth W R 503 (503) Where the lower appellate Court has not fully carried out order of the High Court remanding a case the High Court would not remand a second time if it should appear that the lower appellate Court substantially tried the case fully on its merits]
⁴ (1925) 1925 Nag 31 (31)
(1911) 12 Ind Cas 807 (808) (Nag) But in h.
⁵ (1908) 4 Nag L J 166 (168)
^{1a} (1872) 17 Suth W R 70 (70)
(1933) 1933 Cal 83 (85) 36 Cal W N 693 (695)
(1922) 1922 Ind Cas 251 (252) (Oudh)

from the said provisions an order of remand under this Rule as contrasted with an order remitting issues for findings under R 25 is as regards the Court passing the order, conclusive on all points decided thereby and they cannot be re-opened in that Court before the same judge or his successor, in appeal from the decision of the lower Court on remand² Nor can the Court to which the case is remanded go behind the order of remand³

The High Court of Allahabad has, however, held in the undermentioned case^{3a} that notwithstanding the fact that an order of remand if not appealed against the Court is bound to take notice of a subsequent event which renders the order of remand nugatory. Thus where a Revenue Court dismisses the suit on the ground that the plaintiff has no title to the property and the District Judge remands the suit in appeal under this Rule and the trial Court after remand decrees the suit but before the hearing of the appeal after remand, the defendant obtains a declaration from the civil Court that he was the owner, it has been held that the Court is bound to take notice of the Civil Court's decree and act accordingly

from which appeal lies not appealed from—its propriety cannot be questioned in an appeal on the merits

(1922) 1922 Oudh 236 (248) 25 Oudh Cas

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in an appeal from the first decree after remand—

[See (1931) 1931 Oudh 212 (248)]

Similarly a point can be raised by the appellate Court suo motu under O 41 f 2—

(1926) 1926 Nag 147 (148)

Cases under the old Code which proceeded on the footing that the propriety of all

(1863 66) 10 Moo Ind App 340 (359 360)

(1922) 1922 Oudh 236 (248) 25 Oudh Cas

(1922) 1922 Oudh 236 (248) 25 Oudh Cas

(1922) 1922 Oudh 236 (248) 25 Oudh Cas

[But see (1920) 1920 Pat 86 (98)]
If the remand was under R 25 the remanding Court can re-consider its opinion—

(1923) 1923 Mad 391 (392)
(1912) 14 Ind Cas 16 (17) (Lah)
(1912) 17 Ind Cas 224 (226) (Cal)
(1913) 21 Ind Cas 700 (701) (Cal).
(1914) 1914 P C 153 (155) 17 Oudh Cas 33 (P C)

[See also (1892) 14 All 141 (143 144)]

[But see (1912) 15 Ind Cas 89 (41) (Cal) Judge is not bound to re-consider]

[But see (1917) 1917 Cal 701 (703, 704) Court is bound to re-consider]

3 [See (1916) 1916 Mad 421 (421 422)]
(18,6) 20 Suth W R P C 157 (160) (P C)
[See also (1921) 1921 Nag 129 (130)]

3a (1927) 1927 All 691 (692)

that in this case order of remand was not of such a character as precluded the raising of a certain point

[But see (18 6) 14 Suth W R 22 (22) Review specifically granted for considering a certain question—Remand ordered on review—Decision of question on review cannot be re-opened]

2 (1923) 1923 Pat 226 (228)

(1921) 1921 All 216 (217) 43 All 317

But an order of remand does not preclude the determination of points not conclusively decided by it ⁴

30 Jurisdiction after remand depends upon the order of remand

Where a case is remanded to a particular Court, it is only that Court and no other Court can try it ¹ But if a case is remanded to a District Court that Court can, under S 24 of the Code, transfer the case to any other Court subordinate to it which is competent to try it ² An order of remand cannot confer on the lower Court to which the case is remanded jurisdiction which it would not have possessed but for the order of remand ³ Where the order of remand lays down any limits for the enquiry to be made by the lower Court, that Court has no jurisdiction to enter into questions which fall outside those limits ⁴

31 Right of parties after remand—See Notes 27 29 and 32

32 Procedure after remand

When a case is remanded for re-trial the whole case is re-opened and the Court is to proceed *de novo* and is entitled to take evidence again even of those witnesses who had already been examined ¹ But if the remand is only to enable the Judge in the lower Court to record his reasons for his judgment, a trial *de novo* is *ultra vires* ² When the lower Court has not properly carried out the order of remand, the case may be again remanded to it ³

Where a case is remanded to the lower Court for re-trial the parties are, according to the practice of the Nagpur Judicial Commissioner's Court, not entitled as of right to notice of the date fixed for re-hearing ⁴ Nor are they entitled to notice of the receipt of records by the lower Court ^{5a} They are, how-

- 4 (1875) 24 Suth W R 316 (31")
 (1911) 11 Ind Crs 6 (") (Cal)
 (1928) 1928 Bom 201 (202)
 (1925) 1925 Oudh 527 (528)
 (1912) 13 Ind Cas 813 (814) 14 Oudh Cas 321

Note 30

- 1 (1923) 1923 Mad 351 (352)
 2 (1922) 1922 All 35 (36) 44 All 211
 [See also (1914) 1914 Cal 635 (639), 640] 23 Ind Cas 69 (70)
 (1909) 1 Ind Crs 913 (917 918) 36 Cal 193

The following decisions to the contrary under the former Code should be regarded as no longer good law in view of the amendment of S 24 in the new Code—

- (1910) 6 Ind Crs 400 (401) (All)
 (1900) 10 Mad L Jour 238 (239)
 (1899) 21 All 230 (232)
 (1871) 15 Suth W R 574 (575)
 3 (1929) 1929 Lah 531 (535) Order of remand cannot confer jurisdiction which the lower Court would not have had but

lying upon the title]

Note 32

- 1 (1867) 8 Suth W R 285 (287)
 (1868) 10 Suth W R 491 (492)
 (1874) 21 Suth W R 7 (8) Plaintiff may prove his case in any way he can
 2 (1865) 2 Suth W R 275 (276)
 (1866) 1 Ind Jur N S 101
 (1866) 5 Suth W R 124 (124)
 3 [See (1864) 1864 Suth W R Mts 39 (40) In remanding a second time Court should point out the manner in

the lower appellate Court substantially tried the case fully on its

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 son as a title includes an enquiry as to whether he has lost the title or whether he is precluded from re-

- (1904) 4 Nag L J 166 (168)
 4a (1872) 17 Suth W R 70 (70)
 (1933) 1933 Cal 63 (65) 36 Cal W N 633 (635)
 (1929) 100 Ind Cas 251 (252) (Oudh)

ever, entitled to have a reasonable date fixed for further hearing ^{4b} No fresh vakalatnama is necessary in a remanded case ⁵ When a case is remanded in second appeal to the first appellate Court the latter may ask the trial Court to take additional evidence ⁶

33 Refund of Court fee on remand

Where a remand is made under this Rule the appellate Court is *bound* under S 13 of the Court Fees Act 1870 to order a refund of the Court-Fee ¹

There is a difference of opinion, however, as to whether a refund can be ordered in cases in which a remand has been made, not under this Rule but under the Court's inherent powers The Judicial Commissioner's Courts of Nagpur and Peshawar have held that a refund cannot be ordered in such cases ² According to the High Court of Patna also S 13 of the Court-Fees Act, 1870 applies only to cases of remand under this Rule ³ The High Court of Lahore has, on the other hand, held that a refund could be ordered in such cases ⁴ but that the power is a *discretionary* one ⁵

When an appeal is remanded as to a part, the appellant is entitled to a refund of a proportionate part of the Court-Fee ⁶

34 Costs

See the undermentioned cases ¹

35 Revision

Remand under O 41, R 23,—No revision lies against an order of remand under this rule because such an order is *appealable* ¹ Even if the order of remand is not justified under the terms of this rule it is not a case of want of jurisdiction within the meaning of S 115, as the Court has inherent jurisdiction to remand ²

4b (1870) 14 Suth W R 401 (402)

(1868) 9 Suth W R 294 (295)

5 (1864) 1 Suth W R 276 (277)

6 (1916) 1916 Sind 93 (93) 9 Sind L R 148

Note 33

judicata without any decision on the principal point on the merits—Privy Council reversing decision on the above points—Case remanded—Privy Council granted appellant the costs of the appeal

(1933) 1933 All 216 (217)

(1870) 13 Suth W R 39 (40) Costs of appeal can be recovered only if order of remand provides for them *e g* by providing that costs shall abide the result

(1916) 1916 Mad 429 (430) When case is remanded to lower Court because of appellant's failure to set out his case properly and support it by proper evidence respondent is entitled to

response as against as to some of the respondents but is confirmed as to others no refund can be ordered

Note 34

(1866) 5 Suth W R C3 (66) Case disposed of on points (1) limitation, (2) *res*

ture to award costs to the appellant as question depends on merits of case

Note 35

1 (1873) 5 N W P H C R 14 (16)

(1933) 1933 Fe h 48 (49) Suit dismissed on plea of *res judicata*

(1873) 5 N W P H C R 137 (135)

2 (1921) 64 Ind Cas 436 (437) (Cal)

23, 5 *Remand under inherent power*—An order of remand under the inherent power of the Court is not appealable. Hence the question arises whether an order is revisable under S 115. On this question there is a conflict of opinion. According to some decisions a revision does not lie in such case³ according to other decisions a revision is maintainable⁴.

A revision will lie in the following cases —

- (a) Where an appellate Court entertains an appeal from an appealable order and remands the case⁵
- (b) Where an appellate Court remands a case to a Court which is not competent to try it⁶
- (c) Where an appellate Court remands a case to the lower Court directing it to return the plaint under O 7, R 10 in a case where the lower Court has jurisdiction to try the suit⁷

See S 115, *ante* and the notes thereto

24 **R. 24.** [S 565] *Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after re-settling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds*

[1877—S. 565; 1859—S. 353]

Synopsis

Scope of the Rule	Note No 1	Second appeal	Note
<p>3 (1927) 1927 Mad 1190 (1190) [See also (1923) 1923 All 464 (465) Not clear whether remand was under inherent power] <i>No revision lies because there is no usurpation of jurisdiction —</i> (1927) 1927 Mad 335 (336) (1927) 1927 Mad 1111 (1112) (1921) 1921 Mad 716 (716) <i>No revision lies because no case is decided within S 115 —</i> (1923) 1923 Bom 401 (401) (1912) 13 Ind Cas 855 (55) (Lab) (1911) 11 Ind Cas 315 (316) 1911 Pun Ro No 40 [See also (1910) 6 Ind Cas 491 (492) (Lab)] <i>No revision lies because another remedy by way of appeal against the decree after remand is open —</i> (1924) 1924 Lah 487 (487) 4 (1925) 1925 Cal 716 (716) 52 Cal 763 (1930) 1930 All 863 (864) (1927) 1927 Cal 401 (401) (1927) 1927 Cal 800 (803) 53 Cal 110</p>		<p>[See also (1931) 1931 Lrh 302 (3) Revision was entertained because alternative remedy by way of appeal against decree after remand would entail delay] (1921) 63 Ind Cas 858 (858) (All) Lower Court was held to have practically declined to exercise its jurisdiction when it remanded instead of trying case itself [See also (1926) 1926 All 55 (56) All 27] <i>Petition held to lie on grounds of usurpation of jurisdiction —</i> (1931) 1931 Lah 302 (302) (1925) 1925 Mad 171 (172) <i>Revision held to lie on grounds of procedural irregularity —</i> (1931) 1931 Mad 1 (1) (1923) 1923 Mad 113 (113) 5 (1906) 3 All LJ 119 (123) 6 (1915) 1915 Mad 1223 (1234 1235) 13 Ind Cas 555 (560) 33 Mad 193 (194) 7 (1923) 1923 Lah 521 (525)</p>	

ever, entitled to have a reasonable date fixed for further hearing ^{4b} No fresh vakalatnama is necessary in a remanded case ⁵ When a case is remanded in second appeal to the first appellate Court the latter may ask the trial Court to take additional evidence ⁶

33 Refund of Court fee on remand

Where a remand is made under this Rule the appellate Court is *bound* under S 13 of the Court-Fees Act 1870 to order a refund of the Court Fee ¹

There is a difference of opinion, however, as to whether a refund can be ordered in cases in which a remand has been made, not under this Rule but under the Court's inherent powers. The Judicial Commissioners' Courts of Nagpur and Peshawar have held that a refund cannot be ordered in such cases ² According to the High Court of Patna also S 13 of the Court-Fees Act 1870 applies only to cases of remand under this Rule ³ The High Court of Lahore has, on the other hand held that a refund could be ordered in such cases ⁴ but that the power is a *discretionary* one ⁵

When an appeal is remanded as to a part, the appellant is entitled to a refund of a proportionate part of the Court Fee ⁶

34 Costs

See the undermentioned cases ¹

35 Revision

Remand under O 41, R 23.—No revision lies against an order of remand under this rule because such an order is *appealable* ¹ Even if the order of remand is not justified under the terms of this rule it is not a case of want of jurisdiction within the meaning of S 115, as the Court has inherent jurisdiction to remand ²

- 4b (18 0) 14 Suth W R 401 (407)
(1868) 9 Suth W R 294 (295)
5 (1864) 1 Suth W R 2 6 (2 7)
6 (1916) 1J16 Smd 93 (93) 9 Smd L R 148

Note 33

- 1 (1918) 1918 Bom 157 (158) 42 Bom 363
(1934) 1J34 Mad 643 (644)
(1930) 1930 Lah 441 (442)
(1927) 1927 Lah 592 (593)
(1932) 1932 Lah 311 (311)
(192) 1927 Lah 196 (197)
(1939) 1932 All 641 (642)
2 (1918) 1918 Nag 2 1 (272)
(1933) 1933 Pesh 101 (104)
(1916) 1916 Nag 17 (18) 12 Nag L R 126
3 (1918) 1918 Pat 960 (261) 3 Pat L Jour 116
4 (1932) 1932 Lah 219 (290)
(1933) 1933 Lah 135 (135)
5 (1930) 1930 Lah 441 (442)
(1933) 1933 Lah 135 (135)
6 (1866) 6 Suth W R 65 (68)
(1917) 1917 All 314 (315) The remand as to a part must be as against all the respondents—If a decree is reversed as to some of the respondents but is confirmed as to others no refund can be ordered

Note 34

- (1866) 5 Suth W R 63 (66) Case disposed of on points (1) limitation (2) res

judicata without any decision on the principal point on the merits—Privy Council reversing decision on the above points Case remanded—Privy Council granted appellant the costs of the appeal

- (1933) 1933 All 216 (217)
(18,0) 18 Suth W R 39 (40) Costs of appeal can be recovered only if order of remand provides for them e.g. by providing that costs shall abide the result
(1916) 1J16 Mad 429 (430) When case is remanded to lower Court because of appellant's failure to set out his case properly and support it by proper evidence respondent is entitled to his costs of appeal
(1892) 1892 All W N 215 (216) Remanding Court has power to apportion costs—*Held* that ordinarily costs must be left to abide the result—It is premature to award costs to the appellant as question depends on merits of case

Note 35

- 1 (15 3) 5 N W P H C R 14 (16)
(1933) 1933 Pesh 48 (49) Suit dismissed on plea of *res judicata*
(1878) 5 N W P H C R 137 (138)
2 (1921) 64 Ind Cas 436 (437) (Cal)

Remand under inherent power—An order of remand under the inherent power of the Court is not appealable. Hence the question arises whether such an order is revisable under S 115. On this question there is a conflict of opinion. According to some decisions a revision does not lie in such case.³ But according to other decisions a revision is maintainable.⁴

A revision will lie in the following cases—

- (a) Where an appellate Court entertains an appeal from an unappealable order and remands the case.⁵
- (b) Where an appellate Court remands a case to a Court which is not competent to try it.⁶
- (c) Where an appellate Court remands a case to the lower Court directing it to return the plaint under O 7, R 10 in a case where the lower Court has jurisdiction to try the suit.⁷

See S 115, *ante* and the notes thereto

R. 24. [S 365] *Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after re-settling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds*
[1877—S 365; 1859—S. 353.]

Where evidence on record sufficient Appellate Court may determine case finally

Synopsis

Scope of the Rule

Note No 1 | Second appeal

Note No 2

3 (1927) 1927 Mad 1190 (1190)
(See also (1923) 1923 All 464 (464)
Not clear whether remand was under inherent power)

No revision lies because there is no usurpation of jurisdiction—

(1927) 1927 Mad 335 (336)

(1927) 1927 Mad 1111 (1112)

(1921) 1921 Mad 716 (716)

No revision lies because no case is decided within S 115—

(1923) 1923 Lon 401 (401)

(1912) 13 Ind Cas 855 (855) (Lah)

(1911) 11 Ind Cas 315 (316) 1911 Pun Ro No 50

(See also (1910) 6 Ind Cas 491 (492) (Lah))

No revision lies because another remedy lies by way of appeal against the decree after remand is given—

(1924) 1924 Lah 487 (487)

4 (1925) 1925 Cal 716 (718) 52 Cal 753

(1920) 1920 All 843 (864)

(1927) 1927 Cal 401 (402)

(1927) 1927 Cal 500 (503) 55 Cal 213

[See also (1931) 1931 Lah 302 (302)
Revision was entertained because the alternative remedy by way of appeal against decree after remand would entail delay]

(1921) 63 Ind Cas 858 (858) (All) Lower Court was held to have practically declined to exercise its jurisdiction when it remanded instead of trying case itself

[See also (1926) 1926 All 55 (56) 43 All 27]

Revision held to lie on grounds of want of jurisdiction—

(1931) 1931 Lah 302 (302)

(1925) 1925 Mad 171 (172)

Revision held to lie on grounds of material irregularity—

(1931) 1931 Mad 11 (5)

(1923) 1923 Mad 113 (113)

5 (1906) 3 All LJ 119 (123)

6 (1915) 1915 Mad 1223 (1231 1235) 17 Ind Cas 555 (560) JJ Mad 133 (E L)

7 (1923) 1923 Lah 524 (525)

1 Scope of the Rule

This Rule enables the appellate Court to dispose of a case finally without a remand if the evidence on the record is sufficient for the purpose¹ notwithstanding that the appellate Court proceeds on a ground entirely different from that on which the lower Court proceeded. Prior to Act, VII of 1888 the word 'shall' occurred after the words "the appellate Court" and so it was held that the appellate Court was bound to decide the case itself in the circumstances mentioned in the Rule.² The word 'shall' has now been replaced by the word "may" and the appellate Court may now, if necessary, remand a case under the present Code notwithstanding that the decision of the lower Court has not resulted in the exclusion of any material evidence.

There is a conflict of opinion as to whether an appellate Court can, under this Rule, decide a case without a remand on an issue not raised in the Court below. According to the High Court of Calcutta, the framing of a new issue is not a 'resettling' of the issues, and the appellate Court cannot, under this Rule frame such issue and decide it.³ The High Court of Bombay, has on the other hand, held that though the point was raised for the first time in appeal, a remand was not necessary where it could be decided on the evidence on the record.⁴ It is submitted that the latter view is correct. There is no reason why the framing of a new issue should be regarded as necessarily different from 'resettling' issues within the meaning of this Rule. The true view appears to be that when a new case is pleaded in the appellate Court, it will not act under this Rule unless the case arises on the facts stated in the pleadings and the opposite party is not taken by surprise.⁵

In an appeal against an order returning a plaint for presentation to the proper Court, the appellate Court, cannot decide the suit on the merits under this Rule: the reason is that such a decision would be outside the scope of the appeal the same not being against the decree in the suit.⁶

2 Second Appeal

See S 103, Note 2 and the following cases.¹

Order 41 Rule 24—Note 1

1 (1881) 6 All 378 (378)

(1870) 11 South W R 69 (70)

(1868) 10 South W R 374 (374)

(1865) 3 South W R Act 151 (150)

Court without sending the case to

116) 12
Ind App 166 (P C) Rule does not
enable appellate Court to declare a
right in favour of one of the parties,
where no issue has been framed on

7 L B R 7J)

6 (1927) 1927 Oudh 218 (219)

Note 2

1 Cases under the former Code —

(1837) 9 All 99n (29)

(1837) 9 All 26 (30)

(1835) 11 Cal 499 (501)

(1867) 8 South W R 493 (499).

Cases under the present Code—High

recorded though trial Court held
a portion inadmissible—Appellate
Court held justified in deciding with-
out a remand

2 (1882) 1882 All W N 5 (3) (5)

(1874) 22 South W R 224 (225)

5

R. 25. [S. 566.] *Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue,³ or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues,⁵ and refer the same for trial*

Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from

to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;⁶

and such Court⁷ shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.

[1877—S. 566; 1859—S. 354.]

Synopsis

	Note No		Note No
Legislative changes	1	Powers and duties of Court to which issues are remitted	8
Scope of the Rule	2	Remand, if open for re consideration by appellate Court after return of findings See R 26 Note 4 <i>infra</i>	9
'Has omitted to frame or try any issue'	3	New issues raised before the appellate Court	10
Distinction between this Rule and R 23	4	Remand in second appeal	11
May if necessary frame issues	5	Appeal	12
'Shall direct such Court to take the additional evidence required'	6	Letters Patent Appeal	13
What Court may try the issues remitted	7	Revision	14

Other Topics

Power of Court to which issue is remitted to restore case disposed of *ex parte*

See Note 8, Pt (8)

1 Legislative changes —

The words 'and the reasons therefor' in the second paragraph are new

2 Scope of the Rule

This Rule enables the appellate Court to remit issues to the lower Court for findings where the lower Court has failed to try any issue or determine any question of fact essential to the right decision of the suit on the merits¹

not

(1932) 1932 Mad 545 (502) High Court can arrive at finding not recorded by lower appellate Court instead of referring the matter to the lower Court

(1933) 1933 Oudh 23 (30) All evidence on record—High Court can determine question without remand

Order 41, Rule 25—Note 2

1 (1920) 1920 P C 67 (68) 43 Mad 537 47 Ind App 76 (PC)

(1933) 1933 Mad 187 (190) From evidence appellate Court noticing that consideration for suit transaction is immoral—No issue and finding by trial Court on that point—Remand

Cases under present Code—High Court's power to interfere when finding of lower Court is vitiated by error of law—Conflict of decisions —

(1914) 1914 Lah 68 (69) High Court has power to interfere

(1922) 1922 Pat 417 (419) Evidence improperly rejected by lower Court—Can High Court decide after taking into consideration that evidence under R 247 No (Per Dawson Miller, C J, and Per Jwala Prasad, J)

1 Scope of the Rule

This Rule enables the appellate Court to dispose of a case finally without a remand if the evidence on the record is sufficient for the purpose¹ notwithstanding that the appellate Court proceeds on a ground entirely different from that on which the lower Court proceeded. Prior to Act, VII of 1888 the word 'shall' occurred after the words 'the appellate Court' and so it was held that the appellate Court was bound to decide the case itself in the circumstances mentioned in the Rule². The word 'shall' has now been replaced by the word 'may' and the appellate Court may now, if necessary, remand a case under the present Code notwithstanding that the decision of the lower Court has not resulted³ in the exclusion of any material evidence.

There is a conflict of opinion as to whether an appellate Court can, under this Rule, decide a case without a remand on an issue not raised in the Court below. According to the High Court of Calcutta, the framing of a new issue is not a *resettling* of the issues, and the appellate Court cannot, under this Rule, frame such issue and decide it⁴. The High Court of Bombay, has on the other hand, held that though the point was raised for the first time in appeal, a remand was not necessary where it could be decided on the evidence on the record⁵. It is submitted that the latter view is correct. There is no reason why the framing of a new issue should be regarded as necessarily different from 'resettling' issues within the meaning of this Rule. The true view appears to be that when a new case is pleaded in the appellate Court, it will not act under this Rule unless the case arises on the facts stated in the pleadings and the opposite party is not taken by surprise⁶.

In an appeal against an order returning a plaint for presentation to the proper Court, the appellate Court, cannot decide the suit on the merits under this Rule: the reason is that such a decision would be outside the scope of the appeal: the same not being against the decree in the suit⁶.

2 Second Appeal

See S. 103. Note 2 and the following cases¹

Order 41 Rule 24—Note 1

- 1 (1834) 6 All 378 (378)
- (1834) 1931 Pat 630 (632)
- (1831) 10 S. Ch W R 211 (212)
- (1865) 10 S. Ch W R 451 (452)
- (1923) 19 3 All 603 (604) 45 All 60
- (1911) 10 Ind L R 25 (26) (All) Appellate Court has full power to decide with reference to evidence on record the issues left unsettled by the lower Court without sending the case to lower Court
- (1890) 11 All 112 (116) 12 Ind App 1 (P C)
- (1891) 13 All 53 (63) 17 Ind App 150 (1 C)
- (1919) 1919 Cal 96 (97)
- (1919) 1919 Cal 672 (673)
- (1894) 4 Mad L Jour 161 (182)
- (1893) 16 Mad 299 (301) (P C)

- (1870) 14 Suth W R 69 (70)
- (1868) 10 Suth W R 374 (374)
- (1865) 3 Suth W R Act N 151 (150)
- (1886) 9 Mad 300 (306)
- (1880) 3 Mad 96 (98)

- 3 [See also (1917) 1917 Cal 136 (197)]
[See also (1886) 12 Cal 2 J (216) 12 Ind App 150 (P C) Rule does not enable appellate Court to declare a right in favour of one of the parties, where no issue has been framed on the point and the right has not been set up in the lower Court]
- 4 (1875) 12 Bom H C R 23 (49)
- 5 (1917) 1917 Cal 463 (475 475)
[See also (1913) 20 Ind Cas 674 (675) 7 L B R 79]
- 6 (1927) 1927 Oudh 218 (219)

Note 2

- 1 Cases under the former Code —
(1857) 9 All 29n (29)
(1887) 9 All 26 (30)
(1885) 11 Cal 499 (501)
(1867) 3 Suth W R 499 (499)

Cases under the present Code—High

out a remand

- 2 (1832) 1832 All W N 5 (3) (5)
(1874) 22 Suth W R 221 (225)

R. 25. [S. 566.] *Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue,³ or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues,⁵ and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;⁶*

Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from

and such Court⁷ shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon *and the reasons therefor.*

[1877—S. 566; 1859—S. 354.]

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Scope of the Rule	2	Remand, if open for re consideration by appellate Court after return of findings See R 26 Note 4 <i>infra</i>	9
Has omitted to frame or try any issue ¹	3	New issues raised before the appellate Court	10
Distinction between this Rule and R 23	4	Remand in second appeal	11
May if necessary frame issues	5	Appeal	12
Shall direct such Court to take the additional evidence required	6	Letters Patent Appeal	13
What Court may try the issues remitted	7	Revision	14

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Power of Court to which issue is remitted to restore case disposed of *ex parte*

See Note 8, Pt (8)

1 Legislative changes—

The words 'and the reasons therefor' in the second paragraph are new

2 Scope of the Rule

This Rule enables the appellate Court to remit issues to the lower Court for findings where the lower Court has failed to try any issue or determine any question of fact essential to the right decision of the suit on the merits¹

Court can determine questions of fact not determined by lower appellate Court—
(1911) 12 Ind Cas 925 (925) 36 Bom 183
(1916) 1916 Oudh 257 (264)

Cases under present Code—High Court's power to interfere when finding of lower Court is vitiated by error of law—Conflict of decisions—

(1914) 1914 Lah 68 (69) High Court has power to interfere

(1972) 1922 Pat 417 (419) Evidence improperly rejected by lower Court—Can High Court decide after taking into consideration that evidence under R 24? No (Per Dawson Miller, C J. and 1er Jwala Prasad J)

(1932) 1932 Mad 545 (552) High Court can arrive at finding not recorded by lower appellate Court instead of referring the matter to the lower Court

(1933) 1933 Oudh 28 (30) All evidence on record—High Court can determine question without remand

Order 41, Rule 25—Note 2

1 (1920) 1920 P C 67 (68) 43 Mad 537 47 Ind App 76 (PC)

(1933) 1933 Mad 187 (190) From evidence appellate Court noticing that consideration for suit transaction is immoral—No issue and finding by trial Court on that point—Remand

Where the lower Court has not disposed of the suit on a preliminary point within the meaning of Rule 23 but at the same time has omitted to try any material issues or to determine any material questions of fact it is not competent to the appellate Court to remand the whole case under Rule 23, but it may, if necessary, remit issues for findings under this Rule keeping the case on its own file.² The appellate Court is not precluded from passing an order of remand under the present rule merely because it would have been competent to the Court under the circumstances to remand the case under Rule 23.³

In an appeal from an order under O 7, R 10 returning a plaint for presentation to the proper Court, the appellate Court has no power to remand issues which would have arisen if the lower Court had entertained the suit.⁴

As to the points of distinction between this rule and Rule 23 see Notes to Rule 23.

3 Has omitted to frame or try any issue

The rule applies only to cases in which the lower Court has omitted

- under this Rule should be made
- (1879) 4 Cal 744 (746) 6 Ind App 15 (PC)
 (1869) 13 Moo Ind App 419 (425 426) (PC)
 (1875) 1895 All W N 79 (79)
 (1921) 1927 Cal 555 (556) In the absence of proof of some fact within Evidence Act S 32 what the appellate Court has to do is to find whether or not there was any real contention that the writer was still alive and if so grant a remand
- (1920) 1920 Cal 374 (374)
 (1919) 1919 Cal 157 (158)
 (1919) 1919 Cal 945 (945)
 (1896) 25 Suth W R 47 (47)
 (1929) 1929 Lah 618 (619)
 (1919) 1919 Lah 250 (252) 1919 Pun Ro No 64
 (1911) 12 Ind Cas 53 (54) (Lah)
 (1896) 9 Mad 44 (44)
 (1864) 7 Mad 8 (10)
 (1918) 1918 Oudh 471 (473)
 (1901) 4 Oudh Cas 274 (227)
 (1921) 1921 Sind 155 (157) 16 Sind L R 17
- See also the following cases —
- (1931) 1931 P C 196 (140) 58 All 190 58 Ind App 173 (PC)
 (1876) 25 Suth W R 140 (141) Lower Court having come to no decision on a point raised plaintiff in appeal has a right to remand even though the point is very trifling
 (1864) 2 Bom H C R 61 (64)
 (1866) 5 Suth W R P C 63 (66) (P C) In appealable cases Courts below should as far as possible pronounce opinion on all the important issues so as to obviate necessity for a remand
 (1867) 2 Agra H C R 106 (107) Co defendants—One defendant cannot bind another by his pledge to abide by reference to rent roll for a certain year for the decision of the principal issue in the case
 (1867) 2 Agra H C R 61 (62) Judge's remark as to certain fact without any issue
- being framed for trial does not amount to judicial finding
 [See also (1935) 1935 Bom 216 (217) In a case which can be remitted under this Rule remand under R 23 or under inherent powers should not be made]
 [See also (1933) 1933 Pat 706 (707) Appellate Court should not rashly order re trial which case can be remanded under this Rule]
 [See also (1935) 1935 Pat 63 (63) Do]
- 2 (1915) 1915 All 460 (461)
 (1934) 1934 Lah 576 (579)
 (1935) 1935 Lah 161 (161)
 (1868) 3 Agra H C R 146 (147)
 (1929) 1929 Bom 175 (176) 53 Bom 335
 (1926) 1926 Cal 976 (977)
 (1926) 1926 Cal 951 (954 955)
 (1926) 1926 Cal 912 (912)
 (1906) 10 Cal W N 422 (423)
 (1905) 9 Cal W N 54 (56)
 (1899) 3 Cal W N 325 (326)
 (1897) 1 Cal W N 340 (341)
 (1864) 1 Suth W R 6 (7)
 (1883) 12 Cal L Rep 136 (138)
 (1876) 25 Suth W R 284 (285)
 (1878) 25 Suth W R 35 (35)
 (1864) Suth W R Gap 361 (361)
 (1864) 1864 Suth W R Gap 357 (353)
 (1864) 1 Suth W R 296 (297)
 (1916) 1916 Lah 238 (239)
 (1925) 1925 Mad 169 (170)
 (1923) 1923 Mad 227 (228)
 (1896) 19 Mad 157 (157)
 (1894) 17 Mad 187 (188)
 (1917) 1917 Pat 463 (464)
 (1875) 24 Suth W R 137 (137)
 (1870) 14 Suth W R 380 (390)
 [See also (1875) 23 Suth W R 317 (318)]
 [See also (1933) 1933 Bom 251 (251)]
 [See also (1933) 1933 Lah 22. (221)]
- 3 (1899) 1899 All W N 2 (3)
 4 (1925) 1925 Oudh 393 (394) 29 Oudh C s 11

5, to try any issue or to determine any question of fact Hence where the lower Court has not omitted to decide any issue or any question of fact a remand cannot be ordered under this Rule¹ merely for the purpose of enabling a party to produce evidence which ought to have been given in the lower Court² It has however, been held that a remand can be made under this rule where the lower Court has not arrived at its findings after a full and proper trial, inasmuch as, in such a case, the issue cannot be regarded as having been tried by the lower Court³

The omission by a plaintiff to press a certain point is, generally speaking, no ground for refusing to remit an issue on the point, if the lower Court has omitted to frame or try the same⁴

4 *Distinction between this Rule and Rule 23*—See R 23, Note 2

5 *May if necessary frame issues*

The appellate Court is not bound to remand issues under this Rule in every case in which the lower Court has failed to frame or decide any issue¹ The question is one for the exercise of the discretion of the Court in each case² Thus, where, in spite of there being no formal issue on a point, it has been tried by the lower Court after giving the parties full opportunity to produce their evidence and present their case on it, a remand under this rule is not necessary,³ especially where the point⁴

Note 3

- 1 (1919) 1919 Cal 945 (945)
- (1909) 4 Ind Cas 168 (169) (Cal)
- (1889) 2 C P L R 113 (114)
- (1914) 1914 Oudh 109 (104)
- (1922) 1922 Pat 575 (577) 1 Pat 639
- (1928) 1928 Cal 546 (547)
- (1910) 6 Ind Cas 499 (500) (All)
- (1900 1902) 1 L B R 143 (143)
- (1917) 1917 Pat 189 (140)
- (1893) 16 Mad 299 (301) (PC)

(See also (1933) 1933 Pat 472 (473)
Important evidence disregarded by lower Court—Case should be remanded]
[But see (1869) 11 Suth W R 25 (86)
Appellate Court has no power to send back case for trial upon issue not satisfactorily tried by Court of first instance]

- 4 (1902) 4 Bom L R 818 (820)
[But see (1920) 1920 Cal 325 (326)
N . 5

R

340 No irregularity or prejudice to other party—Order of remand even when all materials are on record is not bad]

- 2 (1687) 9 All 513 (518 519)
- (1927) 1927 Bom 125 (126)
- (1924) 1924 Cal 396 (397)
- (1919) 1919 Cal 836 (836)
- (1880) 5 Cal 283 (285)
- (1927) 1927 Lah 272 (273) 3 Lah 123
- (1919) 1919 Oudh 216 (217)
- 3 (1897) 1897 All W N 90 (91)
- (1912) 15 Ind Cas 3 (5) (All)
- (1881) 1881 All W N 12 (12)
- (1894) 18 Bom 250 (255)
- (1885) 7 All 649 (655) (FB)
- (1895) 17 All 117 (119 120)
- (1929) 1929 Lah 376 (377)
- (1899) 1 Bom L R 110 (112)
- [See also (1871) 15 Suth W R 346 (347)]
- (1923) 1923 Mad 718 (718)

- 2 (1923) 1923 Cal 291 (292)

further enquiry which is likely to

- 4 (1927) 1927 All 410 (411)
- (1919) 1919 Lah 119 (120)

Where the lower Court has not disposed of the suit on a preliminary point within the meaning of Rule 23 but at the same time has omitted to try any material issues or to determine any material questions of fact it is not competent to the appellate Court to remand the whole case under Rule 23 but it may, if necessary, remit as lies for findings under this Rule keeping the case on its own file.² The appellate Court is not precluded from passing an order of remand under the present rule merely because it would have been competent to the Court under the circumstances to remand the case under Rule 23.³

In an appeal from an order under O. 7, R. 10 returning a plaint for presentation to the proper Court, the appellate Court has no power to remand issues which would have arisen if the lower Court had entertained the suit.⁴

As to the points of distinction between this rule and Rule 23 see Note to Rule 23

3 'Has omitted to frame or try any issue'

The rule applies only to cases in which the lower Court has omitted

under this Rule should be made

(150) 4 Cal 744 (746) 6 Ind App 15 (PC)

(1563) 13 Mo Ind App 419 (425, 426) (PC)

(1795) 1535 All W N 79 (73)

(121) 1927 Cal 805 (806) In the absence of proof of some fact within Evidence Act S. 37 what the appellate Court has to do is to find whether or not there was any real contention that the writer was still alive and if so grant a remand

(110) 1920 Cal 374 (374)

(1919) 1319 Cal 157 (155)

(1919) 1319 Cal 945 (945)

(1876) 25 Suth W R 47 (47)

(1929) 1929 Lah 618 (618)

(1919) 1919 Lah 200 (252) 1919 Pun Re No 64

(1911) 12 Ind Cas 53 (54) (Lah)

(1931) 1931 P C 126 (110) 33 All 130 53 Ind App 173 (1 C)

(1576) 25 Suth W R 140 (141) Lower Court having come to no decision on a point raised plaintiff in appeal has

being framed for trial does not amount to judicial finding

[See also (1935) 1935 Bom 216 (217)]

In a case which can be remitted under this Rule remand under R. 23 or under inherent powers should not be made]

[See also (1933) 1933 Pat 06 (70)]

Appellate Court should not rashly order retrial which case can be remanded under this Rule]

[See also (1933) 1933 Pat 63 (68) Do]

2 (1915) 1915 All 460 (461)

(1934) 1934 Lah 576 (579)

(1935) 1935 Lah 161 (161)

(1868) 3 Agra H C R 146 (147)

(1929) 1929 Bom 175 (176) 53 Bom 335

(1926) 1926 Cal 916 (917)

(1926) 1926 Cal 934 (934, 935)

(1926) 1926 Cal 912 (912)

(1906) 10 Cal W N 422 (423)

(1905) 9 Cal W N 54 (56)

(1899) 3 Cal W N 325 (325)

(1891) 1 Cal W N 340 (341)

(1864) 1 Suth W R 6 (7)

(1883) 12 Cal L Rep 136 (133)

(1876) 25 Suth W R 281 (285)

(1876) 25 Suth W R 35 (35)

(1506) 19 Mad 157 (159)

(1894) 17 Mad 157 (158)

(1917) 1917 Pat 463 (464)

(1875) 24 Suth W R 137 (137)

(1870) 14 Suth W R 380 (380)

[See also (1875) 23 Suth W R 347 (348)]

[See also (1933) 1933 Bom 251 (251)]

[See also (1933) 1933 Lah 274 (224)]

3 (1899) 1899 All W N 2 (3)

4 (1923) 1923 Oudh 393 (394) 29 Oudh Cas 21

ants—One defendant cannot bind another by his pledge to abide by reference to sent roll for a certain year for the decision of the principal issue in the case

(186) 2 Agra H C R 61 (62) Judge's remark as to certain fact without any issue

25. to try any issue or to determine any question of fact Hence where the lower Court has not omitted to decide any issue or any question of fact a remand cannot be ordered under this Rule¹ merely for the purpose of enabling a party to produce evidence which ought to have been given in the lower Court² It has however, been held that a remand can be made under this rule where the lower Court has not arrived at its findings after a full and proper trial, inasmuch as, in such a case, the issue cannot be regarded as having been tried by the lower Court³

The omission by a plaintiff to press a certain point is generally speaking, no ground for refusing to remit an issue on the point, if the lower Court has omitted to frame or try the same⁴

4 Distinction between this Rule and Rule 23—See R. 23 Note 2

5 May if necessary frame issues

The appellate Court is not bound to remand issues under this Rule in every case in which the lower Court has failed to frame or decide any issue¹ The question is one for the exercise of the discretion of the Court in each case² Thus, where, in spite of there being no formal issue on a point, it has been tried by the lower Court after giving the parties full opportunity to produce their evidence and present their case on it, a remand under this rule is not³

..

(1900) 4 Ind Cas 105 (105) (104)
(1889) 2 C P L R 113 (114)
(1914) 1914 Oudh 103 (101)
(1922) 1922 Pat 575 (577) 1 Pat 639
(1928) 1928 Cal 546 (547)
(1910) 6 Ind Cas 499 (400) (All)
(1900 1902) 1 L B R 143 (143)

104 & 50 (1900) 1900 Ind Cas 105 (104) - Important evidence disregarded by lower Court—Case should be remanded
[But see (1869) 11 Suth W R 35 (36) Appellate Court has no power to send back case for trial upon issue not satisfactorily tried by Court of first instance]

4 (1902) 4 Bom L R 818 (820)
[But see (1920) 1920 Cal 325 (326)]

Note 5

1 (1869) 13 Moo Ind App 513 (583) (PC)
(1928) 1928 Mad 635 (636)
(1923) 1923 All 603 (604) 40 All 565
2 (1923) 1923 Cal 231 (292)
(1918) 1918 Mad 1159 (1162)
(1878) 22 Suth V R 496 (499)

L R

340 No irregularity or prejudice to other party—Order of remand even when all materials are on record is not bad]

2 (1887) 9 All 513 (518 519)
(1927) 1927 Bom 125 (126)
(1924) 1924 Cal 396 (397)
(1919) 1919 Cal 836 (836)
(1880) 5 Cal 283 (285)
(1927) 1927 Lah 272 (273) 8 Lah 123
(1919) 1919 Oudh 216 (217)

3 (1897) 1897 All W N 90 (91)
(1912) 15 Ind Cas 3 (5) (All)
(1881) 1881 All W N 12 (12)
(1894) 18 Bom 250 (255)
(1885) 7 All 643 (655) (I B)
(1895) 17 All 117 (119 120)
(1929) 1929 Lah 376 (376)
(1899) 1 Bom L R 110 (112)
[See also (1871) 15 Suth W R 346 (346)]
(1923) 1923 Mad 718 (718)

(1879)

1 - - - - -
ter of discretion claim for a declaration ought not to be remanded for further enquiry which is likely to entail delay and expense]

3 (1924) 1924 Bom 113 (114)
(1907) 29 All 184 (193) 34 Ind App 27 (I C)
(1932) 1932 Lah 293 (294) 13 Lah 399
Party knowing and failing to discharge onus—Remand is not proper though issue is not clear
(1875) 24 Suth W R 275 (276)
4 (1927) 1927 All 410 (411)
(1913) 1913 Lah 119 (120)

But where a point is newly raised in the appellate Court it should not be decided without giving the opposite party an opportunity to meet the new case.⁵ A remand will not, however, be ordered if the circumstances are such that even if the remand is granted it is unlikely that the party asking for the remand, would be able to establish the case he wants to make out.^{5a} In ordering a remand under this rule the appellate Court should specify the issues to be tried by the lower Court.⁶

6 Shall direct such Court to take the additional evidence required

These words "additional evidence required" leave a discretion to the appellate Court not to direct the lower Court to take further evidence when it remands a case for a finding on a specific issue on a consideration of the evidence in the case.¹ Where the appellate Court has not directed the lower Court to take further evidence the lower Court may² but is not bound to do so.³

7 What Court may try the issues remitted

Where issues are referred to the Court from which the appeal was preferred no other Court has power to try them.¹ It has been held by the Punjab Chief Court that an order remitting issues to a Court other than that from which the appeal has been preferred is not one without jurisdiction but is only an error of procedure.² Where during the pendency of an appeal to the High Court the lower Court had lost jurisdiction over the suit area owing to a redistribution of areas but the High Court directed the lower Court to submit findings on certain issues, *Held* that the lower Court should be considered to have retained the jurisdiction as regards pending suits and that even assuming that the lower Court had lost its jurisdiction to try the

[See also (199) 21 Lom 325 (324) Wrong issue framed but finding given on point which would have been raised if correct issue had been framed—High Court in second appeal refused to remand for a new finding on that issue]

clarity

Note 6

(1918) 1 J18 Lah 264 (265)

5 (1915) 1 J15 Lah 251 (251)

Code if the lower Court could take further evidence

in Cts

389

6 (1889) 2 C I L R 113 (114)

(1900) 27 Cal 941 (960) 27 Ind App 110

1 (1)

3

[See also (1888) 1638 All W N 81 (81)]

[But see (1881) 1881 All W N 75 (76) Omission to direct further evidence

[See also (1864) 1 Suth W R 63 (70) Appellate Court cannot remand case for re trial with instructions to frame new issues]

(1874) 22 Suth W R 396 (39) Appellate Court should not remand a case and order the lower Court to call upon the parties to submit to arbitration. But parties may waive the irregu-

of give of further evidence —

(1868) 10 Suth W R 491 (492)

(1868) 9 Suth W R 294 (295)

Note 7

1 (1907) 29 All 660 (662)

2 (1886) 1886 Pun Re No 111

25, suit, the direction of the High Court should be considered as a transfer of the case to that Court³

In the undermentioned case⁴ the Court of first instance omitted to try a certain issue. The case went up in appeal before a Court which had no jurisdiction to entertain the appeal. The appellate Court, however entertained the appeal and remanded an issue under this rule to the Court of first instance. On the return of the findings, the appeal was returned for presentation to the proper Court. The appeal then came before the proper Court. It was held that though the order of remand was made by a Court which had no jurisdiction to deal with the case, this was not a fatal objection to the result of the enquiry made in pursuance of the order and that the appellate Court which subsequently dealt with the case could take it into consideration^{4a}. It has also been held in the case cited below that where an additional District Judge has remanded the case to a subordinate Judge, the District Judge has power to transfer the proceedings to another subordinate Judge^{4b}. See also the undermentioned case⁵.

8 Powers and duties of Court to which issues are remitted

A Court to which issues are remitted under this rule can only try the issues and has no power to decide the *suit itself*¹ which continues to be pending in the appellate Court². Hence it has no power to refer the case to arbitration³. Nor can such Court delegate its function of deciding the remanded issues to any other Court⁴. But where the High Court has remanded issues to the lower appellate Court for findings the latter can under O 41, R 28 direct the Court of first instance to take further evidence⁵ or appoint a commissioner to examine witnesses under S 75 of the Code⁶.

238 (240)
5 (1850) 21 Suth W R 353 (353)

Note 8

appellate Court
(1850) 7 Cal L Rep 103 (103-106) Lower
Court cannot allow issue remitted to
be abandoned and try case on other

Court

(1865)

(1869) 11 Suth W R 77 (78-79) Held that
under the terms of the remand order
the lower Court had power to try
the issue of possession.
[But see (1870) 13 Suth W R 91 (93)
Where High Court made a remand

order mistakenly for the trial of an
issue other than that which should
have been remanded for trial and
the lower Court disregarding the
order tried the proper issue. Held
that lower Court's disregard of the
High Court's order will not affect
the merits of the case.]

2 (1932) 1932 Rang 137 (137) 10 Rang 335
Remand order does not take away
appellate Court's seisin of case

3 (1885) 7 All 523 (526)
(1906) 1906 All W N 221 (222)

4 (1892) 14 All 23 (24-25)
(1901) 20 All 660 (662)
(1899) 1899 All W N 137 (137-138)
(1895) 19 Bom 551 (552-553)
(1927) 1927 Lah 769 (770)
(1924) 1924 Lah 354 (355)
(1913) 19 Ind Cas 970 (971) 1913 Ind Re

No 105
(1916) 1916 Sind 93 (93) 9 Sind L R 143
(1909) 4 Ind Cas 606 (606) 3 Sind L R 120
5 (1918) 1918 Lah 342 (342)
(1903) 32 Bom 441 (445) District Court

may also itself take what evidence
it wants to take
(1916) 1916 Sind 93 (93) 9 Sind L R 143
(1909) 4 Ind Cas 606 (606) 3 Sind L R
120
6 (1925) 1925 Lah 39 (41) 5 Lah 252

But where a point is newly raised in the appellate Court, it should not be decided without giving the opposite party an opportunity to meet the new case.⁵ A remand will not, however, be ordered if the circumstances are such that even if the remand is granted it is unlikely that the party asking for the remand, would be able to establish the case he wants to make out.^{5a} In ordering a remand under this rule the appellate Court should specify the issues to be tried by the lower Court.⁶

6 Shall direct such Court to take the additional evidence required

These words additional evidence required leave a discretion to the appellate Court not to direct the lower Court to take further evidence when it remands a case for a finding on a specific issue on a consideration of the evidence in the case.¹ Where the appellate Court has not directed the lower Court to take further evidence the lower Court may² but is not bound to do so.³

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Where issues are referred to the Court from which the appeal was preferred, no other Court has power to try them.¹ It has been held by the Punjab Chief Court that an order remitting issues to a Court other than that from which the appeal has been preferred, is not one without jurisdiction but is only an error of procedure.² Where during the pendency of an appeal to the High Court, the lower Court had lost jurisdiction over the suit area owing to a re-distribution of areas, but the High Court directed the lower Court to submit findings on certain issues, *Held*, that the lower Court should be considered to have retained the jurisdiction as regards pending suits, and that even assuming that the lower Court had lost its jurisdiction to try the

[See also (1897) 21 Bom 325 (327) Wrong issue framed but finding given on point which would have been raised if correct issue had been framed—High Court in second appeal refused to remand for a new finding on that issue]

larity

Note 6

1859 did not require the appellate Court to direct further evidence to be taken still it was held in the following cases under that Code that the lower Court could take further evidence though the order of remand

- (1918) 1918 Lah 264 (265)
- 5 (1915) 1915 Lah 251 (251)
- (1917) 1917 Cal 196 (197)
- (1922) 1922 All 281 (282) 44 All 571
- (1859) 1859 Bom P J 233 (233)
- (1874) 21 Suth W R 59 (60 61)
- (1872) 17 Suth W R 361 (361)
- 5a (1925) 1925 Oudh 97 (98) 27 Oudh Cas 383
- 6 (1889) 2 C P L R 112 (114)
- (1900) 27 Cal 951 (960) 27 Ind App 110 (111)

3

[See also (1888) 1888 All W N 81 (81)]

[But see (1881) 1881 All W N 75 (76) Omission to direct further evidence to be taken — Still party entitled to adduce further evidence]

See also the following cases under Code of 1859 in which it was held that the parties are entitled to have an opportunity of giving further evidence —

- (1868) 10 Suth W R 491 (492)
- (1868) 9 Suth W R 294 (295)

Note 7

- 1 (1907) 29 All 660 (662)
- 2 (1886) 1886 Pun Re No 111

not one under R 25]

[See also (1864) 1 Suth W R 69 (70) Appellate Court cannot remand case for re-trial with instructions to frame new issues]

- (1874) 22 Suth W R 306 (307) Appellate Court should not remand a case and order the lower Court to call upon the parties to submit to arbitration But parties may waive the irregu

25, suit, the direction of the High Court should be considered as a transfer of the case to that Court³

In the undermentioned case⁴ the Court of first instance omitted to try a certain issue. The case went up in appeal before a Court which had no jurisdiction to entertain the appeal. The appellate Court, however, entertained the appeal and remanded an issue under this rule to the Court of first instance. On the return of the findings, the appeal was returned for presentation to the proper Court. The appeal then came before the proper Court. It was held that though the order of remand was made by a Court which had no jurisdiction to deal with the case, this was not a fatal objection to the result of the enquiry made in pursuance of the order and that the appellate Court which subsequently dealt with the case could take it into consideration^{4a}. It has also been held in the case cited below that where an additional District Judge has remanded the case to a subordinate Judge, the District Judge has power to transfer the proceedings to another subordinate Judge^{4b}. See also the undermentioned case⁵.

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A Court to which issues are remitted under this rule can only try the issues and has no power to decide the *suit itself*¹ which continues to be pending in the appellate Court². Hence it has no power to refer the case to arbitration³. Nor can such Court delegate its function of deciding the remanded issues to any other Court⁴. But where the High Court has remanded issues to the lower appellate Court for findings, the latter can, under O 41, R 28, direct the Court of first instance to take further evidence⁵ or appoint a commissioner to examine witnesses under S 75 of the Code⁶.

5 (1875) 21 *Suth W R* 353 (353)
Note 8

233 (240)

order mistakenly for the trial of an issue other than that which should have been remanded for trial and the lower Court disregarding the order tried the proper issue. *Held* that lower Court's disregard of the High Court's order will not affect the merits of the case.]

2 (1932) 1932 *Rang* 137 (137) 10 *Rang* 330
Remand order does not take away

appellate Court
(1890) 7 *Cal L Rep* 103 (103 106) Lower Court cannot allow issue remitted to be abandoned and try case on other issues

(1865) 3 *Suth W R* 198 (199) Lower Court cannot try any other issue

(1868) 9 *Suth W R* 380 (381) (Do)

(1868) 10 *Suth W R* 203 (204) Court receiving orders of remand for taking some special evidence should confine itself to such special evidence alone

(1869) 11 *Suth W R* 77 (78 79) *Held* that under the terms of the remand order, the lower Court had power to try the issue of possession

[But see (1870) 13 *Suth W R* 91 (93)

Where High Court made a remand

5 (1903) 32 *Bom* 441 (445) District Court may also itself take what evidence it wants to take
(1916) 1916 *Sind* 93 (93) 9 *Sind L R* 114
(1900) 4 *Ind Cas* 605 (606) 3 *Sind L R* 120
6 (1925) 1925 *Lah* 39 (41) 5 *Lah* 252

Re

The Court to which issues are remitted must give its findings on *all* the issues remitted. It is not open to it to decide only some of the issue and to say that in the view of the law its recording a finding on the other issues is not necessary.⁷ Where it is asked to submit a finding on an issue after recording such evidence as may be produced by the parties it is bound to give an opportunity to both the parties to produce their evidence.⁸ Where the Court to which issues are remitted records its findings *ex parte* without giving any party such an opportunity to produce his evidence, it may restore the case and allow him to produce his evidence.⁹

After a case is remanded under this rule the lower Court cannot add new parties to the suit¹⁰ but it can bring on record the legal representatives of a deceased appellant.¹¹

As to the interpretation of a remand order *see* the undermentioned case¹²

9 Remand if open for re consideration by appellate Court after return of findings — *See R 26 Note 4 infra*

10 New issues raised before the appellate Court

As a general rule a new point not based on the case pleaded or set up by the parties in the lower Court, cannot be raised for the first time in the appellate Court, and a remand cannot be ordered for the decision of such point.¹ But the bar is not an absolute one and the appellate Court can in a proper case, remand issues under this rule, even on points not arising on the pleadings as framed.² But this can be done only in exceptional circumstances, for good cause shown, and on payment of all costs thrown away.³

A remand can be ordered on a point not raised in the memorandum of appeal.⁴

11 Remand in second appeal

The High Court in second appeal can remit issues to the lower Court under this rule.¹ (*See also* S 103)

- (1874) 21 Suth W R 333 (333)
 (1872) 17 Suth W R 407 (408)
 (1927) 1927 Mad 83 (84)
 (1894) 17 Mad 69 (71, 72)
 (1913) 19 Ind Cas 368 (369) 6 Sind L R 130
 (1876) 26 Suth W R 55 (64) 3 Ind App 259 (P C)
 2 (1906) 30 Bom 173 (188)
 (1892) 14 All 366 (371)
 (1911) 10 Ind Cas 922 (923) (L B)

It would be necessary only if decision on the other point was not accepted by the appellate Court — Appellate Court should be held to have confirmed the decision thereon.

Note 10

- 1 (1918) 1918 P C 3 (4) 45 Cal 748 45 Ind App 94 (P C)
 (1933) 1333 All 829 (830)
 (1875) 3 Ind App 259 (279) (P C)
 (1870) 2 N W L R 11 C R 23 (24)
 (1875) 19 Bom 212 (216)
 (1920) 1920 Cal 14 (1) (14)
 (1875) 24 Suth W R 121 (122)
 (1875) 23 Suth W R 189 (170)
 (1874) 21 Suth W R 339 (339)

- 4 (1921) 1921 Lab 256 (258)

order under O 41 R 25 but an order of remand in the exercise of inherent power]

25, 12 Appeal

No appeal lies against an order remitting issues to the lower Court under this rule¹ but it can be questioned in the appeal filed against the decision eventually arrived at, after the receipt of finding from the lower Court.²

13 Letters Patent Appeal

No appeal lies under the Letters Patent against an order remitting issues under this rule¹

14 Revision

See the undermentioned cases¹

26

Findings and evidence to be put on record Objections to finding

R. 26. [S. 567.] (1) Such evidence and findings shall *form* part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court,¹ present a memorandum of objections² to *any* finding.

(2) After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.³

[1877—S. 567; 1859—S. 35±.]

Note 12

- 1 (1926) 1926 Cal 568 (570)
- (1935) 1935 All 140 (140)
- (1933) 1933 Cal 496 (497)
- (1933) 1933 Oudh 350 (351) Alteration of O 43, R 1, Cl (u) by the Oudh and Allahabad Courts do not cover remand under this Rule
- (1935) 1935 Oudh 333 (334) (Do)
- (1927) 1927 Cal 642 (644)
- (1930) 1930 Oudh 366 (368)
- (1924) 1924 Rang 131 (131)
- [See also (1868) 10 Suth W R 209 (210) Issue remitted to trial Court—Limitation for appeal from the appellate Court's decree runs not from the order of remand but from the final decision]
- (1933) 1933 Cal 496 (497)
- 2 (1920) 1920 Pat 735 (736)
- (1933) 1933 Bom 251 (252) Order remitting issues is only an interlocutory order and can be challenged in appeal to the Privy Council against the final decree—Principle of S 103 applies to the Privy Council also
- (1926) 1926 Cal 568 (570)
- (1927) 1927 Oudh 499 (502)
- (1924) 1924 Rang 131 (131)
- (1895) 22 Cal 419 (422)
- (1929) 1929 Lah 119 (119) Death of one of the plaintiffs after remand—Legal representative not brought on record—Objection can be taken in second appeal

N . 11

Note 14

- 1 (1886) 1886 Pun Re No 111 Appellate Court in remanding a case under R 25 to a Court other than the Court which tried the case cannot be said to exercise a jurisdiction not vested in it by law within the meaning of S 115
- (1935) 1935 Bom 216 (218) Where appellate Court purports to remand a case under its inherent power in a case covered by this Rule it is a material irregularity in the exercise of its jurisdiction
- (1933) 1933 Cal 496 (497) Appeal memo may be treated as application for revision
- "
- is not a case decided and no revision lies
- (1918) 1918 Lah 377 (377) Remand under R 25—Case is not 'decided' within the meaning of S 44 of Punjab Courts Act and no revision lies.
- (1921) 1921 Lah 370 (371) Order under R. 25 will be interfered with only in exceptional cases because it is not a final order

Synopsis

	Note No. 1	appeal	Note No.
Appellate Court to fix time for presenting memo of objections	1	Unnecessary remission	3
Effect of not filing objections	2	Second appeal	4
Shall proceed to determine the		Court fee	5
			6

1 Appellate Court to fix time for presenting memo of objections

The appellate Court must fix a time within which objections to the findings returned by the lower Court should be filed¹ But the failure to fix a time is a mere technical irregularity and may be ignored if it does not in any way prejudice the party complaining of the same² Where no time is fixed for filing objections they may be filed at any time before the hearing³ The period for filing objections may be fixed at the time of remitting the issues. It is not necessary that it should be fixed only after the return of the findings⁴

2 Effect of not filing objections

Where no objections to the findings are filed within the time fixed the Court may in its discretion allow or decline to allow the objections to be taken afterwards¹ But this does not mean that the appellate Court can treat the findings received from the lower Court as final and binding merely because objections are not filed in time. The appellate Court must examine the findings on their merits inasmuch as the rule says that after the expiration of the period fixed for filing the objections the appellate Court shall proceed to determine the appeal² (*See* O 41 R 31)

Where objections to findings were not taken in the lower appellate Court which remitted the issues, they cannot be raised for the first time as grounds of second appeal³

3 Shall proceed to determine the appeal

At the hearing after the remand, the appellate Court is to determine the appeal on the whole of the material on the record, including the evidence and findings returned by the lower Court under the remand order¹ It is not open to the appellate Court to consider only the findings returned by the lower Court under the remand, and simply confirm the other findings without examin-

Order 41 Rule 26—Note 1

- 1 (1898) 3 Agra H C R 96 (96)
- 2 (1914) 26 Ind Cas 736 (131) (Oudh)
- 3 (1894) 1881 All W N 108 (158)
- 4 (1910) 7 Ind Cas 547 (518) 6 Nag J R 107

after the finding in respect of which no objection is preferred within the time fixed

2

Note 2

- 1 (1890) 7 All 79 (91-92)
- (1898) 1838 All W N 119 (119)
- (1895) 2 All 908 (909-910)
- (1873) 5 N W P H C R 114 (110)
- (1872) 4 N W P H C R 72 (73)
- (1868) 3 South W R 438 (430)
- (1921) 1921 Lah 225 (226)
- (1890) 1890 Pun Re No 27 page 77
- (1899) Pun Re No 131 page 400
- [See also (1913) 20 Ind Cas 30 (96-97) (Cal)]
- [See also (1879) 4 Cal 744 (701) 6 Ind App 15 (17 C)]
- [But see (1866) 1 Agra H C R 50 (51)]
- Appellate Court is not competent to

3 (1899) 10 All 28 (99)

Note 3

1 (1920) 1920 Cal 93 (94)

ing them on the merits² The appellate Court must take into consideration any objections to the findings returned by the lower Court that may be duly filed³ But the absence of any objections is no justification for the appellate Court not examining the findings on their merits (*See Note 2 supra*)

It has been held in cases under the old Code that the Court which passed the order of remand under this Rule has no power to transfer the case to any other Court for disposal whether before⁴ or after⁵ the return of the findings. It is submitted that under the present Code S 24 is wide enough to enable such transfers to be made

Where the lower Court makes its return without giving its findings on any of the issues the appellate Court can remit the issues again for a proper finding being given⁶

It has been held by the Punjab Chief Court⁷ that before the return of findings by the lower Court the appellate Court has no jurisdiction to dismiss the appeal for default (*See also Note 4, infra*)

4 Unnecessary remission

Is it open to the appellate Court when the appeal comes on for hearing after the receipt of fresh findings from the lower Court to reconsider the views expressed by it before the remand and to hold that the remand was improper or unnecessary? On this question there is a conflict of decisions. According to the great majority of cases¹ there is no final decision on any matter when an appellate Court remits issues under R 25 and the entire appeal including matters on which the Court may have expressed its views before the order of remand, is open for consideration at the hearing after the remand. Under this view it is open to the appellate Court to hold that the order of remand previously made was unnecessary or improper and to disregard the findings returned by the lower Court. Thus it may dismiss the appeal, after the findings are received on the ground that the appeal as originally filed was itself incompetent² It has also been held that when a single Judge of the High Court makes an order of remand under R 25 and the case subsequently comes on for final disposal before a Bench of two Judges, the latter can go back upon the order of remand and the views expressed therein³ But it has been held by the Calcutta High Court in the undermentioned case⁴ that an order of remand under R 25 is an interlocutory order which, under the principle laid down by the Privy Council in *Administrator General of Bengal v Hook*⁵ and *Ram Kirpal v Rup Kumar*⁶

(1923) 1923 Oudh 50 (51) 25 Oudh Cas 215
(1922) 1922 Oudh 236 (248) 25 Oudh Cas 183
(1922) 1922 Oudh 118 (120) 25 Oudh

Mad 556

49 Ind App 286 (P C)

(1869) 10 Suth W R 236 (237)

7 (1906) 1906 Pun L R No 90 page 275

will operate as *res judicata* and is binding on the Court which passed it, until it is set aside in appropriate proceedings

An appellate Court is not bound to reconsider the views expressed in the remand order⁷

Where the appellate Court has heard arguments on some of the issues and expressed its views thereon and remanded other issues under R 25 it is not bound on the return of the findings to hear the case *de novo* but may confine counsel to arguments on the findings returned⁸ It has been held that a party is not entitled to raise new issues for the first time at the hearing after the remand⁹

5 Second appeal

The findings of lower appellate Court upon issues remanded by the High Court in second appeal cannot be challenged upon the evidence as in the case of first appeal but objections to such findings must be restricted to the limits within which the original pleas in second appeal are confined¹

6 Court fee

No Court fee is chargeable on a memorandum of objections filed under this Rule²

R. 27. [S 568] (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted,³ or

(b) the Appellate Court requires any document to be produced⁴ or any witness to be examined⁵ to enable it to pronounce judgment,⁷ or for any other substantial cause,⁸

the Appellate Court may allow such evidence or document to be produced or witness to be examined

(2) Wherever additional evidence is allowed to be produced by an appellate Court, the Court shall record the reason¹⁰ for its admission

[1887—S 568, 1859—S 355]

8 (1878) 10 All 162 (160, 166)
J (1883) 1853 Pun Re No 54
(1860) 3 South W R 118 5 (5)

Note 5

1 (1885) 7 All 765 (768, 769)
(1928) 1928 I C 219 (221) (P C)
(1897) 1855 All W N 225 (225) (F B)

(1917) 1917 All 112 (113)
(1897) 24 Cal 98 (101)
(1924) 1924 Lah 455 (455) 5 Lah 268
(1884) 7 Mad 52 (53)
(1910) 8 Ind Cas 878 (875) 13 Oudh Cas
352
[See also (1886) 12 Cal 37 (38)]
[But see (1884) 7 Mad 52 (53, 54)]

Note 6

1 (1932) 1932 All 526 (526) 54 All 465
(1928) 1928 Pat 85 (85)

27.

ALLAHABAD

(1)

Local Amendment

(2) Convert the existing Clause (b)' into Clause (c)

Synopsis

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Additional evidence in appeal against *ex parte* decree See Note 1 Pt (11)

1 Scope and object of the Rule

The general principle is that the appellate Court should not travel outside the record of the lower Court and cannot take any evidence in appeal. This rule elucidates the provisions of S 107, Cl (d) of the Code¹ and is an exception to the general rule stated above in that it enables the appellate Court to take additional evidence in the circumstances mentioned therein². Therefore, the appellate Court is entitled to call for fresh evidence only when the conditions laid down in this rule are found to exist³. On the other hand, the Court is not *bound* under the circumstances mentioned in the rule, to allow additional evidence and the parties are not entitled, as of right, to the admission of such evidence, the matter is entirely in the *discretion* of the Court⁴. It has, however, been held in some cases that apart from this rule,

Order 41 Rule 27—Note 1

- 1 (1931) 1931 P C 143 (148 149) 58 Ind App
254 10 Pat 654 (P C)
- 2 (1917) 1917 P C 111 (115) (P C)
(1935) 1935 Rang 3J (41) But the provisions
of this Rule cannot be used to test
the evidence of witnesses
- 3 (1923) 1923 Cal 300 (301)
(1919) 1919 Cal 170 (171)
(1932) 138 Ind Cas 253 (261) (11th)
(1919) 1919 Lah 123 (123)
(1915) 1915 Lah 323 (324)
(1898) 1 Oudh Cas 159 (201)
4. (1901) 23 All 121 (122 123)
(1933) 1933 Lah 1011 (1011)
- (1911) 12 Ind Cas 332 (333) 11 Oudh Cas
327
(1923) 1923 Oudh 109 (111) 26 Oudh Cas
66
(1930) 1930 Oudh 110 (111) 5 Luck 433.
(1925) 1925 Pat 501 (501)

an appellate Court can, under general principles of law⁵ or under its inherent power⁶ admit additional evidence. But these decisions cannot be accepted as correct in view of the decision of the Privy Council in *Kesowji Issur v G I P Rj*⁷ which lays down clearly that this rule can *alone* be looked to for taking additional evidence and that the Court has no *jurisdiction* to admit such evidence in cases where this rule does not apply. This rule does not apply so as to prohibit the appellate Court from doing any of the following things —

- (a) To take into consideration admissions by the parties before the appellate Court⁸
- (b) To issue a commission for local investigation⁹ or to examine and adjust accounts¹⁰
- (c) To refer to books on history, etc., which may have a bearing on the facts of the case¹¹ (See Evidence Act, S 57)
- (d) To send for papers from its own records or from the records of any other Court and inspect the same¹² (See O 13 R 10)
- (e) To examine parties present in Court^{12a} (O 10, R 2) See *also* the undermentioned case¹³

Additional evidence may be admitted even in an appeal against an *ex parte* decree¹⁴. The rule is made applicable so far as may be to second appeals by O 42, R 1^{14a}. But the rule must be applied to second appeals subject to the conditions under which a second appeal is maintainable. Hence the High Court has no power, in second appeal, to admit additional evidence for the purpose of entering into questions of fact^{14b}. But the High Court may, under its inherent powers, remand a case for retrial with a direction to take additional evidence^{14c}. The rule applies also to appeals in income-tax proceedings,¹⁵ but does not apply to proceedings under S 195 of the Criminal Procedure Code¹⁶.

2 When additional evidence may be admitted in appeal — See Notes 1 4 7 8 and 9

3 Has refused to admit evidence which ought to have been admitted¹

The appellate Court may admit additional evidence if the evidence

5 (1923) 1923 P C 128 (135) 2 Pat 676 50
Ind App 183 (P C) Explained in 1931
P C 143 (148)
(1927) 1927 Cal 140 (142)

Evidence not to be allowed on point
not in issue and not arising on the
[pleadings]
121 (1810) 13 Suth W R 328 (329)
[See (1933) 1933 Lah 328 (329) More
examination of defendant on cer-
tain points which were otherwise is

115
P C

1 Rang 656]
14a (1919) 1919 Mad 17 (18)
(1929) 1929 All 375 (376)
14b (1929) 1929 All 375 (376)
(1872) 9 Bom H C R 89 (90)
(1926) 1926 Cal 941 (943)
(1918) 1918 Mad 1159 (1162)

[Lut see (1923) 1923 All 413 (413)

27, in question was tendered in the lower Court but was improperly rejected by it¹ But where the lower Court had properly rejected the evidence the appellate Court cannot admit the same² Where the lower Court had declined to take certain evidence tendered by a party as being, in its opinion, unnecessary, and passed a decree in his favour and the appellate Court takes a different view of the matter, it should not reverse the decree without giving the decree-holder an opportunity to adduce the evidence which the lower Court had declined to take³

4 If the appellate Court requires etc¹

Under Cl 1 (b) of the rule, it is only when the Court requires it (*i.e.*, finds it needful) that additional evidence can be admitted¹ it may be required (a) to enable the Court to pronounce judgment, or (b) for any other substantial cause but in either case it must be the Court that requires it upon its appreciation of the evidence as it stands² The legitimate occasion, therefore, for the exercise of the discretion under this rule, is not, whenever *before the appeal is heard* a party applies to adduce evidence but when, *on examining the evidence* as it stands some inherent *lacuna* or defect becomes apparent to the Court³ It follows that additional evidence cannot be admitted

Others not examined because trial Judge expressed his opinion that the point was made out — Appellate Court reversing decision — Opportunity to produce the omitted evidence need not be given]

- (1891) 18 Cal 201 (203 204) 17 Ind App 159 (P C)
 (1874) 22 Suth W R 268 (269)
 (1932) 1932 Lah 202 (202)
 (1916) 1916 Lah 208 (209 210) 1916 Pun Re No 14
 (1927) 1927 Mad 1065 (1065)
 (1900) 23 Mad 447 (448)
 (1924) 1924 Oudh 252 (254) 27 Oudh Cas 114
 (1918) 1918 Oudh 170 (171)
 (1915) 1915 Oudh 14 (15)
 (1928) 1928 Pat 113 (114) 7 Pat 90
 (1916) 1916 Sind 34 (34) 9 Sind L R 191
 Rule applies even to appeals from *ex parte* decree
 [See (1892) 14 All 356 (357 358)]
 2 (1879) 4 Cal 213 (215) Lower Court having rejected document as not being properly stamped

Evidence not tendered in the trial Court in proper time —

- 3 (1875) 23 Suth W R 63 (64)
 (1869) 6 Bom H C R A O 88 (89)
 (1903) 30 All 367 (368 369)
 (1898) 22 Bom 253 (255)
 (1887) 9 All 339 (340)
 (1875) 23 Suth W R 63 (64)

- Note 4
 1 (1931) 1931 P C 143 (148) 58 Ind App 241
 10 Pat 654 (P C)
 (1934) 1934 All 175 (1 5)
 (1907) 31 Bom 381 (390) 34 Ind App 115 (P C)
 2 (1931) 1931 P C 143 (149) 58 Ind App 254
 10 Pat 654 (P C)
 (1934) 1934 All 948 (949)
 (1934) 1934 All 175 (175 176)
 (1934) 1934 Pat 284 (286)
 3 (1931) 1931 P C 143 (148 149) 58 Ind App 254 10 Pat 654 (P C)
 (1934) 1934 All 948 (949)
 (1934) 1934 Cal 707 (708)
 (1934) 1934 Cal 627 (628) 61 Cal 412
 (1933) 1933 Lah 547 (548) 14 Lah 152
 (1935) 1935 Lah 555 (557) No *lacuna* in evidence on record — Judge should not summon additional evidence
 (1933) 1933 Mad 407 (408)
 (1934) 1934 Pat 60 (61)
 (1935) 1935 Rang 21 (22)
 (1907) 31 Bom 381 (390) 34 Ind App 115
 (P C)

under this rule on a preliminary objection *before* the hearing of the appeal^{3a}. It is, however, open to the party to point out the defect or to move the Court to supply the defect⁴.

It was held in the undermentioned cases⁵ relying upon certain observations of the Privy Council in *Infrant v Amar Singh*⁶ that additional evidence could be admitted in appeal for reasons independent of the existence of any *lacuna* or defect. These decisions are no longer good law since the decision of the Privy Council in *Parsoum Thakur v Lal Mohar Thakur*⁷ in which the said view has been definitely repudiated.

5 The appellate Court requires any document to be produced⁸

Where a Court permits documentary evidence to be produced under this rule it should also permit oral evidence to be adduced in order to prove the documents.

For meaning of the word 'requires' see Note 4 above.

6 Where appellate Court requires any witness to be examined

The appellate Court should not take additional evidence which impugns the testimony of a witness who was called in the Court below unless that witness is given an opportunity to clear up the mistake. Otherwise, no witness, whatever his standing, would be safe from adverse judicial comment¹.

7 To enable it to pronounce judgment

When the appellate Court finds itself unable to pronounce judgment owing to a *lacuna* or defect in the evidence as it stands, it may, as has been seen in Note 4 above admit additional evidence¹. The ability to pronounce a judgment refers not to the ability to pronounce *any* judgment but to the ability to pronounce a judgment *satisfactory to the mind of the Court* deliver-

(1911) 10 Ind Cas 332 (333) (Cal)
(1909) 2 Ind Cas 995 (995) (Cal)
(1921) 137 I Ch 11 (12)
(1916) 1915 Lah 120 (121)
(1932) 1932 Oudh 227 (229)
(1925) 1925 Pat 113 (114) 7 Pat 90

Ordinarily it is not desirable to hear application for further evidence under O 41 R 27 C P Code until appellate Court has heard appeal and considered the evidence already on record.]

135

[See also (1939) 1933 Lah 823 (823)
Held on facts that additional evidence should be admitted.]

(1917) 1917 All 36 (97)

2a (1907) 31 Bom 381 (390) 34 Ind App 115 (P C)

327

5 (1929) 1929 All 375 (375 376)
(1929) 1925 All 268 (269) 47 All 412
(1926) 1926 Lah 20 (21)
(1926) 1926 Lah 80 (81)
(1929) 1925 Mad 181 (182)
[See also (1920) 1930 Mad 343 (343)]

Note 5

1 (1913) 20 Ind Cas 542 (543) (Oudh)

Note 6

1 (1914) 22 Ind Cas 103 (104) 16 Oudh Cas 386 36 All 93 41 Ind App 76 (P C)

Note 7

Court to decide point conclusively was held proper in the circumstances of the case.]

7, ing it ² But the appellate Court should not, ordinarily, allow new evidence to be adduced in order to enable a party to raise a new point in appeal ³ Similarly where a party on whom the *onus* of proving a certain point lies fails to discharge the *onus*, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment ⁴

8 Or for any other substantial cause

The words for any other substantial cause must be read with the word requires in the beginning of the sentence So that it is only where for any other substantial cause, the appellate Court *requires* additional evidence that this rule will apply ¹ The words or for any other substantial cause need not be construed in the narrow sense suggested by the doctrine *ejusdem generis* ² and power to allow additional evidence may be exercised when any point is required to be cleared up in the interest of justice ³ But at the same time it should be remembered that it is a power to be exercised cautiously and sparingly ⁴ and only in exceptional cases ⁵ Further, the new evidence should have a direct and important bearing on a main issue in the case ⁶ Subject to these general rules, additional evidence may be admitted in the following cases —

- (1) When the party wishing to produce the additional evidence was unable, through no fault of his, to produce it in the trial Court ⁷

(1925) 1925 Mad 444 (446)

(1919) 1919 All 49 (49) 42 All 48

4 (1931) 1931 P C 148 (148 149) 53 Ind App

4 (1918) 1918 Pat 253 (253) 1 Pat L Jour 135

[But see (1929) 1929 Pat 324 (325)

Obviously genuine documents not to

be rejected on such technical grounds

as that they were produced too late]

5 (1912) 15 Ind Cas 250 (251) 15 Oudh Cas 253

(1876) 25 Suth W R 246 (247)

(1869) 12 Suth W R 245 (246)

(1911) 12 Ind Cas 332 (333) 11 Oudh Cas 327

2 (1912) 14 Ind Cas 140 (141 142) 36 Mad 477

(1915) 1915 Mad 762 (762)

(1923) 1923 Lah 584 (585)

[But see (1923) 1923 Oudh 109 (111)

26 Oudh Cas 66]

9 (1914) 1924 Cal 578 (581) 51 Cal 185

(1875) 24 Suth W R 325 (326)

(1931) 1931 Pat 181 (182)

cross examining witness not allowed]

7 (1905) 27 All 634 (651) 32 Ind App 203 7 Oudh Cas 317 (P C)

(1933) 1933 All 104 (106) Judge satisfied on affidavit that documents could

- (2) When evidence has been taken by the lower Court so imperfectly that the appellate Court cannot pass a satisfactory judgment⁸
- (3) When through the negligence of the guardian of a minor party, an important document was not produced in the lower Court⁹
- (4) For other instances, see the following cases¹⁰

But the provisions of this rule are not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up the omission in the Court of appeal¹¹ It is not the business of the appellate Court to supplement the evidence adduced by one party or the other in the lower Court¹² Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial Court additional evidence should not be admitted in appeal¹³ as a party guilty of remissness in the lower Court is not entitled to the indulgence of being allowed to give further evi-

noted in the case

evidence
(1914) 1914 Outh 406 (406) Party having reason to suppose that a certain document would be challenged

(1915) 1915 Cal 749 (750)

(1917) 1917 Mad 189 (189) Admission of original document when secondary evidence of its contents had been given in the lower Court

(1913) 21 Ind Cts 619 (621) 35 All J3 Additional evidence as to attestation of mortgage deed—Effect of recent P C decision

(1919) 1919 Cal 1065 (1067) Elucidation of obsolete or provincial expression

11 (1931) 1931 P C 143 (148 149) 58 Ind App 254 10 Pat 654 (P C)

(1935) 1935 Ring 21 (72)

(1932) 1932 Mad 148 (151)

(1932) 1932 Mad 709 (713)

(1866) 6 Suth W R 262 (265)

(1917) 1917 Cal 711 (712)

(1921) 1921 All 408 (408)

(1868) 10 Suth W R 402 (403)

(1932) 1932 Lrh 135 (136)

(1898) 20 All 266 (267)

13

Admitted by the appellate Court
(1921) 1921 Smil 155 (157) 16 Smil L R 17

(1876)

son C of surprise confusion etc—Additional evidence may be allowed

12 (1923) 1923 Cal 265 (266) Certified copy of a document not offered in evidence at the primary Court on account of the point not having been disputed—Such document may be admitted

have been taken by the
intention of case when defendant had no means of explaining away the supposed admission therein
Hill first Court was wrong in accepting same and lower appellate Court was right in sending for defendant and examining him on the subject

(1921) 1921 U B 16 (18) 4 U B R 35

(1917) 1917 Mad 158 (159)

(1882) 1882 All W N 5 (5)

(1812) 17 Suth W R 390 (391)

27. dence under this rule¹⁴ So a party who had ample opportunity to produce certain evidence in the lower Court but failed to do so¹⁵ or elected not to do so¹⁶ cannot have it admitted in appeal

The inadvertence of the party¹⁷ or his inability to understand the legal issues involved¹⁸ or the wrong advice of a pleader¹⁹ or the negligence of a pleader²⁰ does not constitute a 'substantial cause' within the meaning of this rule For other cases in which additional evidence was not allowed, see the following cases²¹

9 Discovery of fresh evidence

The mere discovery of fresh evidence subsequent to the decision of the lower Court is no ground for its admission in appeal¹ unless the *appellate Court requires* the evidence to enable it to pronounce judgment or requires it for any other substantial cause² If the latter condition is not present the proper course is to apply for review of judgment and not for the admission of additional evidence in appeal³ Even where the appellate Court requires the

- 14 (1920) 1920 P C 81 (83) 47 Cal 662 47 Ind App 11 (P C)
(1918) 1918 Pat 253 (254) 1 Pat L Jour 435

- (1871) 15 Suth W R 507 (510)
(1926) 1926 Nag 486 (487)
15 (1871) 16 Suth W R 211 (212)
(1915) 1915 Mad 68 (69)
(1919) 1919 Cal 637 (641 642) 46 Cal 119
(1887) 9 All 366 (363)
(1919) 1919 Oudh 373 (391)
(1927) 1927 Bom 147 (148)
(1924) 1924 All 231 (232)
(1871) 16 Suth W R 211 (212)
(1927) 1927 Nag 393 (398)
(1931) 1931 Oudh 298 (300 301)
(1927) 1927 Lah 272 (273) 8 Lah 123
(1912) 16 Ind Cas 587 (589) (Oudh)
(1917) 1917 Mad 547 (550)
(1932) 1932 Mad 709 (713)

- 16 (1888) 12 Bom 247 (257)
(1905) 1905 Pun Re No 51, page 181
(1915) 1915 Mad 68 (69)
17 (1990) 1920 Pat 266 (266) 5 Pat L Jour 263

- 18 (1924) 1924 All 538 (539) 46 All 264

- 19 (1930) 1930 Bom 272 (272)

- 20 (1932) 1932 Lah 93 (94)

- (1924) 1924 Lah 444 (447) 5 Lah 81

- (1930) 1930 Sind 318 (324)

- (1925) 1925 Mad 793 (793)

- 21 (1873) 19 Suth W R 83 (89) Documents alleged to be burnt but one document sought to be admitted in appeal on the ground that it had escaped the general destruction—Not to be allowed without proof of its genuine nature

- (1866) 12 Cal 219 (224) 12 Ind App 183 (P C) Evidence as to special means of knowledge within S 32 Evidence Act

- (1866) 15 Cal 763 (770 771) Additional evidence to prove genuineness of a document held by the lower Court

to be fabrication

- (1911) 10 Ind Cas 315 (318) 1911 Ind Re No 57 Appellate Court suspecting that false evidence would be given

Note 9

- 1 (1907) 31 Bom 381 (390) 31 Ind App 115 (P C)

- (1934) 1934 All 175 (176)
(1925) 1925 All 808 (809)
(1924) 1924 Bom 227 (228) 47 Bom 674
(1904) 28 Bom 4 (7)
(1875) 12 Bom H C R 247 (249)
(1904) 1906 Cal 941 (943)
(1923) 1923 Cal 273 (274)
(1919) 1919 Cal 46 (46)
(1919) 1919 Cal 287 (290 291)
(1915) 1915 Cal 407 (408) 42 Cal 674
(1927) 1927 Lah 574 (577)
(1918) 1918 Mad 1159 (1162)
(1911) 9 Ind Cas 251 (252) (Mad)

- (1908) 31 Mad 114 (116)
(1925) 1925 Nag 284 (288)
(1922) 1922 Nag 119 (120)
(1922) 1922 Pat 28 (28)
(1920) 1920 Pat 107 (108)
(1918) 1918 Pat 275 (276)

- 2 (1929) 1929 Pat 245 (247) 8 Pat 776

- (1927) 1927 P C 123 (124) (P C)

- (1924) 1924 Cal 1071 (1072)

- (1923) 1923 Cal 606 (607)

- (1920) 1920 Cal 813 (814)

- (1872) 17 Suth W R 47 (47)

- (1931) 132 Ind Cas 6 (6) (Lah)

- (1916) 1916 Mad 538 (539)

- (1919) 1919 Mad 17 (18)

- (1926) 1926 Oudh 74 (75)

- 3 (1908) 31 Bom 381 (390) 31 Ind App 115 (P C)

- (1934) 1934 All 175 (176)

evidence so discovered, it should not be admitted unless it is shown that the party had exercised due diligence ⁴ O

10 Record of reasons

Whenever the appellate Court admits additional evidence it should record its reason for doing so ¹ It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection ^{1a} But this provision is only directory and not mandatory ² and the failure to record reasons does not make the evidence inadmissible ³ A contrary view has, however, been expressed in the undermentioned cases ⁴ It is submitted that it is opposed to the decision of the Privy Council in *Ganga Gobind Mundal's case* ^{4a} where it is laid down that the provision as to the record of reasons is not a condition precedent to the reception of the evidence, and cannot, therefore, be accepted as correct

The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court ⁵ A mere reference to the 'peculiar circumstances of the case' ⁶ or a mere statement that the evidence is necessary to pronounce judgment ⁷ is not enough compliance with the requirement as to recording of reasons The issue by the appellate Court of a commission for local investigation is not the same thing as the admission of additional evidence, and no reasons need be recorded for issuing such commission ⁸

11. Additional evidence by consent of parties

Where parties consent to the admission of additional evidence they cannot afterwards object to the receipt of such evidence ¹ A party in whose fa-

4 (1900) 1 J O Lah 1004 (1007)
Note 10
1 (1931) 1 31 P C 175 (177) (P C)
(1931) 1 34 Cal 627 (62~)
(1931) 1974 Cal 707 (709)
(1933) 1923 Mad 407 (40~)

(1920) 1920 Cal 813 (814)
(1927) 1927 Cal 126 (128) Dissenting from
1919 Cal 170 (171)
(1903) 2 Cal L Jour 4 n
(1886) 12 Cal 37 (38)
[See (1885) 11 Cal 139 (142 143)]
(1869) 12 Suth W R 52 (53)
(1869) 11 Suth W R 47 (48)
[See (1870) 14 Suth W R 236 (237)]
3 (1926) 1926 Cal 369 (370)

5

(1917) 1917 Cal 201 (202)
(1902) 6 Cal W N 31 (32)
(1867) 7 Suth W R 313 (313)
(1868) 10 Suth W R 228 (229)
(1869) 11 Suth W R 6 (7)
(1869) 12 Suth W R 245 (246)
(1870) 13 Suth W R 85 (86)
(1874) 21 Suth W R 416 (418)
(1875) 24 Suth W R 20 (21)
(1877) 26 Suth W R 50 (76) 3 Ind App 259
(1900)

7 (1924) 1924 All 303 (304)
[See also (1870) 14 Suth W R 19 (2~)
But see the following cases decided under Code of 1859 —
(1869) 3 Beng L R 218 (221)
(1869) 12 Suth W R 245 (216)
(1870) 13 Suth W R 323 (329)
8 (1932) 1932 All 270 (271)
Note 11
1 (1900) 3 Ind Cas 465 (465) 26 Cal 7 7

27, your an order for the admission of additional evidence is made, cannot subsequently attack it² Similarly, a party who has taken advantage of the order for the admission of additional evidence and lets in such evidence cannot himself subsequently question the order³

12 Procedure to be adopted under this Rule

The formalities as regards the admission and recording of evidence in the original Court apply to additional evidence taken in the appellate Court¹ The appellate Court is not authorised merely to send a document to the thumb impression bureau and act upon their report² The issue of a general commission to try an issue is not warranted by this Rule If additional evidence is required, it should be taken by the appellate Court itself or the appellate Court should direct it to be taken by the lower Court³

There is nothing illegal in an appellate Court first ordering additional evidence and then cancelling the order and remanding the case for re trial, for, there is no decision of finality in the exercise of the discretionary power conferred by the Rule⁴

13 Application to put in evidence

The Rule does not require an *application* for the admission of additional evidence But such an application is not prohibited, for, although the test of admissibility of additional evidence under this Rule is the *requirement of the appellate Court* on an appreciation of the evidence as it stands, it is open to a party to point out to the Court any defects in the evidence on the record (See Note 4) In fact the existence or otherwise of such an application seems to have been regarded as an indication of whether the Court required the additional evidence¹

14 Opportunity to opposite party to contest admissibility of or rebut the fresh evidence

When additional evidence is sought to be admitted in the appeal, the opposite party should be given an opportunity to contest the admissibility of the evidence¹ and to adduce rebutting evidence² But failure to give such opportunity does not vitiate the proceedings if it has not caused any prejudice to the opposite party³

- | | |
|--------------------------------------|---------------------------------------|
| Ind App 221 (P C) | (1917) 1917 M L J 158 (158) |
| [See (1929) 1929 Bom 14 (15) 33] | Note 14 |
| Bom 12] | 1 (1924) 1924 Cal 403 (401) |
| 2 (1929) 1929 Cal 492 (493) | (1927) 1927 Lah 11 (12) |
| 3 (1875) 24 Suth W R 825 (826) | (1923) 72 Ind Cas 239 (241) (111) |
| (1929) 1929 Nag 119 (120) | 2 (1930) 1930 All 220 (221) |
| Note 12 | (1934) 1934 Lah 462 (464) |
| . | (1925) 1925 Cal 671 (672) |
| . | (1925) 1925 Cal 98 (100) |
| . | (1923) 1923 Cal 300 (302) |
| . | (1921) 1921 Cal 661 (672) |
| . | (1917) 1917 Cal 201 (203) |
| 2 (1915) 1915 All 112 (113) | (1924) 1924 Lah 638 (633) |
| [See also (1932) 1932 Pat 352 (352) | (1921) 1921 Lah 279 (280) |
| 11 Pat 762 Suit on promissory note | (1915) 1915 Lah 323 (321) |
| — Alleged alterations—Opinion ob- | (1925) 1925 M L J 181 (183) |
| tained by appellate Court about date | (1913) 18 Ind Cas 857 (859) 2 N. L. R |
| of stamp held inadmissible] | (1912) 15 Ind Cas 250 (250) 15 Oudh |
| 3 (1888) 1 C P L R 160 (161 162) | |
| 4 (1887) 1887 All W N 145 (145) | |
| Note 13 | |
| 1 (1915) 1915 M L J 589 (593) | |
| (1916) 1916 M L J 535 (536) | |

15 Remand for trial de novo

The Rule contemplates a disposal of the case on the merits by the appellate Court itself¹ Where the appellate Court desires to take further evidence the proper course is to follow the procedure laid down in Rr 27 and 28 and not to remand the whole case² But in exceptional cases the appellate Court has an inherent power to remand the case for taking additional evidence³

16 Court if can take notice of subsequent events

As a general rule a Court of appeal in considering the correctness of the judgment of the Court below will confine itself to the state of the case at the time such judgment was rendered and will not take notice of any facts which may have arisen subsequently but in exceptional cases the Court will depart from this Rule specially where by so doing it can shorten litigation and best attain the ends of justice¹ See also Note 4 to O 7 R 7 *ante* and Note 4 to R 33 *infra*

17 Party on whom onus is shifted by appellate Court if entitled to let in additional evidence

Such a party is not entitled to let in additional evidence if he is not taken by surprise by the action of the appellate Court¹

18 Second appeal

An order of an appellate Court admitting or rejecting additional evidence is neither a decree nor an appealable order and hence no appeal lies therefrom¹ But the order can be questioned in the appeal from the appellate decree (S 105) As regards the grounds on which such an order can be attacked, the High Court will not ordinarily interfere with the discretion of the lower appellate Court² in admitting³ or refusing to admit⁴ additional evidence But

N. 17

(1930) 1930 Lah 32 (33)

(1925) 1925 Pat 612 (613)

(1920) 1920 Cal 816 (816) 64 Ind Cas 721

(722)

1 470
iction
d su t
s and

(1918) 1918 Lah 10 (12)

(1920) 1920 Pat 559 (561) 4 Pat L Jour 312

Note 17

1 (1914) 1914 Oudh 44 (52)

[See also (1926) 1926 Lah 491 (495)

7 Lah 297]

N. 18

—Order is not appealable—But appeal can be treated as revisionary application]

2 (1897 01) 1897 01 U B R 309

(1894) 21 Cal 484 (486 487)

s (169)

the discretion has been properly exercised

3 (1927) 1927 Cal 140 (145)

(1915) 1915 All 64 (65)

4 (1931) 1931 Lah 600 (607)

Note 16

1 (1907) 6 Cal L Jour 74 (78)

7, an objection can be raised on the ground that the lower appellate Court has admitted additional evidence in contravention of this Rule⁵ or has refused to exercise the discretion vested in it by that Rule⁶ (Such objection being covered by S 100)

Additional evidence admitted in contravention of this Rule should be disregarded as inadmissible⁷ But the decree should not be reversed or varied on that ground unless the decision, on the merits, has been affected thereby⁸ (See C P C, S 99 and Evidence Act, S 167)

Where the lower appellate Court has admitted additional evidence the second appeal cannot, on that account, be treated as a first appeal so as to enable questions of fact to be gone into⁹

19 Privy Council

There is no restriction on the powers of the Privy Council to admit additional evidence in appeals before it¹ The rejection of an application for the admission of additional evidence does not involve any substantial question of law within S 110 so as to give a right of appeal to the Privy Council²

20 Revision

Where an appellate Court admits additional evidence which it is not competent to receive in accordance with the provisions of the Code, the defect in its order amounts only to an error of law, and not a want of jurisdiction and hence, no revision lies from such an order.¹

R. 28. [S 569] *Wherever* "additional evidence is allowed to be *produced*, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is *preferred*, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court

[1877—S 569; 1859—S 356]

Mode of taking additional evidence

- | | | |
|--|---------------|---|
| <p>(1919) 1919 Mad 1106 (1171) 42 Mad 737 (F B)</p> <p>5 (1836) 11 Cal 139 (142 143)
[See also (1923) 1923 Cal 300 (301)]</p> <p>6 (1901) 23 All 121 (122 123)
[See also (1921) 1921 Bom 267 (269)
45 Bom 377]</p> <p>7 (1931) 1931 P C 175 (177) (P C)
(1932) 1932 All 264 (269)
(1907) 31 Bom 351 (391) 34 Ind App 115 (P C)</p> | <p>Cas 56</p> | <p>(1930) 1930 Lah 750 (752)
(1912) 13 Ind Cas 131 (132) (All)
(1898) 1 Oudh Cas 199 (204)
(1915) 1915 Mad 588 (589)
(1915) 1915 Lah 323 (324)
(1918) 1918 Lah 120 (121)
8 (1915) 1915 Mad 762 (762)
(1934) 1934 Cal 269 (270)
(1933) 1933 Lah 329 (329)
(1921) 1921 Sind 155 (157) 16 Sind L R 17
(1870) 14 Suth W R 19 (20)
9 (1897) 24 Cal 98 (101)
(1886) 12 Cal 37 (38)
(1875) 23 Suth W R 51 (51)</p> <p style="text-align: center;">Note 19</p> <p>1 (1923) 1923 P C 123 (136) 2 Pat 676 53
Ind App 183 (P C)
[Compare (1869) 3 Beng L R 5
26 (P C)]</p> <p>2 (1894) 21 Cal 484 (486 487)</p> <p style="text-align: center;">Note 20</p> <p>1 (1920) 1920 Pat 266 (266) 5 Pat L J 203
(1909) 4 Ind Cas 878 (880) 12 Oudh Cas 493</p> |
|--|---------------|---|

Synopsis

Mode of taking additional evidence Note No 1

1 Mode of taking additional evidence

This Rule permits the appellate Court to either take the additional evidence itself or direct the lower Court to take it¹ The lower Court taking evidence under this Rule acts in a ministerial capacity The parties may object to the admissibility of the evidence before the appellate Court, though they may not have taken any such objection before the lower Court²

Where pending proceedings for taking additional evidence before the lower Court (directed by the appellate Court) one of the parties to the appeal dies, the application for substitution of legal representatives can be entertained only by the appellate Court and not by the lower Court³ The appellate Court may under this Rule send the case back to the first Court to have a local enquiry made⁴ (Cf O 41, R 27 Note 1)

R. 29. [S 570] Where additional evidence is directed or allowed to be taken the Appellate Court shall specify the points to which the evidence is to be confined and record on its proceedings the points

Points to be defined and recorded

so specified

[1877—S 570; 1859—S 357]

Synopsis

Points to be defined and recorded Note No 1

1 Points to be defined and recorded

When additional evidence is allowed to be given this Rule requires that the appellate Court should specify and record on the proceedings the points to which the evidence should be confined¹

JUDGMENT IN APPEAL

R. 30. [S 571] The Appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court *from* whose decree the appeal is *preferred*, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders

Judgment when and where pronounced

[1877—S 571, 1859—S 349]

Order 41 R 28—Note 1

- 1 (1864) 1664 Suth W R Sup No 124 (193)
 (1934) 1934 Lah 664 (666) *Lacusa* on every important point — Proper course is to remit the case to trial Court for additional evidence
 (1921) 1921 Cal 122 (123)

30

Synopsis

After hearing the parties or their pleaders	Note No 1	In open Court etc	Note No 2
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Other Topics

Death of party pending appeal See Note 1 Pts (1) and (2)

1 After hearing the parties or their pleaders¹

Compare O 20, R 1 *ante*

The Rule authorises a judgment to be pronounced only after hearing the parties or their pleaders¹ A judgment pronounced without hearing them is unauthorised by the Code Hence where before the hearing of an appeal a party to the appeal dies and it is heard and disposed of without his legal representatives being brought on the record the decree is a nullity whether it is adverse to the deceased^{1a} or is in his favour²

Where a party dies after the hearing but before the judgment is pronounced, it is not vitiated by the absence of his legal representatives on the record See O 22 R 6

2 In open Court etc

Where the provisions of this Rule as to the judgment being pronounced in open Court and after notice to the parties were not complied with it was held that an appeal filed within 90 days of the appellant coming to know of the decision against him was within time and that in any case there was sufficient cause for the delay within the meaning of S 5 of the Limitation Act¹ The judgment may be given at once after the hearing is over or on some future day² (See also Notes on O 20 R 1)

31

Contents date and
signature of judgment

R. 31. [S 374] The judgment of the Appellate Court shall be in writing and shall state—

(a) the points for determination,⁵

(b) the decision thereon,⁶

(c) the reasons for decision,⁷ and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled,⁸ and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein

[1877—S 374, 1859—S 359]

(1916) 1916 Mad 574 (J75)
(1920) 1920 Oudh J (J8)

Note 2

1 (1919) 1919 Lah 102 (103) 1919 102 ho

2 (1911) 1911 Suth W R 41 (J)

MADRAS

Local Amendment

into—(a) the
the decision,

and (i) where the decree appealed from is reversed or varied the relief to which the appellant is entitled and shall bear the date on which it is pronounced and shall be signed by the Judge or the Judges concurring therein provided that where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court the transcript of the judgment so pronounced shall after such revision as may be deemed necessary be signed by the Judge

Synopsis

	Note No		Note No
I Object and applicability of Rule	1	O 41 R 11	
II Contents of judgment of appellate Court—General	2	IV Non compliance with Rule—Effect General	9
(a) Judgment of affirmance.	3	(a) Second appeal—Maintainability of on ground of non compliance	10
(b) Judgment of reversal	4	(b) Non compliance with the Rule by lower appellate Court—Procedure of High Court	11
(c) Points for determination	5	V Appeal in proceedings under S 476 of the Criminal Procedure Code	12
(d) Decision thereon	6	VI Applicability of Rule to High Court	13
(e) Reasons for decision	7		14
(f) Where the decree appealed from is reversed etc.—Cl (d)	8		
III Summary dismissal of appeal under			

Other Topics

Consideration of evidence See Notes 7 and 8 Pt (3)
Consideration of grounds of appeal See Note 5 Pt (1)

1 Object and applicability of Rule

The objects of requiring an appellate Court to record in its judgment the particulars mentioned in this Rule are two fold, namely (a) to afford the parties an opportunity of knowing and understanding the grounds of the decision with a view to enable them to exercise, if they see fit and are so advised the right of second appeal conferred by S 100¹ and (b) to enable the High Court in second appeal to Judge whether the lower appellate Court has properly appreciated the case and has decided it after applying its mind to it and considering the evidence² See also Note 3 to O 20, R. 3.

The provisions of this rule as also R 30 *supra* apply also to proceedings under the Agra Tenancy Act, III of 1926, but a judgment of the Board need not be dated, signed or pronounced in open Court See List II, Sch 2 of that Act

2 Contents of judgment of appellate Court—General

A judgment of the first appellate Court must be complete and self-contained¹ and must state the points for determination, the decision thereon and the reasons for the decision² Compare O 20, R 3

Order 41 Rule 31—Note 1

- 1 (1854) 10 Cal 932 (930)
(1914) 1915 L B 32 (33)
2 (1924) 1924 All 100 (100)
Note 2
1 (1926) 1926 Oudh 408 (409) 70 Oudh Crs 271
2 (1916) 1916 All 200 (260)
(1911) 9 Ind Crs 804 (1) (804) (11)

- (1910) 8 Ind Cas 157 (154) (Mad) Nature of case and grounds urged in appeal to be stated
(1916) 1916 Mad 427 (427)
(1928) 1928 Oudh 374 (375)
(1905) 1905 U B R Crs 100 34
(1915) 1915 L B 32 (33)
(1890) 1890 Lun Re No 72 page 197
(1875) 15 South W R 170 (131)

1. 3 Judgment of affirmance

The Rule makes no distinction between affirming judgments and reversing judgments, and in either case it is obligatory upon the appellate Court to comply with the requirements of the Rule. Hence, where an appellate Court affirms the decision of the trial Court, a mere general expression of concurrence with the trial Court's judgment without giving any reasons, is not a sufficient judgment under the law.¹ But an affirming judgment need not enter into detailed reasons to the *same extent* as a judgment of reversal.² Further, where the case is comparatively a simple one, and a trial Court has dealt with it fully and accurately, and it is evident from the appellate Court's judgment, that it has appreciated the case properly and has decided it after considering the evidence, the mere fact that it has not repeated the reasons given by the trial Court which it approves of, does not vitiate the judgment.³ See also Note 10, *infra*

(1871) 15 Suth W R 321 (326)

Note 3

1 (1931) 1931 All 589 (589) 53 All 228

(1934) 1934 Lah 77 (78)

(1924) 1924 All 100 (100 101)

(1906) 1906 All W N 86 (86)

(1888) 8 All W N 61 (62)

(1886) 1886 All W N 285 (286)

(1887) J All 26 (27 28 31)

(1866) 1 Agra H C R 73 (74)

(1918) 1918 Bom 235 (235 236)

(1919) 16 Ind Cas 354 (355) (Mad)

(1910) 8 Ind Cas 157 (157) (Mad)

(1908) 31 Mad 469 (470) (F B)

(1893) 22 Mad 12 (13)

(1869 70) 5 Mad H C R 174 (175)

(1928)

(1924) 1927 Oudh 95 (96) 99 Oudh Cas 330 1 Luck 458

(1919) 1919 Oudh 131 (131) 21 Oudh Cas 309

(1917) 1917 Oudh 344 (344)

(1914) 1914 Oudh 265 (265)

(1905) 8 Oudh Cas 290 (292)

(1919) 1919 Pit 162 (162) 49 Ind Cas 757 (753)

(1927) 1927 Rang 208 (208)

(1912) 17 Ind Cas 893 (899) (L R)

(1911) 11 Ind Cas 915 (915) (L B)

(1907) 14 Bur L Rep 156

(1900 02) 1 L B R 204 (205)

(1927) 1927 Cal 323 (324)

(1923) 1923 Cal 163 (163 164)

(1912) 13 Ind Cas 194 (196) (Cal)

(1868) 10 Suth W R 100 (101)

(1871) 15 Suth W R 131 (132)

(1865) 3 Suth W R 126 (126)

(1876) 25 Suth W R 12 (13)

(1874) 21 Suth W R 260 (260 261)

(1872) 18 Suth W R 173 (173)

(1871) 15 Suth W R 54 (55)

(1869) 11 Suth W R 318 (319)

(1918) 1918 Bom 235 (235) 16 Ind Cas 161

(161 162)

(1928) 1928 Oudh 450 (450)

(1919) 1919 Pat 13 (16)

(1886) 1886 Pun Re No 25 [See also (1886) 9 All 33 (33) Judgment of High Court]

4 Judgment of reversal

It is specially important that an appellate judgment reversing the judgment of the lower Court should be adequate and satisfactory.¹ It must contain definite findings on the questions involved,² and must give reasons for reversing the decision of the trial Court.³ It must come into close quarters with the judgment appealed from⁴ and must express an opinion on all the points on which the lower Court has based its conclusions.⁵ It has, however, been held in the cases cited below⁶ that it is not necessary for an appellate Court when reversing the decision of the trial Court, to meet the reasons given by such Court, and that it is enough if the appellate Court gives its own reasons for its own decision.

5 Points for determination

This rule requires the appellate Court to state in its judgment the points that arise for determination.¹ These points must cover all the important questions involved in the case² and must not be general and vague.³ The object of the legislature in making it incumbent on an appellate Court to raise points

Note 4

- 1 (1318) 1915 L at 543 (544)
- (1310) 7 Ind Cas 421 (421) (Cal)
- (1844) 1 Suth W R 19 (19) Appellate Court
- not to decide the case upon a mere allegation in the plaintiff's regard the evidence
- [See also (1374) 1934 Mad 169 (173)]

See also the cases cited in Note 3 F V 2

- 2 (1324) 1923 Mad 453 (490)
- (1910) 7 Ind Cas 421 (471) (Cal)
- (1926) 1926 Oudh 578 (587)
- 3 (1920) 1920 Cal 533 (579)
- (1897) 1 Cal W N 631 (632)
- (1863) 2 Beng L R 20 (20)
- (1863) 2 Suth W R 77 (77)
- (1863) 11 Suth W R 503 (500)
- (1870) 14 Suth W R 58 (53)
- (1872) 17 Suth W R 307 (306)
- (1873) 20 Suth W R 403 (404)
- (1874) 21 Suth W R 284 (285)
- (1876) 25 Suth W R 363 (364)
- (1876) 25 Suth W R 26 (27) Question of
impe credit to be given to a witness
— Opinion of Court of first instance
not to be lightly disturbed
- (1871) 8 Beng L R 31 p 3 (4, 5)
- (1926) 1926 L at 496 (4 8)
- (1923) 1923 Pat 275 (216)
- (1916) 1916 Pat 343 (300)
- (1892) 16 Lom 540 (545)
- (1915) 1915 Oudh 218 (219)
- (1872 1892) 2 L B R 603.

See the following cases showing that there is a *prima facie* presumption in favour of the correctness of the lower Court's judgment —

- (1871) 15 Suth W R 228 (229)
- (1876) 25 Suth W R 30 (31)
- (1922) 1922 P C 39 (40) (P C)
- (1921) 1921 P C 55 (56) 17 Nsg L R 73 (P C)
- (1867) 11 Moo Ind App 177 (171) (P C)

- 4 (1926) 1926 Nsg 495 (499)

- (1900) 1926 Nsg 45 (46)
- 5 (1866 67) 11 Moo Ind App 177 (184) (P C)
- (1867) 11 Suth W R 100 (100)
- 6 (1863) 2 Beng L R 5 N 2 (c)
- (1915) 1915 Cal 99 (99 100)
- (1871) 16 Suth W R 11 (16)
- (1869) 13 Suth W R 361 (362)
- (1863) 12 Suth W R 152 (152)
- (1871) 21 Suth W R 260 (260 261) First
Court believing defendant's witnesses
— Appellate Court believing plain-
tiff's witnesses—No reasons neces-
sary to be given

Note 5

- 1 (1908) 10 Lom L R 492 (494)
- (1870) 2 N W P H G R 109 (109)
- 2 (1929) 1929 Cal 110 (114) 55 Cal 1216
- (1890) 12 All 46 (49)
- (1926) 1926 Lah 351 (352) Lower appellate
judgment dealing with part only of
subject matter — Remand should be
ordered
- (1912) 15 Ind Cas 818 (818) 36 Bom 379
- (1918) 1918 Cal 251 (252)
- (1917) 1917 Pat 429 (429, 430) 2 Pat L Jour
701
- (1914) 1914 Mad 683 (686)

It is not necessary for the appellate Court to state the questions involved therein are not conclusive in second appeal

- (1884) 1884 All W N 99 (99)
- (1925) 1925 Cal 316 (317)
- 3 (1857) J All 26 (31, 32) Not sufficient to
state, the point to be determined
on appeal is whether or not the de-
cision is consistent with the merits

31. for determination, is to clear up the pleadings and focus the attention of the Court and of the parties, on the specific and rival contentions of the parties.^{3a} But an appellate Court is not bound to decide a point which although taken in the grounds of appeal, has been abandoned⁴ or is not urged at the hearing of the appeal.⁵ Similarly, a new point⁶ or a point not raised by the parties⁷ or not necessary for the disposal of the appeal,⁸ need not be decided.

6 Decision thereon

There must be finding on each point raised for determination¹ and it must be definite² especially on questions of fact.³

7 Reasons for decision—also O 20 R 3 ante

Under this rule the appellate Court must state in its judgment the reasons for its decision.¹ It must set forth the evidence relied upon² and must come to its own independent conclusion on a *consideration of such evidence*. It must not proceed on the assumption that it is, in any way bound by the views of the trial Court though it must not forget that the trial Court has had the opportunity of watching the demeanour of the witnesses in Court.³ A mere statement that a point is proved or not proved⁴ or that counsel admits that

3a (1903) 7 Bom L R 174 (174)

4 (1900) 3 Oudh Cas 279 (280)

[See also (1927) 1927 Lah 768 (769)
Appellate judgment silent as to certain points in the grounds—Presumption is that they were abandoned]

(1919) 1919 Cal 112 (113) A statement in a judgment that a point is not seriously pressed in the first Court must be taken to be proof of its having been abandoned

(1910) 5 Ind Cas 813 (814) (Mad) No issue is raised on a point covered by the plead

(1927) 1927 Oudh 95 (96) 29 Oudh Cas 330
1 Luck 158

(1915) 1915 Oudh 218 (219)

(186J) 11 Suth W R 559 (560)

(1871) 16 Suth W R 260 (280 281)

(1882) 9 All 304 (314) *Sizing* that a suit is a bit of wanton litigation is not enough

(1917) 1917 Lah 210 (210) Suit not to be dismissed on ground that it related to a worthless piece of land

2 (1909) 4 Ind Cas 321 (322) 30 Cal 813

(1865) 3 Suth W R 176 (177)

(1920) 1920 Cal 774 (775)

not pressed]

[See also (1872) 18 Suth W R 218 (221) Objection as to value and maintainability of appeal taken after argument was over]

6 (1923) 1923 Lah 259 (259)

7 [See (1918) 1918 L C 53 (55) 40 All 497 (P C)]

(1871) 15 Suth W R 297 (221)

8 (1905) J Cal W N 60 (60)

Note 6

1 (1933) 1933 P C 33 (35) (P C)

(1865) 2 N W P H C R 142 (147)

suffice
force in

(1884) 8 Bom 28 (30)

(1922) 1922 Oudh 122 (123) 20 Oudh Cas 69

(1912) 17 Ind Cas 694 (699) (L L)

(1893) 1900 2 L B R 64

(1921) 1921 Cal 832 (855) 64 Ind Cas 753 (794) (Cal)

(1874) 21 Suth W R 436 (437)

(1873) 19 Suth W R 321 (321)

[See also (1921) 1921 L at 215 (2148) Several suits disposed of by common judgment—Appellate Court should consider evidence in each case separately]

[But see (1862) 1 H J 103]

4 (1894) 2 Cal W N cccxxxix (cccxi)

(1916) 1916 Pat 262 (263) 21 L at L Jour 3

(1916) 1916 L at 349 (350)

(1881) 10 Cal 324 (325)

(1895) 19 Lom 323 (323 324)

(1917) 1917 Pat 353 (354)

(1919) 1919 L at 521 (521)

Note 7

1 (1894) 1900 2 L B R 313

certain evidence is the best evidence,⁵ or that the arguments of plaintiff's counsel represent the correct view of the case,⁶ or that a point is absurd, or ridiculous, or worthless,⁷ is not a proper judgment. Nor should the judgment be based on mere conjectures and presumptions⁸ or on evidence not legally admitted.⁹

But the whole evidence on the record need not be reviewed. It is enough if the evidence discussed is reasonably adequate for a proper decision of the case.¹⁰ Nor is it necessary to discuss a document not brought to the notice of the appellate Court.¹¹

In the undermentioned case¹² it was remarked by Markby, J., that reasons in S. 359 of the Code of 1859 (now O. 41, R. 31) meant not the reasons for any conclusion of fact, but reasons showing the point of fact or of law upon which the decision runs. Having regard to the foregoing discussion this view seems to be wrong.

Where a judgment does not discuss a document of obvious importance, it may be presumed that the Court has not considered it.¹³

8 Where the decree appealed from is reversed etc. CI (d)

Where an appellate Court reverses or modifies the decree appealed from it must specify in its judgment the *relief* to which the appellant is entitled. It is not enough merely to say, that the appeal is decreed, or that the decree is reversed.¹ Where the conclusions in the appellate judgment differ in important points from those of the trial Court, the appellate Court must specify in its decree the modifications necessitated by its conclusions.²

9 Summary dismissal of appeal under O. 41 R. 11

There is a conflict of decisions as to the applicability of this rule to cases of summary dismissal of an appeal under R. 11 *ante*. On the one hand it has been held by High Courts of Calcutta,¹ Madras,² Allahabad,³ Rangoon,⁴ the Chief Court of Punjab⁵ and the Judicial Commissioners' Court of Oudh⁶

5 (1916) 1916 All 260 (260)
6 (1921) 1921 Lah 119 (120) 2 Lah 271.
7 (1863) Marsh 332
(1900 O) 1 L B R 204 (205)

407, 408) (Cal) Dismissal of appeal under S. 551 — Whether judgment should be written Cox C J — No Richardson J — Yes.
[But see (1934) 1934 Cal 26 (27) Where order dismissing appeal under this Rule is not subject to a further appeal it is not necessary to write a judgment though it would be satisfactory if one is written]

2 (1881) 3 Mad 1 (2)

3 (1931) 1931 All 597 (599) (F B) Overruling (1908) 20 All 319
(1931) 1931 All 589 53 All 528

4 (1926) 1926 Rang 129 (131) 4 Rang 66
(1927) 1927 Rang 208 (208)

[But see (1916) 1916 U B 9 (11) 2 U B R 92 Rule does not apply in entirety. But judgment must at least show that Judge has understood case]

312

[But see (1920) 1920 Cal 869 (869)]

Note 8

1 (1870) 2 N W P H O R 415 (416)
(1868) 1 Beng L R (A C) 50 (54, 55)
2 (1897) 12 All 46 (48)

Note 9

1 (1897) 25 Cal 97 (98)
(1923) 1923 Cal 558 (558)
(1922) 60 Ind Cas 479 (480) (Cal)
(1926) 1926 Cal 992 (992)
[But see (1909) 2 Ind Cas 405 (406,

1, that the Rule applies to such cases and the appellate Court is not exempt from writing a judgment in the manner prescribed by R 31. In the special circumstances of any case, however, a short judgment merely expressing concurrence with the views of the lower Court without entering into reasons may be held sufficient.⁶ On the other hand, it has been held by the High Court of Patna^{6a} and the Judicial Commissioners Courts of Nagpur⁷ and Sind⁸ that the Rule does not apply and that the appellate Court is not bound to write a formal judgment in such cases. The Bombay High Court inclines to the latter view⁹ but holds that under Civil Circular No 51 of 1890 of that Court issued under the Indian High Courts Act, appellate Courts are bound to comply with the requirements of Rule 31 even in cases falling under Rule 11.¹⁰

10 Non compliance with Rule—Effect—General

This Rule is imperative and a judgment which is not in accordance with it, is not one according to law.¹ But a substantial compliance with the rule is enough. What is substantial compliance depends on the facts and circumstances of each case.² The important point is that it must be evident from the judgment of the appellate Court that it has properly appreciated the case, has applied its mind to it and has decided it after considering the evidence on the record.³ If the judgment satisfies this requirement, the appellate Court will be deemed to have substantially complied with the Rule, and its judgment will not be interfered with merely because it does not strictly fulfil the formalities laid down therein.⁴

11 Second appeal—Maintainability of on ground of non compliance

A second appeal will lie on the ground that the judgment of the lower appellate Court does not substantially comply with this Rule, and is therefore

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- | | |
|--|--|
| <p>(1903) 5 Bom L R 233 (233)
 (1891) 1891 Bom P J 58 (58)
 (1894) 1894 Bom P J 113 (113)
 [But see (1885) 9 Bom 452 (453 4 4)
 Rejection of appeal as time barred—
 Circumstances showing reasonable
 cause for delay pleaded—Reasons
 for rejection of appeal must be
 given]
 (1891) 1891 Bom P J 233 (239) But if ap-
 pellant not prejudiced appellate
 decree not to be reversed</p> | <p>(1904) 8 Oudh Cas 240 (292)
 (1920) 1920 Sind 12 (13) 14 Sind L P 1¹⁰
 (1856) 1856 All W N 285 (286)
 (1889) 1889 All W N 178 (179)
 (1888) 1888 All W N 61 (62)
 (1886) 1886 All W N 171 (171 172)
 (1923) 1923 Pat 215 (216)
 (1909) 2 Ind Cas 404 (404) (Cal)
 (1924) 1924 All 100 (100 101)
 2 (1923) 1923 Cal 163 (163 164)
 (1916) 1916 Pat 343 (350)
 (1911) 1911 All 597 (600)
 (1874) 21 Suth W R 260 (260 261)
 3 (1907) 1907 Cal 329 (324)
 (1926) 1926 Cal 545 (545)
 (1917) 1917 Pat 358 (358)
 (1916) 1916 Pat 139 (140)
 (1914) 1914 Oudh 965 (965)
 (1841) 18 Suth W R 15 (16)
 (1864) 1 Suth W R 214 (215)
 (1919) 1919 Pat 486 (486)
 (1913) 1913 Pat 13 (16)
 (1925) 1925 Cal 316 (317)
 (1915) 1915 Pat 212 (213)
 (1919) 1919 Pat 336 (337)
 (1925) 1925 All 503 (509)
 (1911) 2 Ind Cas 601 (604) (All)
 (1898) 2 Cal W N 63 (64)
 4 (1884) 2 All 6 (31)
 (1920) 1920 Sind 112 (13) 14 Sind L P 1¹⁰
 (1911) 1911 All (600) (11)</p> |
|--|--|
- 10 (1913) 20 Ind Cas 906 (907) 37 Bom 610 (1 B)
- Note 10**
- 1 (1847) 9 All G (27 28 31)
 (1907) 1907 Lah 332 (333) Judgment held
 to be not a judgment in law and
 set aside
 (1856) 6 All W N 171 (172)
 (1884) 1884 All 619 (626)
 (1884) 6 All 24 (24)

for a judgment according to law¹ A contrary view has, however been taken in some cases, on the ground, that the non compliance with this rule cannot be considered to be an irregularity which may possibly have affected the decision on the merits within § 100 Cl (c)² This view is against the general trend of opinion Further at least some of the cases laying down the view³ are cases in which the non-compliance with the rule was not of a substantial nature

Findings of fact of the lower appellate Court for which reasons are not given are not conclusive in second appeal⁴

12 Non compliance with the rule by lower appellate Court—Procedure of High Court

Where the lower appellate Court has not substantially complied with this Rule the High Court may reverse the decree and remand the case for disposal according to law¹ It has however been held in the cases cited below²

Note 11

- 1 (1901) 31 Mad 401 (404)
 (1895) 1 Cal 37 (38)
 (1924) 114 All 100 (100 101)
 (1885) 7 All 114 (6 C)
 (1900) 8 Oudh L R 230 (21)
 (1911) 11 Ind Cas 415 (31) (L B)
 (1909) 2 Ind Cas 404 (404) (Cil)
 (1916) 1916 L B 9 (10) 2 U B R 9
 Error may possibly have affected
 decision on merits
 (1917) 1917 L B 124 (190)
 [See also (1870) 18 L R 100 (6)]

- (1924) 114 All 100 (100 101)
 (1901) 112 L B 246 (247)
 (1906) 112 L B 241 (357)
 (1923) 114 L B 241 (357)

1 Luck 408

- (1976) 1928 Mad 16 (17)
 (1977) 1927 L B 419 (419)
 (1928) 1928 L B 650 (650)
 (1912) 16 Ind Cas 387 (383) (Mad)
 (1917) 1917 Oudh 374 (374)
 (1916) 1916 L B 139 (140)
 (1916) 1916 L B 9 (10) 2 U B R 92
 (1910) 1915 L B 32 (33)
 (1914) 1914 Oudh 260 (260)
 (1912) 17 Ind Cas 698 (899) (L B)
 (1871) 10 Suth W R 324 (326)
 (1863) 4 Suth W R 4 (4)
 (1875) 3 Suth W R 176 (177)
 (1838) 2 Cal W N 690 (691)
 (1906) 1906 L B 96 (96)

330

1 Luck 408

- (1916) 1916 L B 366 (366)
 (1917) 1917 L B 258 (258)

Note 12

- 1 (1887) 9 All 26 (28)
 (1886) 6 All W N 171 (171 172)
 (1842) 17 Lom 420 (420)
 (1897) 25 Cal 97 (98)
 (1878 51) 3 Mad 1 (2)
 (1897) 90 Mad 436 (437 438)
 (1896) 22 Mad 12 (13)
 (1893) 22 Mad 344 (345)
 (1907) 31 Mad 469 (470 471) (L B)
 (1892) 11 Cal L Rep 131 (132)
 (1910) 5 Ind Cas 38 (101) (Cal)
 (1894) 6 All 383 (38)

[See also (1971) 15 Suth W R 131 (132)]

- (1905) 31 Mad 469 (470 471) (F B)
 (1911) 11 Ind Cas 910 (910) (L B)
 (1906) 1906 P L R No 153 page 505 Re
 mand was made in revision
 2 (1885) 12 Cal 139 (139)
 (1891) 10 Cal 137 (930 936)
 (1872) 18 Suth W R 473 (473)
 (1873) 20 Suth W R 403 (404)
 [See also (1819) 1819 L R 100 (100 101)]

- 1, that the High Court cannot do so but can only require the Judge in the lower Court, if he is still in service and in the same district, to state his reasons for his conclusions. This view is against the general trend of opinion. Further some of the cases expressing such a view³ will on examination, be found to be not cases of *substantial* non-compliance with the Rule.

The High Court may instead of remanding the whole case call for fresh findings from the lower appellate Court⁴.

13 Appeal in proceedings under S 476 of the Criminal Procedure Code

The judgment in an appeal in proceedings under S 476 Criminal Procedure Code must, according to the general rule, give reasons for the decision¹.

14 Applicability of rule to High Court

In the undermentioned case¹ the High Court confirmed the decree of the lower Court but failed to give in its judgment any reasons for its decision. An application was made to the High Court for leave to appeal to the Privy Council on the ground that the requirements of the present rule were not complied with. On this application, Edge C J, said that the present Rule was not intended to apply to cases where the High Court, after hearing the judgment of the lower Court and the arguments thereon comes to the conclusion that both the judgment and reasons given by the lower Court for its decision are complete and satisfactory. The learned Chief Justice gives no reason for his view, and it is not clear why the present rule or at least the principle thereof should not apply to the High Court². On the other hand the Privy Council itself has held that the High Court must give reasons for its decision in its judgments³. See also Cl 42 Letters Patent. But under O 49 R 2 where at the commencement of the present Code there were, in force, any Rules for the recording of judgments by Chartered High Courts, the present rule cannot in any way, affect the operation of such Rules⁴.

- 2 **R. 32.** [S 577] The judgment may be for confirming, varying or reversing the decree *from* which the appeal is *preferred*, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be *made* in appeal, the Appellate Court may pass a decree or *make* an order accordingly [1877—S 577; 1859—S 350]

Synopsis

What judgment may direct	Note No	Confirming varying or reversing decree	Note No
	1	Compromise decree in appeal	2

[See also (1869) 12 Suth W R 152 (1872)]

3 [See (1846) 12 Cal 159 (203)]
1 (1916) 1916 Mad 427 (427)

48 Ind App 76 (P C)
3 (1882) 11 All 460 (470) 16 Ind App 705 (P C)

Note 13
1 (1931) 1931 Cal 454 (454 455)
(1924) 1924 Cal 244 (244 255) 54 Cal 305

Note 14

1 (188) 9 All 99 (95) (F 1)
2 (See (1921) 1921 L C 40 (82) 48 Cal 481

1 Confirming varying or reversing decree

Under this Rule an appellate Court has no power to dismiss an appeal. The judgment must be one for confirming varying or reversing the decree appealed from. But an appeal may be dismissed under R 11 *ante* or as being incompetent as where it is time barred or is barred under S 102¹

2 Compromise decree in appeal

Where an agreement set up by one party is denied by the other there was a conflict of decisions under the Old Code as to whether the Court had the power to determine the question as to the factum and validity of the alleged agreement and pass a decree if it finds such agreement to have been validly made. In O 23 R 3 of the present Code (corresponding to S 375 of the former Code) the Legislature has given effect to the view that the Court has such a power. This view has been applied to compromises entered into during the pendency of appeals¹ as well as those entered into in the lower Court. See O 23, R 3 Note 6

R. 33. [New] *The Appellate Court shall have power to*

pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require³ and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objections⁶

[Provided that the Appellate Court shall not make any order under section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order¹²]

Illustration

A decree is set aside as to part only of the decree and a decree is passed against both parties. The appellant appeals against the decree and the respondent appeals against the decree. The appellate Court decides in favour of the appellant. It has power to pass a decree against the respondent.

Synopsis

	Note No	Note No
Scope, object and applicability of Rule	1	Power may be exercised notwithstanding that appeal is as to part only of the decree
Any decree or order which ought to have been passed	2	5
Such further or other decree or order as the nature of the case may require	3	Power may be exercised in favour of respondents or parties who have not filed appeal or cross objections
Power of appellate Court to take cognizance of subsequent events	4	6
		(a) Power may be exercised in favour of
		(1913) 21 I d Cas 639 (641) (Mad)
		(1924) 1324 Cal 991 (392)
		(1929) 1929 Pat 102 (102)
	465	[But see (1932) 14 All 350 (352) This

Note 2

1 (1886) 9 Mad 103 (105-106)

3

	Note No		Note No.
of persons not parties to appeal	7	Illustration to the Rule	11
(b) Decree against several persons —		Proviso	12
Appeal by one—Power of appeal		Limitation	13
late Court to set aside decree		Res judicata	14
against all	8	Remand	15
Power if can be exercised against per-		Second appeal	16
son not party to appeal	9	Privy Council appeal	17
(a) Addition of parties appeal	10	Revision	18

Other Topics

Alternative relief See Note 6 Pts (5) and (6)
 Applicability of the Rule to partition suits
 See Note 1, P N (7)
 Cross objection against respondent See
 Note 6 F N (19), also O 41 R 22

Note 14
 Power to grant relief to respondent who has
 filed appeal or cross objection and filed
 therein See Note 6 Pt (23)

1 Scope object and applicability of Rule

Thus Rule is new and is based on O 58, R 4 of the Rules of the supreme Court in England. It is wider than O 41, R 4. Its object is to enable the appellate Court to do complete justice between the parties¹ and to avoid contradictory and inconsistent decisions on the same questions in the same suit² For this purpose a discretionary³ power is conferred on the appellate Court to pass such decree or order as ought to have been passed or as the nature of the case may require notwithstanding that the appeal is as to part only of the decree or that the party in whose favour the power is proposed to be exercised has not filed any appeal or cross-objection. The discretion conferred is wide⁴ and in a proper case, the appellate Court should not hesitate to exercise it^{4a} But as the power is in derogation of the general principle that a party cannot avoid a decree against him without filing any appeal or cross-objection it must be exercised with care and caution⁵ No hard and fast rule can however

Order 41 Rule 33—Note 1

- 2 (1916) 1916 Pat 400 (401) 1 Pat L Jour 149
 [See also (1918) 1918 Val 794 (801)
 40 Mid 816]
 (1905) 28 Mad 229 (231)
 (1913) 1919 Mid 136 (197)

own i

- (1927) 1927 P C 252 (256) 6 Rang 29 (P C)
 (Do)
 (1922) 1922 Cal 393 (399) 43 Cal 373 (Do)

(Do)

- (1940) 1940 Mad 707 (707) (Do)
 (1901) 1901 Cal 64 (67)
 [See also (1913) 1913 F Ch 374 (379)]

- 4 (1914) 1914 Cal 722 (723)
 (1916) 1916 Cal 136 (149) 43 Cal 730.
 (1916) 1916 Cal 240 (251)
 (1911) 9 Ind Cas 825 (826) (Lth)
 (1917) 1917 Cal 343 (345)
 (1920) 1920 Pat 77 (82) 5 Pat L Jour 5.
 (1931) 1931 Bom 288 (294)
 (1926) 1926 Cal 57 (59)
 (1928) 1928 All 746 (750)
 (1927) 1927 Mid 620 (621) 6 Mad 614
 4a (1911) 11 Ind Cas 640 (641) 71 All 32 (P C)
 (1918) 1918 Cal 13 (14)
 (1930) 1930 Mid 801 (805) 33 Mad 1
 (1925) 1925 F Ch 155 (156)
 5 (1913) 21 Ind Cas 767 (768) (Mad)
 (1933) 1933 Lth 682 (685)
 (1916) 1916 Cal 261 (262)
 (1914) 1914 Cal 722 (723)
 (1911) 11 Ind Cas 640 (641) 71 All 32 (P C)
 (1918) 1918 Cal 13 (14)
 (1920) 1920 L C 77 (81) 82 3 Pat L Jour

(1922)

- (1928) 1928 F Ch 117 (118)
 (1924) 1924 Lth 53 (601) 3 F Ch 291

be laid down as to the circumstances under which the power may or may not be exercised and each case must depend on its own facts ⁶ (*See also* Note 6)

There is no restriction as to the class of suits to which the Rule applies ⁷ The principle of the Rule applies also to applications for revision ⁸ It also applies to a suit to set aside a decree Thus, where a decree is passed against several defendants, some of whom sue to have the decree set aside, the decree may be set aside as against all ⁹ *See also* the following cases ¹⁰

2 Any decree or order which ought to have been passed

The Rule enables the appellate Court to pass any decree or order which ought to have been passed

Illustrations

1

and for one fourth in favour of the second defendant The first defendant appeals The appellate Court considers that the appeal must be dismissed but that the trial Court should not have passed a decree for one fourth in favour of the second defendant as he was a defendant and not a plaintiff The appellate Court therefore in dismissing the appeal passes a decree for the entire sum in favour of the plaintiffs declaring at the same time that as to one fourth it is for the second defendant's share Held that the appellate Court has power to do so ¹

2 Plaintiffs sue for a declaration that the proceedings taken against them by the defendants are *ultra vires* and null and void The trial Court passes an order of *mandamus* against them instead of giving a declaratory decree The defendants appeal The appellate Court considers that an order of *mandamus* should not have been passed but that a decree for a declaration should have been passed It has power to pass such a decree ² For other instances *see* the undermentioned cases ³

- 6 (1914) 1914 Cal 722 (723)
(1933) 1933 Mad 606 (80-)
(1911) 11 Ind Cas 640 (641) 34 All 32 (F B)
(1927) 1927 All 453 (454) 49 All 224
(1930) 1930 Mad 801 (806) 53 Mad 881 (F B)

7 (1922) 1922 Cal 393 (399) 49 Cal 379 Rule applies to partition suits

8 (1924) 1924 Nag 154 (155)

9 (1931) 1931 Mad 6 (8)

10 (1911) 9 Ind Cas 815 (816) (Cal) Rule applies to appeals pending at commencement of present Code

(1910) 5 Ind Cas 23 (26) 33 Mad 241 (Do)

Note 2

- 1 (1916) 1916 P C 182 (184 185) 44 Cal 759 44 Ind App 65 (P C)
[See also (1916) 1916 P C 96 (101) 43 Cal 660 (P C) *A* suing *B* and *C*—Decree in favour of *A* and *C*—Appeal by *B*—Appellate Court can transpose *C* as plaintiff and maintain decree in his favour]

2 (1932) 1932 Rang 123 (128) 10 Rang 412 (F B)

3 (1929) 1929 Cal 322 (325) 56 Cal 21 Appeal from *ex parte* decree—Power of the appellate Court in appeal from *ex parte* decree is not confined only to the investigation of the cause of

non appearance

(1919) 1919 Lah 341 (344) In dismissing appeal appellate Court can amend decree

(1919) 1919 Pat 196 (198) (Do)

(1918) 1918 Nag 41 (44) (Do)

(1916) 1916 Mad 538 (540) (Do)

(1920) 1920 Cal 115 (117) 46 Cal 1009 Even

specific performance of contract to sell immoveable property—Proper decree—Appellate Court has while dismissing defendant's appeal power to pass a decree in the proper form

(1915) 1915 Mad 37 (37) 25 Ind Cas 373 (375) (Do)

3 'Such further or other decree or order as the nature of the case may require'

The appellate Court has power to pass not only any decree or order which ought to have been passed but also such further or other decree or order as *the nature of the case may require*. Accordingly the appellate Court has power to deal with the case in any way that may seem equitable to all the parties concerned.¹

Illustrations

- 1 A property, the subject of two mortgages, one in favour of S and the other in favour of B, is sold for arrears of revenue and purchased by T. S sues for the enforcement of his mortgage against the surplus sale proceeds and makes B, a defendant to the suit claiming priority over him. The suit is decreed. B appeals against the decree. In the meanwhile there is a suit by B for setting aside the revenue sale and this suit is also decreed. T, (the purchaser at the revenue sale) appeals against this decree. Both appeals are heard together and are dismissed. The appellate Court can in dismissing the appeals, direct that S's rights should be enforced against the *property* instead of against the *sale proceeds*.²
- 2 A suit is erroneously dismissed on the merits instead of for default. An appeal is filed by the plaintiff. The appellate Court can not only pass the order which the lower Court ought to have passed viz., an order of dismissal for default, but also a further order that the suit do stand restored and that the lower Court do proceed to try the suit according to law.³
- 3 Where on an application to set aside an execution sale on the ground of the price being less than that payable under certain Rules, the lower Court refuses to set aside the sale, and on appeal, the appellate Court considers that the sale should be set aside, it has power to accept the purchaser's offer of a higher price, and to leave the sale undisturbed.⁴ See also the undermentioned cases.⁵

that suit had abated—Appellate Court can hold so
(1923) 1923 Lah 422 (423)
(1923) 1923 Nag 80 (31) Trial Court rejecting plaintiff for want of Court fee—Appellate Court reversing order may reject plaintiff on another ground, viz., on the ground of suit being barred by limitation
(1913) 19 Ind Cas 2 (2) 6 L B R 144 Trial Court decreeing suit on a particular ground—Appellate Court can reverse decision on that point but may maintain the decree on another ground

(1918) 1918 Nag 228 (231) 14 Nag L R 50 Appellate Court not to grant relief not asked for in plaint
(1917) 1917 Pat 42 (43) 2 Pat L Jour 639, (Do)
(1923) 1923 All 235 (241 242) (Do)
(1917) 1917 Mad 838 (838) Appellate Court has no jurisdiction under R 93 to grant extension of time, fixed for payment of the price in a decree for specific performance

Note 3

- 1 (1911) 9 Ind Cas 825 (826) (Lah)
(1914) 1914 Mad 226 (230) 39 Mad 550
- 2
- 3
- 4 (1900) 1930 Bom 290 (292) 54 Bom 348
- 5 (1906) 3 Cal L Jour 23 (36) Order appointing guardian—Appeal against—Appellate Court can appoint (another) guardian in pending appeal, viz., ancillary to the power which it possesses of appointing another guardian in supersession of the one appointed by the lower Court
(1910) 7 Ind Cas 797 (797) (Mad) Court of appeal has the power to allow the appellant to amend the heading of an appeal

- alter the same
(1922) 1922 Bom 267 (263 264) 46 Bom 184 Decree *ex parte*—Appellate Court has power to remand for re trial
(1925) 1925 Mad 735 (735) Appellate Court can amend its own decree
(1910) 6 Ind Cas 416 (417) (Cal) Appellate Court can try case only on issues on which parties went to trial
(1923) 1923 Lah 115 (116) 3 Lah 342 Appellate Court may issue a fresh commission for the purpose of examining accounts and remedying certain mistakes and omissions made by another commissioner
(1923) 1923 Mad 617 (618 619) 46 Mad 679 If the record of a case under appeal is lost, the appellate Court has power to re construct the record

4 Power of appellate Court to take cognisance of subsequent events

See also Note 4 to O 7 R 7 and Note 16 to O 41, R 27 for a full discussion. As a general rule a Court of appeal, in considering the correctness of the judgment of the Court below, will confine itself to the state of the case at the time such judgment was rendered and will not take notice of any facts which may have arisen subsequently¹. But the Court will in exceptional cases, depart from this rule, especially where, by so doing, it can shorten litigation and best attain the ends of justice. In such cases it is not only competent to a Court of appeal, but it may be its *duty* to take notice of events which have happened subsequently to the passing of the decree or order appealed against².

5 Power may be exercised notwithstanding that appeal is as to part only of the decree

This rule expressly empowers the appellate Court on an appeal from one part of the decree to reverse or modify the other part¹.

But where there are several suits and a separate decree is passed in each of them the appellate Court has no jurisdiction in an appeal against one of them to set aside the other decrees².

6 Power may be exercised in favour of respondents or parties who have not filed appeal or cross objections

The general principle is that a decree is binding on the parties to it, until it is set aside in appropriate proceedings¹. A party who wishes to have a decree against him modified or reversed, must comply with certain requirements as to filing of appeals, objections and so forth². Hence *as an ordinary rule*, an appellate Court must not reverse or vary a decree in favour of a party who has not preferred any appeal or cross objection against it, and this general rule holds good notwithstanding the enactment of R 33³. But in *exceptional cases* the rule enables an appellate Court to pass such decree as ought to have been passed, or as the nature of the case may require, even if such decree would be in favour of parties who have not filed any appeal or cross-objections against the lower Court's decree⁴. Ordinarily the power con-

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(1916) 1916 Cal 654 (656)

(1926) 1926 Cal 1042 (1044)

(1925) 1925 Mad 266 (267 268)

[See also Note 6 Points 7 8 and 9 and Note 8 Point 5]

2 (1925) 1925 Bom 230 (291)

(1919) 1919 Lah 201 (202) 1919 P R No 116

Compare also Note 8 Point 4

Note 6

(1934) 1934 Mad 675 (616)

(1901) 25 Bom 606 (613)

(1899) 1 Bom L R 218 (219)

(1931) 1931 Bom 250 (282)

(1931) 1931 Bom 288 (294)

(1930) 1930 Bom 254 (260) 54 Bom 125

(1917) 1917 Cal 716 (719) 44 Cal 47.

(1911) 10 Ind Cas 675 (6 6) (Mad)

[See also (1917) 1917 P C 111 (115)

(1917)]

(1925) 1925 Lah 2 (9 10)

(1929) 1929 All 334 (335)

(1920) 1920 Cal 428 (434)

(1937) 1937 All 32 (33)

(1917) 1917 Lah 423 (426)

(1916) 1916 P C 182 (184) 44 Cal 759 44

Ind App 65 (P C)

Note 5

1 (1920) 1920 Cal 428 (434).

- 33, ferred by this rule will be confined to those cases where, *as a result of interference in favour of the appellant*, further interference with the decree of the lower Court is rendered necessary, in order to adjust the rights of the parties according to justice, equity and good conscience ^{4a}

Illustrations

- (a) A claims Rs 500 as due to him either from B or from C and in a suit against both of them claiming relief in the alternative obtains a decree against B B appeals making A and C respondents The appellate Court comes to the conclusion that C and not B is liable to A It has jurisdiction while allowing B's appeal to pass a decree in favour of A against C ⁵
- (b) A sues B and C for a certain sum of money The suit is decreed against B and dismissed against C B appeals making A and C respondents to the appeal A his suit can while
- (c) A suit is brought on behalf of the public for a declaration (a) that the public are entitled to use the locks on a certain river without paying tolls to the defendant and (b) that the defendant is under an obligation to keep the locks in repair The trial Court holds that the plaintiff is entitled to use the locks without paying tolls

- (1916) 1916 Cal 890 (890)
 (1910) 8 Ind Cas 337 (338) (Mad)
 (1919) 1919 Mad 1102 (1102)
 (1931) 1931 P C 234 (239) 58 Ind App 350
 54 Mad 774 (P C)
 [See also (1929) 1929 Rang 153 (159
 160) 7 Rang 88]
 (1921) 1921 Pat 502 (503)
 [But see (1920) 1920 Oudh 145 (146)
 23 Oudh Cas 110 This case makes
 no reference to R 33 and follows a
 decision under the old Code]

The following decisions under the old Code (which did not contain any provision corresponding to R 33) holding that the appellate Court had no power to reverse or modify in favour of a respondent a portion of a decree against which he had not

- (1913) 21 Ind Cas 767 (768) (Mad)
 (1918) 1918 Cal 223 (225)
 (1908) 30 Cal 538 (540)
 (1916) 1916 Cal 237 (238)

537
 ad 503
 rent in
 pleading tenants and plaintiffs co

- missory note
 (1908) 25 Cal 565 (568) Suit for contribut o:
 (1890) 26 Cal 109 (112 113) Suit on bond
 (1901) 3 Dom L R 172 (178)
 (1904) 31 Cal 643 (645 646) (F D) Suit for
 contribution
 (1909) 3 Ind Cas 917 (918) 12 Oudh Cas
 280
 (1927) 1927 Mad 349 (350) Suit on mort
 gage
 [See also (1917) 1917 L D 61 (61)
 Suit by A against B and C—Suit
 dismissed against B and decreed
 against C—Appeal by A—Appellate
 Court can while passing decree
 against B, exempt C from liability
 though he has not filed appeal or
 cross objection]

[See (1934) 1934 Pat 524 (526) Dis
 tinct and separate decree against
 non appealing defendant—Appellate
 Court ought not to interfere in his
 favour]

but the defendant is under no obligation to keep the locks in repair and a decree is accordingly passed. The defendant appeals but the plaintiff neither appeals nor files cross objections against the decree. The appellate Court comes to the conclusion that the plaintiff is not entitled to use the locks without paying the tolls. The defendant is liable to keep the locks in repair."

- (i) A is the vendee of certain lands from B. B fails to deliver possession of the lands to A. A sues B for possession or in the alternative for the return of the purchase money. The trial Court awards A a decree for possession. B appeals. The appellate Court considers that A is not entitled to sue for possession, but is entitled to the return of the purchase money. The appellate Court can vary the decree accordingly.⁷
- (c) A an auction purchaser sues B the judgment debtor for possession or in alternative C the decree holder for refund of the purchase money. The trial Court decrees possession. B appeals making A and C respondents. The appellate Court comes to the conclusion that A is not entitled to recover possession from B but is entitled to the refund of the purchase money from C. A decree may be passed to this effect.⁸
- (j) A and B sue C for recovery of certain property. The trial Court passes a decree in A's favour but dismisses B's suit. C appeals. Neither appeals nor prefers cross objection. The appellate Court holds that B and not A is the person entitled. It can pass a decree in B's favour.¹⁰ See also Note 8.

The cases given in the above illustrations were cases in which there was interference by the appellate Court in *appellant's favour*. Suppose there is *no* interference in appellant's favour in a certain case, can the appellate Court reverse or modify the decree in favour of parties who have not filed any appeal or cross-objection? For instance A sues B for Rs. 1000. A decree is passed in A's favour for Rs. 400 only. A appeals from the decree. B files neither an appeal nor prefers cross-objections against the decree. The appellate Court finds that A is not entitled to *any amount*. Can it dismiss his suit *in toto* or can it merely dismiss his appeal leaving untouched the decree for Rs. 400 in his favour? Similarly in the above case, B (the defendant) appeals and A (the plaintiff) neither appeals nor files any cross-objection. The appellate

7 (1901) 2 Ch. D 671 (719) *Attorney General v. Simpson*

(1927) 1927 All 453 (454) 49 All 224 Plaintiff succeeding partly in trial Court—appeal by defendant—No cross appeal or cross objections by plaintiff—appellate Court reversing in favour of defendant the finding of trial Court but finding that the finding of the trial Court against plaintiff on the other point was wrong may pass decree in plaintiff's favour on that point.

(1917) 1917 Lah 429 (426) (Do)

(1928) 1928 All 77 (80) 50 All 218 Decree

mother can be directed to be enforced against properties in another village also

(1931) 1931 P C 234 (230) 58 Ind App 350

C P C 345 & 346

54 Mad 774 (P C) Confirming 1930 Mad 154 (154)

8 (1908) 18 Mad L Jour 586 (587-588)

(1925) 1925 Lah 155 (156) Where plaintiff made alternative claims on one of which the trial Court decreed the

trial Court in plaintiff's favour—appellate Court reversing decree may grant the alternative relief to which he is entitled

9 (1913) 18 Ind Cas 381 (382) (Bom)
(1927) 1927 Cal 831 (832)

10 (1915) 1915 P C 57 (59) 43 Cal 417 (P C), Confirming 12 Ind Cas 931 (936)
[See also (1926) 1926 Oudh 101 (108)]
[But see (1928) 1928 All 746 (752)]

1, Court finds that *B* is liable for the whole amount claimed by the plaintiff and not merely for the portion of it decreed against him. Has it the power, under such circumstances, to pass a decree against *B* for the whole amount or can it merely dismiss his appeal leaving untouched the decree which exempts him from the liability for the balance of the amount? On this question there is a divergence of opinion. The decisions fall into three classes:—

- (a) Those which hold that the appellate Court has *no jurisdiction* to pass a decree in *B's* favour in such a case.¹¹
- (b) Those which do not advert to the question of jurisdiction but simply say that the appellate Court should not pass a decree in *B's* favour in such circumstances.¹²
- (c) Those which say that the appellate Court has *jurisdiction* to pass a decree in *B's* favour even in such cases though the question whether the power should be exercised in a given case depends on its own circumstances.¹³

11. (

- (1934) 1934 Pat 524 (526) Distinct and separate decree against non appealing defendant — Appellate Court ought not to interfere in his favour
 (1914) 1914 Cal 722 (723) (Do)
 (1917) 1917 Cal 343 (345) (Do)
 (1911) 11 Ind Cas 640 (641, 642) 34 All 32 (Do)
 (1913) 18 Ind Cas 530 (531) (All) Suit by *A* against *B* and *C* — Decree partly in favour of *B* and partly against *C* —

[But see (1915) 18 Ind Cas 114 (115)]

Held, that the amount could not be so reduced
 (1928) 1928 Nag 322 (323) Appellate Court refused mortgage

13 (1930) 1930 Mad 801 (806). *See also* Plaintiff dissatisfied with decree, appealing—In proper case appellate Court can dismiss plaintiff's suit in toto though respondent has not preferred cross appeal or memorandum of objections *Confirming* 1935 Mad 266 (267, 268)

(1920) 1920 Cal 990 (991) (Do)
 (1931) 1931 Mad 519 (518, 519) (Do)
 (1933) 1933 Mad 529 (531, 533) *Ex parte* decree against some defendants restored by High Court — Against rest *ex parte* decree set aside—Suit tried by another Sub-Judge and dismissed as based on false document — Plaintiff alone appealing — Appeal dismissed — High Court can set aside the *ex parte* decree against the de-

execution allowed — Appeal by decree holder claiming higher rate of interest — Application for execution not to be dismissed as barred by limitation.

12 (1916) 1916 Cal 250 (251) Suit partly decreed and partly dismissed—Appeal by plaintiff, no cross objection by defendant—Suit not to be wholly dismissed.

It is submitted that the view expressed in (c) above is correct for the following reasons —

- (1) This rule is general in its terms and contains no words which would warrant its being restricted to cases where the appellate Court interferes in appellant's favour¹⁴
- (2) The following cases¹⁵ out of the cases cited under (a) were

defendants who had not appealed
(See (1912) 17 Ind Cas 639 (639) 8
Mag L R 174 Suit partly decreed
and partly dismissed — Appeal by
plaintiff — No appeal or cross objec-
tion by defendant — Appellate Court
can dismiss whole suit as barred by

Suit for declaration and possession—
Court holding plaintiff was not en-
titled to the property and passing
money decree for amount paid by
him towards a certain encumbrance
on the property—Appeal by defen-
de
as
ough

defendant's favour
(1921) 1921 All 67 (368) 43 All 85 Suit by
A against B and C — Decree partly
against B and partly against C —
Appeal by B — No appeal or cross

712
f as
against all defendants jointly and
his suit is dismissed as against some

by defendant—Appellate Court can
allow plaintiff to withdraw whole
suit
[See also (1928) 1928 Cal 488 (489)
Suit for declaration that defendant
was not entitled to draw water from
plaintiff's tank from certain bank—
Suit decreed but decree also provid-
ing that defendant was entitled to
take water from another bank—This
was not a point raised in the case
at all—Appeal by defendant—Appel-
late Court affirming decree of trial
Court as to former part but expung-

but defendant wrongly ordered to
pay Court fee payable on a previous
suit filed by him—Appeal by plain-
tiff—Appeal dismissed—Appellate
Court has power to set aside the
erroneous order against the defen-
dant

*—Appellate Court can pass decree
for possession in his favour without
any liability to pay anything
(1919) 1919 Cal 65 (65) 46 Cal 738 Suit
partly decreed and partly dismissed
—Appeal by plaintiff—No appeal or
cross objection by defendant—Whole
case may be remanded
[See also (1877) 1 Cal L Rep 144
(146) Decree partly favourable to
plaintiff and partly to defendant—

(1929) 1929 Cal 8 (31) Suit for declara-
tion and possession of a portion of
a certain land decreed—Appeal by

get joint possession of the portion
decreed

(1932) 1932 All 32 (33) Trial Court passing

14

(F B)]

1891

can grant plaintiff respondent mort-
gage decree in lieu of money decree—

15

(1933) 1933 Mad 806 (808)
(1889) 11 All 35 (38)
(1870) 2 N W P H C R 44 (45)

33 Court finds that *B* is liable for the whole amount claimed by the plaintiff and not merely for the portion of it decreed against him. Has it the power, under such circumstances, to pass a decree against *B* for the whole amount or can it merely dismiss his appeal leaving untouched the decree which exempts him from the liability for the balance of the amount? On this question there is a divergence of opinion. The decisions fall into three classes —

- (a) Those which hold that the appellate Court has *no jurisdiction* to pass a decree in *B*'s favour in such a case ¹¹
- (b) Those which do not advert to the question of jurisdiction but simply say that the appellate Court should not pass a decree in *B*'s favour in such circumstances ¹²
- (c) Those which say that the appellate Court has *jurisdiction* to pass a decree in *B*'s favour even in such cases though the question whether the power should be exercised in a given case depends on its own circumstances ¹³

- 11 (1921) 1921 Lah 211 (212) Suit partly decreed in plaintiff's favour and partly against defendant — Appeal by plaintiff — No cross objections by defendant — Appellate Court dismissing appeal cannot dismiss suit
- (1925) 1925 Pat 283 (287) 4 Pat 37 (Do)
- (1926) 1926 Nag 281 (285) (Do)
- (1911) 9 Ind Cas 121 (122) (Cal) (Do)
- (1889) 11 All 35 (38) (Do)
- (1935) 1935 Cal 458 (459) Reporting to follow 1916 Cal 250 which does not use the word jurisdiction
- (1917) 1917 L at 52 (53) 36 Ind Cas 537 (539)
- (1929)

- (1934) 1934 Pat 524 (526) Distinct and separate decree against non appealing defendant — Appellate Court ought not to interfere in his favour
- (1914) 1914 Cal 722 (723) (Do)
- (191) 1917 Cal 343 (345) (Do)
- (1911) 11 Ind Cas 640 (641 642) 31 All 37

Appellate Court cannot make appealing party pay no appeal against party's costs in trial Court

- (1914) 1914 All 247 (248) Where plaintiff obtained a mortgage decree subject to paying a certain amount to a prior mortgagee and in an appeal by the latter the sum was reduced *held* that the amount could not be so reduced
- (1928) 1928 Nag 322 (323) Appellate Court has no power to reverse mortgage decree and pass money decree only when defendant has not appealed or

for foreclosure not to be passed in absence of cross appeal or cross objections by plaintiff

- (1918) 1918 Cal 163 (169)
- (1918) 1918 U B 50 (51) 2 U B R 144
- (1927) 1927 Bom 128 (129)
- (1926) 1926 Cal 57 (59)
- 13 (1930) 1930 Mad 801 (806) 53 Mad 801 Plaintiff dissatisfied with decree appealing — In proper case appellate Court can dismiss plaintiff's suit *in toto* though respondent has not appealed

not to be dismissed as barred by limitation

- 12 (1916) 1916 Cal 250 (251) Suit partly decreed and partly dismissed — Appeal by plaintiff no cross objection by defendant — Suit not to be wholly dismissed

In such a case the *ex parte* decree against the de

It is submitted that the view expressed in (c) above is correct for the following reasons —

(1) This rule is general in its terms and contains no words which would warrant its being restricted to cases where the appellate Court interferes in appellant's favour¹⁴

(2) The following cases¹⁵ out of the cases cited under (a) were

- defendants who had not appealed
[See (1912) 17 Ind Cas 639 (639) 8 Nag L R 171 Suit partly decreed and partly dismissed — Appeal by plaintiff — No appeal or cross objection by defendant — Appellate Court can dismiss whole suit as barred by limitation]
- (1929) 1929 Rang 178 (153) 7 Rang 88 Decree for mesne profits — Appeal by plaintiff for enhancing amount — Appellate Court can modify decree in defendant's favour
- (1921) 1921 All 167 (368) 43 All 85 Suit by A against B and C — Decree partly against B and partly against C — Appeal by B — No appeal or cross objection by C — Appellate Court can exonerate C completely and make B liable for the whole claim
[But see (1913) 18 L C 550 (531) (41)]
- (1933) 1933 Lah 40 (41) (Do)
(1928) 1928 Cal 468 (469) (Do)
(1915) 1915 All 284 (285) (Do)
(1929) 1929 All 398 (399) Suit for pre emp
- but defendant wrongly ordered to pay Court fee payable on a previous suit filed by him — Appeal by plaintiff — Appeal dismissed — Appellate Court has power to set aside the erroneous order against the defendant
- to modification that plaintiff should get joint possession of the portion decreed
- (1932) 1932 All 32 (33) Trial Court passing
- Suit for declaration and possession — Court holding plaintiff was not entitled to the property and passing money decree for amount paid by him towards a certain encumbrance on the property — Appeal by defendant — Appellate Court can pass decree declining plaintiff's right as mortgagee (by subrogation) though he had not filed cross objections
- (1924) 1924 Pat 160 (160) 2 Pat 712 Where the plaintiff claims relief as against all defendants jointly and his suit is dismissed as against some defendants only in an appeal against the dismissal the appellate Court can dismiss the whole suit
- (1916) 1916 Cal 261 (262) Suit partly decreed and partly dismissed — Appeal by defendant — Appellate Court can allow plaintiff to withdraw whole suit
[See also (1928) 1928 Cal 483 (489) Suit for declaration that defendant was not entitled to draw water from plaintiff's tank from certain bank — Suit decreed but decree also providing that defendant was entitled to take water from another bank — This was not a point raised in the case at all — Appeal by defendant — Appellate Court affirming decree of trial Court as to former part but expunging latter part — Held appellate Court had power to do so]
- (1890) 18 Mad 500 (502) Decree for redemption — Appeal by defendant — No appeal or cross objection by plaintiff — Appellate Court can pass decree for possession in his favour without any liability to pay anything
- (1919) 1919 Cal 65 (65) 46 Cal 788 Suit partly decreed and partly dismissed — Appeal by plaintiff — No appeal or cross objection by defendant — Whole case may be remanded
[See also (1877) 1 Cal L Rep 144 (146) Decree partly favourable to plaintiff and partly to defendant — Appeal by plaintiff — Remand by appellate Court — Second decision may be more favourable to defendant than former one]
- 14 [See (1930) 1930 Mad 801 (805) 53 Mad 881 (T B)]
- (1923) 1923 Mad 806 (808)
15 (1889) 11 All 35 (38)
(1870) 2 N W P H C R 44 (45)

decided under the previous Code which did not contain any provision corresponding to R 33

- (3) The cases cited under (b) do not say that the appellate Court has no jurisdiction to pass a decree in *B's* favour in such circumstances

In exercising the power under this rule, the Court should not lose sight of the other provisions of law such as the Court-fees Act or the Limitation Act which are likely to be infringed by the exercise of such power¹⁶ Care and judicial discretion must, therefore, be exercised in view of all the circumstances of the case¹⁷ The following conditions should be satisfied before such power is exercised in favour of a party —

- (a) The Court must be satisfied that there are good reasons for such party not having filed any appeal or cross objection¹⁸
 (b) Interference in favour of such party must be rendered necessary by the conclusions to which the appellate Court comes in deciding the appeal¹⁹

Illustration

A decree is passed in an administration suit dividing the estate between *A* and *B* and rejecting the claim of *C* to be entitled to the whole estate in preference to both *A* and *B*. *C* does not file any appeal. *C* has no power in such appeal to

- (c) Interference must be necessary in the interests of justice, equity and good conscience²¹

In *Rukia v. Mewa Lal*²² the High Court of Allahabad observed that the rule 'is restricted to cases where without disturbing the grounds upon

appeal without his filing an appeal or memo of objections himself]

(1920) 1900 Lah 438 (440) 1 Lah 396 54

Rule to be invoked only when party appealing to it can fairly be said to be equitably entitled to relief —
 (1928) 1928 Lah 599 (601) 9 Lah 291
 (1931) 1931 Lah 370 (371) Plaintiff not coming into the Court with clean

50 Mad 614 The rule cannot be read as giving a right to a respondent to urge something in his favour against another respondent which has nothing to do with the result of the

12 Pat 261 R 33 gives discretion order to further ends of justice and not to favour one party as against another]

22 (1923) 1923 All 716 (750)

which the judgment of the trial Court proceeds, the appellate Court considers that the decree should be modified in order to do justice to all the parties concerned including such as have not set the law in motion. If these remarks were intended to lay down that under this rule an appellate Court has no power to vary a decree in favour of a respondent who has not filed an appeal or cross-objection if it has upset the grounds upon which the lower Court's judgment is based, it is submitted that the view is incorrect.^{22a}

The appellate Court *can* interfere in favour of a party or a respondent, who has filed an appeal or cross objection and *failed* therein.²³

7 Power if can be exercised in favour of persons not parties to appeal

The appellate Court can exercise its power under this rule in favour of parties to the suit who were not impleaded as parties to the appeal¹. A contrary view has however been taken in the undermentioned cases². It is submitted that this view is not correct as it is inconsistent with the express provisions of the rule which uses the words respondents or parties³. See also Notes to R. 4 *ante*.

8 Decree against several persons Appeal by one Power of appellate Court to set aside decree against all

Where a decree is passed against several persons and one of them appeals against it it is competent to the appellate Court under this Rule to set aside the decree against all of them¹ although such decree does not proceed on any ground *common to all* the persons against whom it is passed² But this power of the appellate Court cannot be exercised as a matter of course and in

^{92a}(1904) 1934 Pat 134 (141) 13 Pat 200
23 (1923) 1930 Lab 2 (3 10)

(1931) 1931 Mad 977 (278) Independent appeals by plaintiff and defendant—Latter's appeal abating—He as respondent in plaintiff's appeal can invoke R 33.

Note 7

1 (1916) 1916 Mad 837 (837)
 (1935) 1935 Cal 24 (26) 61 Cal 919
 (1922) 1933 Mad 506 (506)
 (1916) 1916 Cal 604 (606)
 (1916) 1916 Mad 538 (540)
 (1915) 1915 Mad 227 (229)
 (1921) 1921 All 367 (368) 43 All 85
 (1919) 1919 Mad 196 (197) Preferably they
 may be made 1 urties

[See also (1911) J. Ind. Cas. 815 (816) (Cal.) Appellate Court is competent to make a decree in favour of a party in second appeal though such person was not a party to the first appeal]

2 (1919) 1919 Cal 127 (127)
(1933) 1933 Cal 767 (788)
(1918) 1918 Cal 267 (268)
(1926) 1926 Nag 185 (136)
(1920) 1920 L B 114 (114)

(1928) 1928 AB 746 (751)

(1918) 1918 Mad 665 (666)

[See also (1918) 1918 Nag 228 (231)
14 Nag L R 56]

3 (1913) 1919 Mad 196 (194)
(1926) 1926 Cal 1042 (1044)
(1925) 1925 Mad 266 (267)

Note 8

(1916) 1916 Pat 400 (401) 1 1st L Jour 143

(1927) 1927 All 37 (3) 48 All 551

(1926) 1.126 411 425 (426)

(1924) 1924 Pat. 336 (339)

(1916) 1916 Cal 654 (656)

(1920) 1920 Ca1 426 (434)

(1916) 1916 Cal 830 (890)

(1918) 1918 Mad 794 (799)

(1916) 1916 Pat 400 (401

143 Decreto agai

dants—One of the

by one — Appella

aside decree again.

[See also (1926) 19

(1915) 1915 Mad 227 (229)

1470/2020 2124 221 1020

33. the absence of special reasons³ Moreover, where there are several defendants and the decree imposes a separate liability on each of them, and one of them appeals against that part of the decree which concerns him, it has been held that the appellate Court cannot set aside the decree against all the defendants, the reason given being that in such a case there is really a combination of several decrees one of which alone is the subject-matter of the appeal⁴ See also Note 5 *ante* A contrary view, however has been taken in the following cases⁵

Where a decree is passed against two defendants, against one of whom it is passed on confession of judgment, and against the other, after contest, and the latter appeals against the decree, the appellate Court cannot set aside the decree in favour of the former⁶

9 Power if can be exercised against person not party to appeal

Under this Rule, the appellate Court has no power to interfere to the prejudice of a person who was a party to the suit but who was not impleaded in the appeal¹ The decisions to the contrary are it is submitted not correct² See also Note 6 to Rule 4 and Note 13 to Rule 22, *ante*

10 Addition of parties in appeal

See also O 41, R 20 and the Notes thereunder It has been held that the appellate Court has power under R 33 to add parties to the appeal¹ But

- | | |
|---|---|
| <p>3 (1930) 123 Ind Cas 381 (All)
(1927) 1927 All 177 (178)
(1921) 1927 Nag 196 (197)
(1916) 1916 Lah 113 (114 117) 1917 Pun Re No 71
[See also (1911) 9 Ind Cas 742 (744) (Lah)]</p> <p>4 (1921) 1921 All 56 (57 58) 43 All 320
(1934) 1934 Pat 524 (526)
(1928) 1928 Mad 1144 (1146)
(1928) 1928 Cal 593 (595) 55 Cal 1193
(1918) 1918 Mad 665 (666 667) 42 Ind Cas 972 (973 974 975)
(1917) 1917 Cal 87 (88)
(1913) 18 Ind Cas 543 (544) (All)
(1916) 1916 Mad 907 (907)
(1925) 1925 Mad 771 (774)</p> <p>5 (1919) 1919 Mad 196 (197)
(1925) 1925 Pat 40 (42) 3 Pat 327</p> <p>6 (1913) 18 Ind Cas 755 (760) (Lah)</p> <p>Note 9</p> <p>1 (1912) 16 Ind Cas 387 (388) (Cal)
(1935) 1935 Cal 24 (26) 61 Cal 919
(1933) 1933 Mad 806 (808)
(1934) 1934 Pat 589 (591) Plaintiff's claim dismissed against A but decreed against B—B appealed not joining A—Appeal allowed against plaintiff—Plaintiff appealed impleading A and B—Time for appeal against A having expired he cannot be added as a party—Also appeal against A direct to High Court is not permissible without appealing to lower appellate Court
(1909) 2 Ind Cas 52 (53) 31 All 521
(1911) 10 Ind Cas 275 (276) (Cal)</p> | <p>(1918) 1918 Cal 173 (175)
(1918) 1918 Cal 134 (135)
(1929) 1929 All 243 (244) 51 All 575
(1925) 1925 Mad 266 (267, 268)
(1910) 1915 All 120 (121)
[See also (1926) 1926 Cal 335 (336). Appellate Court cannot vary decree against respondent against whom appeal had abated]
(1920) 1920 Lah 438 (440) 1 Lah 396. Cross objection against co defendant who was not party to appeal not allowed
(1931) 1931 Cal 738 (739 740) 53 Cal 923 (Do)
[See also (1925) 1925 Rang 108 (110) 2 Rang 541 Finding of lower Court not to be reversed in absence of</p> <p>2 (1929) 1929 Cal 315 (317)
(1926) 1926 Cal 1012 (1014) (Obiter)
[See also (1916) 1916 Mad 1219 (1220)]</p> <p style="text-align: right;">N. N. N.</p> <p style="text-align: right;">of passing a decree against him, it</p> |
|---|---|

the power must be exercised very sparingly ²

11 Illustration to the Rule

The illustration to the Rule indicates a *type* of cases for which provision is intended to be made ¹ But it is not exhaustive of the classes of cases to which the Rule applies, and does not restrict the scope of the Rule ² Thus though the illustration contemplates that the person in whose favour the appellate Court interferences is a party to the appeal and that there is interference in favour of the appellant, these two conditions are not essential for the applicability of the Rule See Notes 6 and 7

12 Proviso

The proviso to the Rule was added by Act IX of 1922 Its effect is that the appellate Court cannot make an order for compensatory costs under S 35-A where the trial Court has refused to do so See also Note 3 to S 35-A, *ante*

13 Limitation

A sues B for Rs 1 000 The claim is decreed for Rs 600 A appeals from the dismissal of his suit for the balance It is competent to the appellate Court to dismiss his whole suit if it comes to the conclusion that it is time barred ¹ But it has been held that if the appellate Court is not in a position to reject the whole claim, as for instance, where the defendant has confessed judgment as to a part of the claim, the appellate Court should not dismiss even that part of the claim which is the subject-matter of appeal ² The reason given is that the obligation to dismiss a suit as time-barred under S 3 of the Limitation Act arises only when the appellate Court is in a position to dismiss the whole claim ³

When a suit is decreed partially and the plaintiff appeals against the disallowance of the balance of his claim, the entire decree is imperilled because the appellate Court can in such appeal dismiss the whole suit and hence limitation for execution of the decree runs from the date of the appellate decree ⁴ When a decree imposes a separate liability on each of the several defendants, and one of them appeals against that portion of the decree which affects him, is limitation postponed under Art 182 Cl (2), even for the execution of the decrees against the other defendant? On this question there is a conflict of decisions some cases holding that time runs from the appellate decree ⁵ and others holding that time runs from the lower Court's decree ⁶

had not exercised its discretion properly in this case—Compare 1927 P C 252 (256) (P C)]

2 (1928) 1928 Lah 947 (948)

Note 11

1

(1916) 1916 Lah 113 (114 117) 1917 Pun Re No 71

(1927) 1927 Mad 620 (622) 50 Mad 614

2 (1915) 1915 Mad 227 (229)

(1919) 1919 Mad 196 (197)

(1926) 1926 Cal 1012 (1044)

(1930) 1930 Mad 801 (804) 57 Mad 881

Note 13

1 (1912) 17 Ind Cas 638 (639) 8 Nag L R 174

peals the liability of a non appealing defendant respondent may be enhanced under this Rule as a result of the appeal]

33, 14 *Res Judicata*

A sues B and C in the alternative for a certain sum of money. The suit is decreed against B and dismissed against C. B appeals making A and C respondents. The appellate Court sets aside the decree against B. It can at the same time pass a decree against C. But its failure to do so does not operate as *res judicata* under S 11 Explanation 5 because it was not obligatory but only *discretionary* on the part of the appellate Court to grant relief to A¹ (See S 11 Note 25). Similarly the failure of A to ask for relief being granted to him under R 33 does not operate as *res judicata* under S 11, Explanation 4².

Where a defendant appeals as to a part of the decree against him it has been held by the Madras High Court in the undermentioned case³ that he is precluded by *res judicata* from urging in support of his appeal a point which goes to the root of the whole decree including the portion of it from which he has not appealed. It is submitted that this decision is inconsistent with the Full Bench decision of the same High Court in *Panchanada v Vythinatha*⁴ and other cases cited in S 11 Note 29 Foot-Note 10. Further the decision seems to overlook the provisions of the present Rule which enable the appellate Court to reverse the whole decree though the appeal is as to a part of the decree alone. (See Note 5)

15 Remand

See 1919 Cal 65 cited in N 6 Foot note 13 above

16 Second Appeal

A sues B and C. The suit is decreed against B but dismissed against C. B appeals from the decree but A does not file any appeal or cross objections. B's appeal is allowed and A's entire suit is therefore dismissed. A files a second appeal impleading B and C as respondents. He is not entitled to file a second appeal against C because to allow him to do so would be to allow him to prefer an appeal directly to the High Court from the decision of the trial Court¹. The decisions to the contrary² are not good law in view of the Privy Council case mentioned below³.

A sues for Rs 1000. The trial Court passes a decree for Rs 600. The defendant appeals but A does not file any appeal or cross objection. The defendant's appeal is allowed and A's suit is dismissed in its entirety. A files a second appeal. He cannot contend in the second appeal that his whole suit should be decreed. The utmost he can claim is the restoration of the trial Court's decree⁴. The authorities to the contrary⁵ are not good law as they are opposed to the Privy Council decision in *Nobinchandra v Chandra Madhab*⁶. But where the omission to grant a relief is due to a mere slip of the pen it

Note 14

1 (1918) 1918 Cal 223 (225)

2 (1918) 1918 Cal 223 (225)

3 (1930) 1930 Mad 471 (4 2 473)

4 (1906) 29 Mad 333 (335) (F B)

Note 16

can be decreed on further appeal, though no appeal was preferred against the decree of the first Court ⁷

The mere fact that a decree might have been passed in favour of a party to the suit who was not impleaded as a party to the appeal does not make him constructively a party to the appeal so as to enable him to file a second appeal against the decree in the appeal ⁸ No second appeal lies against an order of remand passed not under R 223 *ante*, but under the present Rule ⁹ The refusal to take action under R 33 in the exercise of its discretion by a lower appellate Court is not an error of law within S 100 so as to sustain a second appeal ¹⁰

17 Privy Council Appeal

A sues B and C. The claim is decreed against B dismissed against C. B appeals to the High Court but A does not file any appeal or cross objections. B's appeal is allowed. A appeals to the Privy Council impleading both B and C. His appeal against C is not maintainable because it amounts to a direct appeal to the Privy Council from the decree of the trial Court which is not allowed under the law ¹

18 Revision

Where an appellate Court refuses to interfere in favour of a respondent on the ground that it has no jurisdiction to do so in the absence of cross objections it fails to exercise a jurisdiction vested in it by law within S 115 ¹ It has been held that no revision lies against an order refusing to add certain persons as parties to the appeal, as such an order is interlocutory in its nature ²

R. 34. [S 576] Where the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.

Dissent to be recorded

[1877—S 576, 1859—S. 359]

DECREE IN APPEAL.

R. 35. [S 579] (1) The decree of the Appellate Court shall bear date the day on which the judgment was pronounced.

Date and contents of decree

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and a clear specification of the relief granted or other adjudication made.

(3) The decree shall also state the amount of costs incurred, or out of what property, and

Note 17

1 (1926) 1926 P C 34 (30) 49 Mad 403 55
Ind App 84 (P C)

Note 18

1 (1913) 21 Ind Cas 767 (768) (Mad)
2 (1916) 1916 Mad 1219 (1220)

10 (1930) 1930 Mad 707 (707)

[See also (1933) 1933 All 113 (114)]

in what proportions such costs and the costs in the suit are to be paid

(4) The decree shall be signed and dated by the Judge or Judges who passed it

Provided that where there are more Judges than one and there is a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree

[1877—S 579; 1859—S 360]

Local Amendments

LAHORE

Add the following as a proviso to Rule 35 (4) —

Provided also in the case of the High Court that in the absence of a Judge who passed a decree or one or more Judges who passed a decree, either the Registrar or the Deputy Registrar of the Court shall sign the decree on behalf of such absent Judge or Judges, but that neither the Registrar nor the Deputy Registrar shall sign such decree on behalf of a Judge who dissented from the judgment of the Court

MADRAS

Substitute the following for sub rule (2) —

(2) The decree shall contain the number of the appeal the names and description of the appellant and respondent, their addresses for service and a clear specification of the relief granted or other adjudication made

Synopsis

	Note No		Note No
Date of decree	1	Court fee	5
Specification of relief	2	Chartered High Courts	6
Costs	3	Form of appellate decree—See App. G, Form No 9	7
Decree in appeal supersedes that of the lower Court	4		

Other Topics

Amendment of appellate decree See Note No 4, & N (1)

1 Date of decree

Under this Rule, the date which the appellate decree shall bear is the date on which the judgment was delivered. Hence, the date of the decree for purposes of limitation for filing a second appeal is the date on which the judgment is delivered¹ Compare O 20, R. 7, ante.

2 Specification of Relief

The Rule requires that the appellate decree must contain a clear specification of the relief granted. But where the decree did not specify the sum due to the appellant except by reference to the judgment and decree of the lower Court, it was held, that though the decree was informal, as the amount due to the decree-holder was ascertainable from the record, it was capable of execution and execution should be allowed as a matter of equity, the defect in the decree being due to the mistake of the officers of the Court². As to the construction of the appellate decrees, see the undermentioned cases²

Order 41 Rule 35—Note 1

1 (1830) 12 All 79 (31)

Note 2

1 (1831) 13 All 343 (344 345)

2 (1905) 29 Mad 84 (86) Decree omitting to reserve rights of prior mortgages admitted by all the parties to the suit—Decree should be construed

3 Costs

See generally S 35 and the notes thereon The appellate decree must provide for costs of the appeal as well as of the suit¹ As regards the costs of the appeal, the appellate decree must state the amount of costs incurred by either party in the appellate Court. A party cannot recover any sum as costs of the appeal if it is not entered in the decree² But the amount³ or particulars⁴ of the costs incurred in the lower Court need not be specified in the appellate decree and the same may be ascertained from the lower Court's decree⁵

The appellate Court must finally determine by which of the parties the costs are to be paid. It cannot declare that the costs shall be borne by the party who will be unsuccessful in a suit to be hereafter brought⁶

The appellate Court can deprive a successful party of his costs for sufficient reasons. Thus where a decree is confirmed on grounds wholly different from those on which it was based by the lower Court the appeal may be dismissed without costs.

4 Decree in appeal supersedes that of the lower Court

*See S 38 Note 5 and S 148, Note 9 and the undermentioned case*¹

5 Court fee

S 33 of the Code provides, that after judgment a decree shall follow. In the undermentioned case¹ it was held by Oldfield, J., that even after the disposal of the appeal and pending the preparation of a decree, a Court had power to direct the plaintiff-appellant to correct the valuation and to pay additional Court-fee. The reason given was that the collection of Court-fees was no part of a Judge's functions in the trial of a suit which can be said to

1887) with reference to the admission

6 (1875) 23 Suth W R 89 (90)
7 (1860) 8 Moo Ind App 170 (192) (P C)

Note 4

1 (1900) 23 Mad 60 (67) Appellate decree is the only executable decree

Decree to be amended is the appellate decree and appellate Court alone can amend

(1894) 18 Mad 214 (216) (F B)

(1865) 2 Bom H C R (1 C J) 101 (102)

(1910) 5 Ind Cas 304 (304) (Cal)

(1832) 6 Mad 43 (46 47) Appeal withdrawn — Lower Court's decree is the executable decree

(1867) 1 All 293 (295) Time fixed for performance of act directed by decree runs from appellate decree

(1869) 70 5 Mad H C R 215 (223) (Do)

(1920) 1920 L B 118 (121) 10 L B R 280 Appellate decree should embody so much of the lower Court's decree as it is intended to affirm so as to avoid the necessity of reference to

done under orders contradictory of the final order in the suit

Note 3

1 [See (1871) 16 Suth W R 266 (267)]

2 (1912) 15 Ind Cas 828 (829) 5 Sind L R 254

(1870) 13 Suth W R 23 (23 24)

But compare (1871) 15 Suth W R 530 (530)

3 (1874) 21 Suth W R 74 (74)

4 (1872) 18 Suth W R 286 (286)

5 (1900) 5 Ind Cas 312 (343) (Cal)

Executing Court can construe it with reference to pleadings.

Note 5

1 (1855) 7 All 528 (534) Mahmood J, contra

5. have ceased with its determination, and that the Court-Fees Act fixes no time for the collection of Court-fees.

6 Chartered High Courts

This Rule does not apply to Chartered High Courts in the exercise of their appellate jurisdiction (*See* O 49, R. 3).

7 Form of appellate decree—*See* Appendix G Form No 9

6 **R. 36.** [S 580] Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the Appellate Court and at their expense
 Copies of judgment and decree to be furnished to parties
 [1877—S 580; 1859—S 360]

7. **R. 37.** [S 581] A copy of the judgment and of the decree, certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits
 Certified copy of decree to be sent to Court whose decree appealed from
 [1877—S 581; 1859—S. 361]

Local Amendments

ALLAHABAD

Delete the words 'and shall be filed with the original proceedings in the suit in lines 5 and 6 of the Rule

Add a new paragraph as follows —

Where the appellate Court is the High Court the copies aforesaid shall be filed with the original proceedings in the suit'

Add the following as R 38 —

- 38 (1) An address for service filed under O 7, R 19 or O 8, R 11, or subsequently altered under O 7 R 24 or O 8, R 12, shall hold good during all appellate proceedings arising out of the original suit or petition
- (2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the appellate Court to such addresses
- (3) Rules 21 22 23 and 24 of O 7 shall apply, so far as may be, to appellate proceedings "

BOMBAY

The following shall be added as R 38 —

- 8 38 (1) An address for service filed under O 7, R 19, or O 8, R 11 subsequently altered under O 7 R 24 or O 8 R 12 shall
 Address for service
 filed to hold good during
 appellate proceedings

- (2) Every memorandum of appeal the opposite parties in the Court below and notices and processes shall issue from the appellate Court to such addresses

(3) Rules 22, 23 and 24 of O 7 shall apply, so far as may be, to appellate proceedings'

LAHORE

8 The following shall be added as R 38 in O 41 —

- 38 (1) An address for service filed under O 7 R 19, or O 8, R 11, or subsequently

altered under O 7 R 24 or O 9 R 12 shall hold good during all appellate proceedings arising out of the original suit or petition

(7) Fv

(3) Rules 21 22 23 24 and 25 of O 7 shall apply so far as may be to appellate proceedings

N W F P

Add the following Rules —

- 38 (1) An address for service filed under O 7 R 19 or O 8 R 11 or subsequently altered under O 7 R 22 or O 8 R 12 shall hold good during all appellate proceedings arising out of the original suit or petition
- (2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below and notices and processes shall issue from the appellate Court to such addresses
- (3) Rules 21 and 22 of O 7 shall apply so far as may be to appellate proceedings "

POUDH

Add the following as R 38 —

- 38 (1) An address for service filed under O 7 R 19 or O 8 R 11 or subsequently altered under O 7 R 22 or O 8 R 12 shall hold good during all appellate proceedings arising out of the original suit or petition
- (2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below and notices and processes shall issue from the appellate Court to such addresses
- (3) Rules 21 22 23 and 24 of O 7 shall apply so far as may be to appellate proceedings

PATNA

Add the following Rule —

- 38 (1) An address for service filed under O 7 R 19 or O 8 R 11 or subsequently altered under O 7 R 22 or O 7 R 12 shall hold good for all notices of appeals and all appellate proceedings arising out of the original suit or petition
- (2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below and notices and processes shall issue from the appellate Court to such addresses
- (3) Rules 21 and 22 of O 7 shall apply, so far as may be to appellate proceedings

SIND

Add the following as R 38 —

- 38 (1) An address for service filed under O 7 R 19 or O 8 R 11, subsequently altered under O 7 R 24 or O 8 R 12 shall hold good during all appellate proceedings arising out of the original suits or petition subject to any alteration under sub rule (3)
- (2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below and notices and processes shall issue from the appellate Court to such addresses
- (3) Rules 22 23 and 24 of O 7 shall apply so far as may be to appellate proceedings

MADRAS

After O 41 insert the following as Orders 41 A and 41 B —

' ORDER XLII

Appeals to the High Court from Original Decrees of Subordinate Courts.

1 The rules contained in O 41 shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this Order

2. (1) The memorandum of appeal shall be accompanied by the prescribed fees for service of notice of appeal and the receipt of the accountant of the Court for the sum prescribed by the rules of Court

(2) Notwithstanding anything contained in R 22 of O 41 the period prescribed for entry of appearance by the respondent and filing by him of memorandum of cross objections, if any, shall unless otherwise ordered be thirty days from the service of notice upon him

3 (1) If the respondent intends to appear and defend the appeal he shall within the period specified in the notice of appeal enter an appearance by filing in Court a memorandum of appearance

(2) If a respondent fails to enter an appearance within the time and in the manner provided by the sub rule above he shall not be allowed to translate or print any part of the record

Provided that a respondent may apply by petition for further time, and the Court may thereupon make such order as it thinks fit, the application shall be supported by evidence to be given on affidavit as to the reason for the applicant's default, and notice thereof shall be given to the appellant and all parties who have entered an appearance Unless otherwise ordered the applicant shall pay the costs of all parties appearing on the application

4 (1) The memorandum of appeal and the memorandum of appearance shall state an address for service within the City of Madras at which service of any notice order or process may be made on the party filing such memorandum

(2) If a party appears in person, the address for service may be within the local limits of the jurisdiction of the Court from whose decree the appeal is preferred

Provided that if such party subsequently appears by a pleader he shall state in the vakalat an address for service within the City of Madras, and shall give notice thereof to each party who has appeared

(3) If a party appears by a pleader, his address for service shall be that of his pleader, and all notices to the party shall be served on his pleader at that address

5 The Court may direct that service of a notice of appeal or other notice or process shall be made by sending the same in a registered cover prepaid for acknowledgment and addressed to the address for service of the party to be served which has been filed by him in the lower Court Provided that, after a party has given notice of an address for service in accordance with Rule 4 service of any notice or process shall be made at such address

6. All notices and process, other than a notice of appeal, shall be sufficiently served if left by a party or his pleader, or by a person employed by the pleader, or by an officer of the Court between the hours of 11 a m and 5 p m at the address for service of the party to be served

7 Notices which may be served by a party or his pleader under Rule 6, or which are sent from the office of the Registrar may, unless the Court otherwise directs, be sent by registered post, and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof and the posting thereof shall be a sufficient service

8 If there are several respondents, and all do not appear by the same pleader, they shall give notice of appearance to each of the other respondents as appear separately.

9 A list of all cases in which notice is to be issued to the respondent shall be affixed to the Court notice board after the case has been registered

10 (1) If upon a case being called on for hearing by the Court, it appears that the record has not been translated and printed in accordance with the rules of the Court the Court may hear the appeal or dismiss it, or may adjourn the hearing and direct the party in default to pay costs, or may make such order as it thinks fit

(2) If the Court proceeds to hear the appeal, it may refuse to read or refer to any part of the record which is not included in the printed papers

11 When costs are awarded unless the Court otherwise orders the costs of a party appealing upon any application before the Registrar or the Court shall be Rs 10 and the cost of appearing when the appeal is in the daily cause list for final hearing and is adjourned shall be Rs 30 At the request of any party the Registrar shall cause the order to be drawn up and the said cost to be inserted therein

Memorandums of objections

12 (1) If the acknowledgment mentioned in R 22 (3) of O 41 is not filed the respondent shall together with the memorandum of objections file so many copies thereof as there are parties affected thereby

(2) The prescribed fees for service shall be presented together with the memorandum to the Registrar

13 If any party or the pleader of any party to whom a memorandum of objections has been tendered has refused or neglected for three days from the date of tender to give the acknowledgment mentioned in R 22 (3) of O 41, the respondent may file an affidavit stating the facts and the Registrar may dispense with service of the copies mentioned in R 12 (1)

14 Rule 31 of O 41 shall not apply to the High Court If judgment is given orally a shorthand note thereof shall be taken by an officer of the Court and a transcript made by him shall be signed or initialled by the Judge or by the Judges concurring therein after making such corrections as may be considered necessary

ORDER XLII B

Letters Patent Appeals

1 The Rules of O 41 A shall apply, so far as may be, to appeals to the High Court of Madras under Cl 15 of the Letters Patent of the said Court

Provided that it shall not be necessary to file copies of the judgment and decree appealed from

2 Notice of the appeal shall be given in manner prescribed by O 41 A, R 6, or if the party to be served has appeared in person in manner prescribed by R 5 of the said order "

ORDER XLII.

APPEALS FROM APPELLATE DECREES.

Local Amendments.

MADRAS

Substitute the following for O 42 —

' ORDER XLII.

Appeals from appellate decrees

1 The rules of O 41 and O 41 A shall apply, so far as may be, to appeals to the High Court of judicature at Madras from appellate decrees with the modifications contained in this Order

Provided that in appeals from appellate decrees the memorandum of appeal shall be accompanied by a copy of the decree appealed from and four printed copies of the judgment on which it is founded, one of them being a certified copy, and also four printed copies of the judgment of the Court of first instance one of them being a certified copy,

2 (1) The memorandum of appeal shall be printed or typewritten and shall be accompanied by the following papers —

One certified copy of the decrees of the Court of first instance and of the appellate Court and four printed copies of each of the judgments of the said Courts, one copy of each judgment being a certified copy,

(2) If any ground of appeal is based upon the construction of a document, a printed or typewritten copy of such document shall be presented with the memorandum of appeal

Provided that if such document is not in the English language and the appellant appears by a pleader an English translation of the document certified by the pleader to be a correct translation shall be presented,

(3) If the appellant fails to comply with this Rule the appeal may be dismissed "

1 *Procedure* **R. 1. [S. 587.]** *The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees.*

[1877—S. 587; 1859—S. 37]

Local Amendments

ALLAHABAD.

Substitute the following for R 1 —

"1 The rules of O 41 shall apply, so far as may be, to appeals from appellate decrees subject to the following provisions —

' It shall not be necessary for an appellant in a second appeal to produce a copy of the judgment of the Court of first instance or any judgment other than the judgment on which the decree appealed against may be founded and the record of the case shall be sent for at the expense of the appellant '

Synopsis

Procedure applicable to second appeals	Note No 1	Inherent power of remand—See O 41, R 23 ante.	Note No 3
Amendment of the Rule	2		

1. Procedure applicable to second appeals

The Rules relating to first appeal apply, so far as may be, to second appeal also. See the various Rules of O 41 and the notes thereon and also the cases cited below¹

2. Amendment to the Rule

See the following cases¹ bearing upon the amendments of the Rule by the High Courts of Allahabad and Lahore

3. Inherent power of Remand—See O 41 R 13 ante

Local Amendments

LAHORE

Add the following as R. 2—

2. In addition to the copies specified in O 41 R 1 the memorandum of appeal shall be accompanied by a copy of the judgment of the Court of first instance unless the appellate Court dispenses therewith

ORDER XLIII

APPEALS FROM ORDERS

R. 1. [S 588] An appeal shall lie from the following orders under the provisions of section 104, namely.—

(a) an order under Rule 10 of Order VII returning a plaint to be presented to the proper Court;

(b) an order under Rule 10 of Order VIII pronouncing judgment against a party;

(c) an order under Rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(d) an order under Rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte*;

(e) an order under Rule 4 of Order X pronouncing judgment against a party;

(f) an order under Rule 21 of Order XI,

Order 42 Rule 1—Note 1

- 1 (1927) 1927 Lah 912 (J14) Every second appeal must be accompanied by a copy of the decree of lower appellate

filed under S 100 of this Code—In a second appeal under S 12 of the Oudh Courts Act respondent is not entitled as of right to file cross ob-

C P C 317 & 348

section

Note 2

- 1 (1918) 1918 All 389 (300) 40 All 1 (F B)
Copy of the judgment of trial Court should be filed along with the memorandum of second appeal
(1921) 67 Ind Cas 610 (Lah) (Do)
(1926) 1926 Lah 638 (638) (Do)
(1926) 1926 Lah 626 (626) (Do)
(1921) 1921 Lah 73 (78) 2 Lah 227 (Do)
(1921) 1921 All 242 (243) (Do)
(1921) 1921 All 23 (23) 43 All 660

(g) an order under *Rule 10 of Order XVI* for the attachment of property ,

(h) an order under *Rule 20 of Order XVI* pronouncing judgment against a party ,

(i) an order under *Rule 34 of Order XXI* on an objection to the draft of a document or of an endorsement ,

(j) an order under *Rule 72 or Rule 92 of Order XXI* setting aside or refusing to set aside a sale ,

(k) an order under *Rule 9 of Order XXII* refusing to set aside the abatement or dismissal of a suit

(l) an order under *Rule 10 of Order XXII* giving or refusing to give leave ,

(m) an order under *Rule 3 of Order XXIII* recording or refusing to record an agreement, compromise or satisfaction ,

(n) an order under *Rule 2 of Order XXV* rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ,

(o) an order under *Rule 2, Rule 4 or Rule 7 of Order XXXIV* refusing to extend the time for the payment of mortgage money ,

(p) orders in interpleader suits under *Rule 3, Rule 4 or Rule 5 of Order XXXV* ,

(q) an order under *Rule 2 Rule 3 or Rule 6 of Order XXXVIII* ,

(r) an order under *Rule 1, Rule 2, Rule 4 or Rule 10 of Order XXXIX* ,

(s) an order under *Rule 1 or Rule 4 of Order XL* ,

(t) an order of refusal under *Rule 19 or Order XLI* to admit, or under *Rule 21 of Order XLI* to rehear, an appeal ,

(u) an order under *Rule 23 of Order XLI* remanding a case, where an appeal would lie from the decree of the Appellate Court ,

(v) an order made by any Court other than a High Court refusing the grant of a certificate under *Rule 6 of Order XLV* ,

(w) an order under *Rule 4 of Order XLVII* granting an application for review

Local Amendments

ALLAHABAD

Rule 1 (u) For the words "an order under Rule 23 of Order 41" read "any order"

BOMBAY

Rule 1 (w) of Order 43 shall be deleted

CALCUTTA

Insert the following after Clause (1) —

(1) (n) an order under Rule 57 of Order XXI directing that an attachment shall cease or directing or omitting to direct that an attachment shall continue"

MADRAS

Substitute the following for Rule 1 (d) of Order —

(d) an order under Rule 13 or Rule 15 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree or order passed ex parte"

ODDH.

In Rule 1 (u) for the words "an order under Rule 23 of Order 41" read "any order"

RANGOON

Add the following between Clauses (i) and (j) —

(ii) a garnishee order under Rule 63 C or Rule 63 E and an order as to costs in garnishee proceedings under Rule 63 G of Order 21

SIND

1 Substitute the words "any order" for the words "an order under Rule 23 of Order XXI" appearing in Clause (u) of Rule 1 of Order XLIII of the Code of Civil Procedure

1 Appeals from Orders

See Ss 104 and 105 See also the notes under the various Rules referred to in the several clauses of this Rule

2 Clause (a) Order returning plaint for presentation to the proper Court

See O 7, R 10, Note 11 and the following cases¹

3 Clause (c) Order rejecting application under O 9 R 9 to set aside dismissal of suit

This clause refers to an order rejecting an application to restore a suit dismissed for default. Hence where an application to restore a suit dismissed for default is itself dismissed for default the order of dismissal is not appealable under this clause¹

4 Clause (d) Order rejecting application for setting aside ex parte decree—See also O 9 R 13 Note 29

This clause refers to an order rejecting an application to set aside an ex parte decree. No appeal lies from an order allowing an application for setting aside an ex parte decree¹ Nor does an appeal lie from an order rejecting an application to set aside an ex parte order² See also Note 7 to S 141 ante

5 Clause (j) Order setting aside or refusing to set aside a sale

See O 21, R 89, Note 29, R 90, Note 50 and R 92, Note 13 and the undermentioned cases¹

Order 43 Rule 1—Note 2

1 (1918) 1918 Lah 116 (117) Appeal lies from order returning plaint to be presented to proper Court

(1921) 1921 All 177 (177) No appeal lies from order of District Judge returning a memorandum of appeal for presentation to proper Court

(1930) 1330 Lah 832 (833)

Note 3

1 (1932) 1332 Nag 101 (102) 28 Nag L R 83 Overruling 1933 Nag 293

Note 4

1 (1916) 34 Ind Cas 702 (702) (Oudh) Ex

parte decree in resumption suit under Oudh Rent Act—Ex parte decree set aside—No appeal lies under the Code—But order is appealable under Oudh Rent Act

2 (1909) 1909 L B R 703 (204) F B Order under O 21 R 60

(1912) 15 Ind Cas 975 (925) 39 Cal 393 Order under Land Acquisition Act not amounting to a void

Note 5

1 (1908) 4 Mad L Tim 96 Order under R 92 of O 21, or one refusing to set aside

6 Clause (l) Order under O 22 R. 10

See O 22, R 10, Note 20 and the undermentioned case ¹

7 Clause (m) Order recording or refusing to record compromise

See O 23, R 3, Note 31 and the cases cited below ¹

8 Clause (q) Order under Order 38

An unconditional order of attachment before judgment can only be passed under O 38 R 6 and not R 5. Hence, where a Judge proposes to pass an *unconditional* order of attachment under R 5 the order must nevertheless be treated as one under R 6 and will therefore be appealable under this clause ¹

9 Clause (r) Orders under Order 39

This clause allows an appeal against an order passed under O 39 R 1, R 2, R 4 or R 10 ¹. But no second appeal lies against such an order ² (See S 104 (2))

10 Clause (s) Orders under O 40 R 1 or R 4

See Notes under O 40, R 1 and 4 and the undermentioned cases ¹

11 Clause (t) Order rejecting application to restore appeal

See the undermentioned case ¹

12 Clause (u) Order of remand under O 41 R 23

See Notes O 41 R 23 and the undermentioned cases ¹

a sale under R 89 of that Order is appealable

(1933) 1933 Lah 210 (210) An order confirming the sale amounts to a refusal to set aside the sale and hence is appealable

Note 6

1 (1906) 2 Nrg L R 178 (179) Case under old Code

Note 7

1 (1925) 1925 C L 921 (922) Order refusing to accept arbitrator's award is not order refusing to record compromise and no appeal lies.

(1935) 1935 All 738 (739) No second appeal lies

(1933) 1

orders under O 43 R 1

(1933) 1933 Cal 91 (95) Appeal from order under O 23 R 3—Decree made before presentation of appeal—Appeal is still competent

Note 8

1 (1928) 1928 Lah 445 (445)

Note 9

1 (1933) 1933 Lah 203 (205) Order refusing to discharge an injunction issued under O 43 R 2 is appealable

(1933) 1933 All 86 (86) Appeal lies from order refusing to grant temporary injunction

(1931) 1931 Lou 509 (510) Order refusing to commit for contempt for disobeying temporary injunction—Appeal lies

(1931) 1924 Mad 857 (857 858) No appeal against order issuing notice on an application for temporary injunction under O 39 R 3

2 (1885) 1885 Bom P J 72 (72)

Note 10

1 (1904) 1904 Lun Re No 26 Order of Court accepting amount stated by the Receiver to have been realised by him and referring decree holder to a suit for the decision of his claim against Receiver is not appealable under this clause

(1933) 1933 Lah 216 (216) Order giving receiver direction to restore property is not appealable

(1933) 1933 Mad 570 (572) 56 Mad 915 Cl 15 of Letters Patent is not controlled by C P Code. An appeal therefore lies against decision of a Judge of the High Court passed in appeal from an order under O 40 R 1

(1931) 1931 Nag 64 (64) No appeal lies

(1933)

Note 11

1 (1931) 1931 All 33 (34) 59 All 516 Order refusing to restore revenue appeal—Such order is order passed in appeal within the meaning of Agra Tenancy Act s 24 and is open to appeal

Note 12

1 (1890) 11 Bom 14 (17) Court hearing an appeal against order of remand is

Procedure

R. 2. [S. 590.] The *Rules of Order XLI* shall apply, so far as may be, to appeals from

orders.

[1877—S 590; 1859—S 366—See S 108, Cl (b)]

Local Amendments

MADRAS

Substitute the following for R 2 —

- 2 The Rules of O 41 and of O 41 A shall apply so far as may be to appeals from the orders specified in R 1 and other orders of any civil Court from which an appeal to the High Court is allowed under any provision of law

Provided that in the case of appeals against interlocutory orders made prior to decree the Court which passed the order appealed from shall not send the records of the case unless an order has been made for stay of further proceedings in that Court "

ALLAHABAD

Add the following as R 3 —

- 3 In every appeal under R 1 in every miscellaneous case and in every suit dismissed for default a formal order shall be drawn up stating clearly the determination of the appeal or case the costs incurred and the parties if any by whom such costs are to be paid

MADRAS

Add the following as R 3 —

- 3 (1) The provisions of O 42 shall apply so far as may be to appeals from appellate orders
(2) A memorandum of appeal from an appellate order shall be accompanied by a certified copy of the judgment and of the order of the Court of first instance and by a certified copy of the judgment and of the order of the appellate Court
(3) If any ground of appeal is based upon the construction of a document a printed or typewritten copy of such document shall be presented with the memorandum of appeal

not restricted to the consideration of the form of the order but may examine it on its merits

- (1934) 1334 All 450 (455) It is only where the entire case has been remanded
re
ly is

Court
and
ly—

Appeal to High Court against the order lies under O 43 R 1

- (1934) 1334 Lah 307 (308) Order of remand—Case disposed of by trial Court on one issue only—Appeal lies

- (1933) 1333 Lah 610 (616) No distinction is made between partial and total remand and an appeal lies even though a portion of order of remand only is challenged

- (1933) 1333 Oudh 191 (192) 8 Luck 676 An appeal against an order of remand should be filed only as a miscellaneous appeal under O 43 R 1

- (1933) 1333 Oudh 350 (351) No appeal lies where the order of remand is purported to be under O 41 R 25

- (1933) 1333 Oudh 233 (234) Order under O 41 R 25—No appeal lies

- (1933) 1333 Cal 436 (437) 37 Cal W N 190 (191) No appeal lies where the order

of remand is purported to be made under O 41 R 25

- (1927) 1327 All 496 (496) Order of remand passed by lower appellate Court under inherent powers under S 101 before the amendment of Cl (u) into its present form by the Allahabad High Court is not appealable

- (1930) 1330 Oudh 365 (368) Amendment of rule by Allahabad High Court—Appeal lies against order of remand under inherent power

- (1911) 10 Ind Cas 819 (813) Remand under O 41 R 23—Appeal lies

- (1919) 1919 Pat 478 (479) Case disposed of on merits—Appeal—Appellate Court reversing decision on merits and remanding case—Further appeal—*valorem* court fee to be paid

- (1928) 111 Ind Cas 789 (Oudh) Order of remand passed in appeal against appealable order—Appeal against order of remand not competent

- (1928) 111 Ind Cas 796 (Lah) Order of appeal is not *interlocutory*—mere fact that the order is *interlocutory* carried out by the trial Court

- (1931) 1931 Lah 497 Order of remand—Order set aside—Appeal lies—Appeal is not under R 25 if it is *interlocutory* appeal lies

Provided that, if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader to be a correct translation shall be presented "

1. OUDH

Add the following as R. 3 —

"3 In every appeal under R. 1, in every miscellaneous case, and in every suit dismissed for default, a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred and the parties, if any, by whom such costs are to be paid "

ORDER XLIV.

PAUPER APPEALS.

1. **R. 1.** [S. 592.] Any person entitled to prefer an appeal, who is unable to pay the fee required² for the memorandum of appeal, may present an application accompanied by a memorandum of appeal,³ and may be allowed to appeal as a pauper, subject, in all matters, including the presentation⁵ of such application, to the provisions relating to suits⁴ by paupers, in so far as those provisions are applicable :

Who may appeal as pauper
 Procedure on application for admission of appeal
 Provided⁶ that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.
 [1877—S. 592 ; 1859—Ss. 369, 370.]

Local Amendment.

ALLAHABAD

Add another proviso as follows

"Provided further that no application under this Rule shall be allowed unless a notice of the application has been given to the proposed respondents "

Synopsis

	Note No		Note No
Legislative changes	1	Power to grant time for payment of Court fee	7
'Who is unable to pay the fee required'—See Notes to O 33, R 1, ante		Power to order security for costs—See O 41 R 10	8
Application accompanied by a memorandum of appeal	3	Cross objection or cross appeal by a pauper respondent—See Notes to O 41, R 22	9
Subject to the provision relating to suits by paupers	4	Appeal	10
In all matters including the presentation of such application	5	Letters Patent appeal	11
Proviso to the Rule	6	Privy Council appeal	12
		Limitation	13
		Revision	14

1 Legislative changes

1 The words 'under the Code or any other' after the words 'Any person entitled'

2 The words "including the presentation of such application" so as to override the decision in I.L.R. 26 Mad 369 (See Note G, *infra*) This order does not apply to appeals under the Agra Tenancy Act (III of 1926) and the Madras Estates Land Act (I of 1903)

2. 'Who is unable to pay the fee required'—See Notes to O 33 R 1 *ante*

3 Application accompanied by a memorandum of appeal

Unlike the plaint in a pauper *suit* which forms an integral portion of the pauper application itself the application for leave to *appeal* as a pauper is a distinct document from the memorandum of appeal accompanying the application. The memorandum of appeal itself cannot be treated as an application for leave to appeal as a pauper¹

4 Subject to the provision relating to suits by paupers

The granting of leave to appeal as a pauper is subject to the provisions relating to suits by paupers as provided in O 33. Thus if the appellant has entered into an agreement with reference to the subject-matter of the appeal¹ or has not stated with the utmost good faith, in his application, the whole of his assets² then his application for leave to appeal is liable to be rejected.

The application for leave to appeal as a pauper should be verified at its foot as required by O 33 R 2³. But though it is not so verified if it is accompanied by an affidavit in which the statements contained in the application are stated to be true and there is no falsehood or concealment in the application the Rule will be deemed to have been sufficiently complied with⁴. It has been held that the presentation of an application under this Rule without a list of properties as required by R 2 is not invalid and the same could be supplied after the limitation period⁵.

5 In all matters including the presentation of such application

In the absence of these words in the corresponding section of the old Code it was held by the High Court of Madras¹ that the Rule as to presentation in person by a pauper applicant now contained in O 33 R 3 did not apply to pauper *appellants*. It is now clear that the application should be presented in the same manner as the case of a person *suing in forma pauperis* *et c.*, in person. But a pardanashin lady is however exempted from personal appearance under S 132 of the Code and therefore she need not present the application to appeal in *forma pauperis* in person². It has been held by the Chief Court of Oudh that the *memorandum of appeal* need not be presented in person³.

6 Proviso to the Rule

The proviso is mandatory¹. In *Sakhu Bai v Ganpat*, I L R 28 Bom 451, Jenkins C J, observed as follows—

Order 44 Rule 1—Note 3

L (1915) 1315 All 310 (311)

[But see (1869) 1 All H C R 246]

Note 4

1 (1930) 122 Ind Cas 831 (831) (Pat)

(1904) 30 Mad 547 (549)

2 (1930) 1930 Pat 368 (363)

3 (1908) 11 Oudh Cas 19 (20)

4 (1923) 1923 Lah 684 (684)

5 (1869) 1869 Pun Re No 19 page 114

Note 5

1 (1903) 26 Mad 369 (370)

[But see (1874) 21 Suth W R 303

(303)

² (1902) 24 All 172 (173) (1885) 8 Mad 501 (503)

3 (1926) 1926 Oudh 13 (14)

N 6

ag 92

from

unably

also falls

within the proviso

(1932) 1932 All 712 (712) Applicant entitled to be heard only if Judge after reading judgments thinks it to be wrong

That proviso is a very necessary safeguard introduced by the legislature for the benefit of litigants who find themselves opposed by paupers and in our opinion the Court should be careful to see that the proviso is satisfied. It is to be noticed that the Court must come to its conclusion upon a perusal only of *application, the judgment* and the decree. This proviso is apt to be overlooked, but it would provide a safeguard against this, if the Judge or Bench admitting a pauper appeal were to express and record very briefly the reasons for granting leave so that the Bench before whom the appeal ultimately comes may have an assurance that the leave was properly given."

A party cannot therefore be allowed to appeal as pauper unless the decree appealed from appears to be contrary to law or to some usage having the force of law or is otherwise erroneous or unjust.² But unlike R 11 of O 41 which empowers the Court to call for the *records*, the Court is restricted under this proviso to a perusal of the *judgment* and *decree* appealed against and has no discretionary power to go into the *record*.³ The High Courts of Allahabad,⁴ Patna⁵ and Lahore⁶ have held that a mere issue of a notice to the respondent under App G, Form No 11 is no ground for holding that the Court is satisfied as to the conditions laid down in the proviso, and that the respondent appearing in answer to the notice is entitled to urge that the application should be rejected on the ground that the conditions of the proviso have not been satisfied. The High Court of Madras⁷ has, on the other hand, held that a notice issued to the respondent under Form No 11 is only to state the objections of the respondent in respect of the pauperism of the applicant, and that the respondent has no *locus standi* to urge at that stage that the proviso is not satisfied.

7. Power to grant time for payment of Court fee

The rejection of an application for leave to appeal as a pauper does not *ipso facto* carry with it the rejection of the memorandum of appeal filed

2 (1925) 1925 Lah 301 (391)

(1933) 1933 Mad 519 (520) 56 Mad 323 The mere fact that the appellant has a *prima facie* good case is not enough 1931 Mad 138 (198) 53 Mad 245 Dismissed from

(1920) 1920 Mad 230 (231)

(1910) 1930 Pat 142 (143) Decree altered in material particular by successor of Judge—Leave can be granted

(1896) 1896 All W N 31 (34)

[See also (1933) 1935 Pesh 22 (23) It is not necessary that the Court should discuss every ground in its order rejecting an application to file appeal in *forma pauperis*]

[See also (1935) 1935 Mad 51 (52) 58 Mad 208 Appeal in *forma pauperis* from decree of Agency Sub-Judge—Though the Code is not applicable to the Agency Tracts leave of Court to appeal as a pauper is necessary and appeal cannot be admitted as a matter of course]

195 The entitled to urge the same ground [But see (1933) 1933 All 925 (925) 56 All 268 Overruled in 1934 All 1001 (F B)] [But see (1933) 1933 All 11 (12) 54 All 304 (Do)]

5 (1931) 1931 Pat 183 (184 185) (F B) Overruled in 1924 Pat 791 1923 Pat 118 1929 Pat 27 and 1929 Pat 31

52.

7

3 (192) 1925 Rang 249 (250)

(1910) 8 Ind Cas 376 (377) 13 Oudh Cas

along with it¹ The memorandum of appeal is a separate document before the Court which remains for disposal after the rejection of the application and the Court has power under S 149 of the Code to give further time for the payment of the requisite Court-fee stamp and admit the appeal² The memorandum of appeal though originally unstamped is not a nullity and can be validated with effect from the date of the presentation by the payment of the Court fee³ The appellate Court can also, in a fit case, excuse the delay under S 5 of the Limitation Act and admit the appeal after the expiry of the limitation on payment of the full Court fee⁴ But where the application for leave to appeal as a pauper is itself filed after the period of limitation has expired the subsequent payment of Court fee will not validate the appeal under any circumstances^{4a}

As to the Court's powers to order the payment of Court-fees after the disposal of the appeal see the following cases⁵

8 Power to order security for costs—S O 41 R 10

9 Cross objection or cross appeal by a pauper respondent See Notes to O 41 R 22

10 Appeal

An order under this rule is not appealable either under S 104 or under O 43 R 1¹ As to the maintainability of a Letters Patent Appeal see next note

11 Letters Patent Appeal

It was held by the High Court of Allahabad¹ and Madras² in cases decided under the old Code that an order rejecting an application under this rule was not appealable under Cl 15 of the Letters Patent The decisions of the Madras High Court abovementioned were however dissented from in a later Full Bench case of the same High Court,³ though the point for decision in the Full Bench was not with reference to an order under this rule In a

Note 7

1. (1916) 1918 Mad 10 9 (1040) 40 Mad 687
(1935) 122 All 620 (626) But if application under this Rule is made without

(1891) 13 All 305 (308) 1891 All W N 99
(1932) 1932 Oudh 343 (344) Court fee is the

- 2
(1898) 22 Lom 849 (857 861)
(1891) 21 Lom 5 6 (5 9)
(1909) 4 Ind Cas 896 (897) 1909 Pun Re No 94
(1926) 126 Oudh 13 (14)
(1906) 6 G All 329 (331)
[See (1925) 1935 Pesh 22 (23) But Court is not bound to grant the time]
[But see (1930) 1935 Rang 336 (339) 13 Rang 30]
3 (1922) 1922 Lah 225 (226) 3 Lah 35
(1916) 1916 L B 124 (124)
[But see (1916) 1916 L B 58 (59) Even in the case of an appeal in *forma pauperis*]

application for leave to appeal in *forma pauperis*—Rejection as being presented beyond time is only order rejecting motion to present application and not order rejecting application itself under O 44 R 1—Subsequent application under S 5 Limitation Act is not maintainable as no appeal is pending]
(1906) 106 Pun Re No 78
5 (1920) 1925 Mad 780 (787)
(1894) 18 Bom 464 (467)

Note 10

- 1 [See also (1870) 18 O Pun Re No 62.]

Note 11

- 1 (1899) 11 All 375 (377)
2 (1903) 26 Mad 437 (438)
(1886) 9 Mad 447 (447)
3 (1910) 8 Ind Case 540 (547) 35 Mad 1

- 1, recent case⁴ the Madras High Court without definitely deciding the question as to the appealability or otherwise under Cl 15 of the Letters Patent, refused to interfere in appeal on the ground that the matter is one of exercise of discretion by the Court See also S 104 Note 6

12 Privy Council Appeal

This rule contemplates the appellate Court perusing the judgment of a *subordinate* Court, and not the Court where judgment is appealed from perusing its own judgment¹ O 44 does not therefore apply to appeals to His Majesty in Council and the High Court has no jurisdiction to grant leave to appeal in *forma pauperis* to the Privy Council² But the petitioner may apply in England for such leave in accordance with the rules that govern such applications³

13 Limitation

Under Art 170 Schedule I of the Limitation Act the period of limitation for presenting an application for leave to appeal in *forma pauperis* is 30 days from the date of the decree appealed against¹

14 Revision

See Note 26 to S 115 and the undermentioned cases¹

- 2 **R. 2.** [S 593] The inquiry into the pauperism of the applicant may be made either by the Appellate Court or under the orders of the Appellate Court by the Court *from* whose decision the appeal is preferred

Inquiry into pauperism

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court *from* whose decree the appeal is preferred, no further inquiry in respect of his pauperism shall be necessary, unless the Appellate Court sees cause to direct such inquiry

1 Inquiry into pauperism

If the pauper applicant-appellant had been allowed in the trial Court to sue as a pauper no fresh inquiry as regards his pauperism is necessary unless the appellate Court sees reason to require it Otherwise enquiry into his pauperism is necessary and such enquiry may be made by the appellate Court itself or under its direction, by the trial Court In the latter case, the report of the trial Court as regards pauperism does not operate as a final disposal of the application, and does not affect the power of the appellate Court to consider and decide whether leave should or should not be granted¹

4 (1926) 19 L M J 606 (606)

N 1

(1895) 19 B n 48 (50)

(1913) 18 Ind Cas 518 (J18) (L 1)

(1890) 12 All 79 (93)

(1890) 12 All 461 (485) (F B)

Note 14

1 (1885) 1830 Pun Re No 21 page 40

(1934) 1934 All 424 (1935) 36 All 500 Ap

pellant allowed to appeal as pauper

—Government pleader not heard—

Order is revisable

Order 44 Rule 2—Note 1

1 (1901) 30 Mad 547 (547)

(14 7) 8 Suth W R 48 (48)

2 (1 12) 12 Ind Cas 122 (122) (Cal)

Note 13

1 (19 5) 1 15 All 310 (311)

ORDER XLV

APPEALS TO THE KING IN COUNCIL

Decree defined **R. 1. [S 594]** In this *Order*, unless there is something repugnant in the subject or context, the expression "decree" shall include a final order
 [1877—S 594 See Ss 109 & 100 *supra*]

Synopsis

Decree	Note No	When appeal lies to the King in Council	Note No
	1		2

1 Decree

The words "decree" shall include a final order have been substituted for the words "decree" includes also judgment and order which occurred in the old Code

As to the meaning of the words "final order" see Note 4 to S 109 and the recent case of *Abdul Rahman v Cassim and Sons*¹ in which their Lordships of the Privy Council re-affirmed the view expressed in *Firm of Ramchand Manjmal v Firm of Govardhandas Vishundas Ratanchand* that the test of finality is whether the order finally disposes of the rights of the parties

2 When appeal lies to the King in Council

See Ss 109 and 110 As to cross appeals see Note 14 to S 110 and the cases noted below¹

Application to Court whose decree complained of **R. 2. [S 598]** Whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is complained of
 [1877—S 598]

Synopsis

Scope of the Rule Appeals in forma pauperis	Note No	Limitation	Note No
	1		3

1 Scope of the Rule

A party desirous of appealing to His Majesty in Council should apply by a petition to the Court whose decree is complained of Where there are two appeals from two decrees although they are decided by a common judgment two separate applications are necessary even though both the decrees were based on one common judgment¹

Where A appeals to the High Court making B a party to the appeal and succeeds in the appeal B is entitled to present a petition for leave to appeal

Order 45 Rule 1—Note 1

- 1 (1933) 1933 P C 58 (60) 11 Rang 58 60
 Ind App 76 (P C)
 2 (1920) 1920 P C 86 (87) 47 Ind App 124
 14 Sind L R 191 47 Cal 918 (P C)

Note 2

- 1 (1854 57) G Moo Ind App 464 (465 466)
 (1859 61) S Moo Ind App 493 (493)
Order 45 Rule 2—Note 1
 1 (19 0) 1920 Pat 267 (2 0)
 (1932) 1932 Lah 441 (442)

2 to the Privy Council and the High Court, in such petition, is not competent to go into the question whether he has any *locus standi* to maintain the application²

2 Appeals in forma pauperis

See Note 13 to O 44, R 1

An order for leave to appeal in *forma pauperis* takes effect from its date and has no effect whatever on costs incurred before that date¹

3 Limitation

An application for leave to appeal to the Privy Council must be filed within 90 days of the date of decree or order appealed from, under Art 179 of the Limitation Act, 1908. Where the decree is modified on review, the time will begin to run from the date of the decree passed on review¹

Where the Court is closed on the last day prescribed for the application it may be presented on the next re opening day². In calculating the period of limitation on the day on which the decree or order appealed from is pronounced or dated should be excluded³. S 12 sub-S (2) of the Limitation Act of 1877 was restricted to applications for leave to appeal as a *pauper* and hence it was held that the time spent in getting a copy of the *decree* could not be excluded in computing the period of limitation⁴. Under the present S 12, sub S (2) of the Limitation Act 1908 such time can be clearly excluded in computing the period of limitation for an application for leave to appeal under this Rule⁵. Sub-S (3) of S 12 of that Act is however not applicable to applications for leave to appeal and therefore the time spent in obtaining a copy of the *judgment* cannot be excluded⁶.

S 6 of the Limitation Act 1908 does not apply to applications for leave to appeal⁷

See also Note 8 to S 109 and the undermentioned cases⁸

3

R. 3. [S. 600] (1) Every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of S. 110, or that it is otherwise a fit one for appeal to *His Majesty* in Council.

(2) Upon receipt of such petition, the Court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted.

[1877—S 600]

2 (1925) 1925 Pat 712 (712)

Note 2

1 (1914) 1914 P C 227 (227) (P C)

Note 3

1 (1924) 1924 Lah 82 (82) 4 Lah 185

2 (1863) 12 South W R 293 (294)

[But see (1863) 1 Long L R (O C) 39 (40) Six months period expiring during holidays — Application for leave made on opening day — Leave could not be given]

18 0; 13 South W R 17 (18) (P C)

59 Cal 251

6 (1926) 1923 All 235 (236)

7 (1895) 18 Mad 484 (485 486)

8 (1920) 1920 Pat 27 (269) Application for copies not filed in time — Time can not be excluded

(1871) 15 South W R 253 (257) Leave granted — Cannot be cancelled subsequently on the ground of limitation.

Local Amendments

BOMBAY

In sub-rule (2) of R 3 of O 45 after the words to show cause why the said certificate should not be granted the following words shall be inserted namely — unless it thinks fit to refuse the certificate

NAGPUR

For sub rule (2) of R 3 of O 45 the following sub rules shall be substituted namely —

- (2) Upon receipt of such petition the Court after sending for the record and after fixing a day for hearing the applicant or his pleader and hearing him accordingly if he appears on that day may dismiss the petition
- (3) Unless the Court dismisses the petition under sub rule (2) it shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted

Synopsis

	Note No		Note No
Legislative changes	1	Ex parte grant of leave to appeal	5
Scope of the Rule	2	Non prosecution of petition	6
Certificate as to fulfilment of the requirements of S 110—See Note 10		Letters Patent Appeal	7
to S 109 and notes to S 110 ante	3	Review	8
Certificate as to fitness	4	Form	9

Other Topics

Notice See Note 1
 Objection to grant of leave See Note 4
 Pts (4) (5) and (6)

Special leave by the Judicial Committee See Note 11 (2)

1 Legislative changes

In sub-rule (2) the words 'shall direct notice' have been substituted for the words 'may direct notice' which occurred in the corresponding section of the Code of 1837

2 Scope of the Rule

This Rule must be read with S 109 Cl (c) and S 110. A party wishing to file an appeal to His Majesty in Council should file a petition to the High Court under this Rule for the issue of a certificate that the case fulfils the requirements of S 110 or is otherwise fit for appeal¹

This Rule does not restrict the power or prerogative of the Judicial Committee to grant *special leave* to appeal See Notes under S 112 *ante* and the following cases² In *Motichand v Ganga Prasad*^{2a} Lord Davey in delivering the judgment of the Board observed as follows — Where a party in an Indian case comes to this Board and asks for special leave to appeal the matter being under the appealable value their Lordships think that he should *first apply to the Court below for a certificate* under the second part of S 600 namely that it is otherwise a fit one for appeal to Her Majesty in Council

3 Certificate as to fulfilment of the requirements of S 110 See Note 10 to S 109 and Notes to S 110 *ante*

4 Certificate as to fitness

It is the *certificate* granting leave to appeal and not the *order* for

Order 45 Rule 3—Note 2

- 1 (1875) 12 Bom H C R 8 (8)
 (1895) Bom P J 462 No fresh vakalatnama

separately

- 2 (1897) 19 All 95 (9) 23 Ind App 167 (P C)
 Special leave granted without security
 (1907) 30 Mad 185 (188) 34 Ind App 93 (P C)
 2a (1901) 24 All 174 (178) 29 Ind App 40 (P C)

such certificate, which the Judicial Committee will consider and act upon and unless the certificate upon which leave to appeal is based is in such a form as to justify that leave, it will be held not to have been properly given¹ In *Radhakrishna Ayyar v Swamunatha Ayyar*² their Lordships of the Judicial Committee pointed out that where an appeal is certified to be otherwise fit it is of the utmost importance that the certificate should on the face of it show clearly the grounds upon which it is based There should be an indication of the nature of the question that is involved in the appeal and that the discretion conferred by S 109, Cl (c) was invoked or was exercised Their Lordships think it should be brought to the attention of the Indian Courts that these certificates are of great consequence, that they seriously affect the rights of litigant parties, and that they ought to be given in such a form that it is impossible to mistake their meaning upon their face Even if the High Court refuses a certificate it is desirable that the reasons for such refusal should be stated³

The respondent can raise a preliminary objection before the Judicial Committee on the ground that the order granting leave is *ultra vires* and that hence the appeal is not maintainable⁴ But objection as to valuation, should be taken at the earliest possible opportunity⁵ The Privy Council will not interfere with any question of valuation unless it can be shown that some one has improperly been made the subject of valuation, or excluded therefrom, or that there is some *fundamental principle* affecting the valuation which renders it unsound⁶

Certificate if can be granted after final adjudication by the Judicial Committee—The certificate under this Rule cannot be granted after there has been a final adjudication in the matter by the Judicial Committee In *Vekt v Chejju Ram*⁷ the plaintiff's suit which was decreed in the trial Court was reversed by the High Court The plaintiff then filed a petition for leave to appeal to the Judicial Committee as also an application for review The latter application was granted and the High Court reversed its original judgment The defendant took the matter in appeal to the Privy Council which held that the application for review was not maintainable and dismissed the suit restoring the first judgment of the High Court Subsequently the plaintiff pressed his original petition for leave to appeal and the High Court granted leave holding that the petition was still alive, and not disposed of The Privy Council reversed the order granting leave holding that there was no suit *existing* after the decision of the Judicial Committee and that no leave could therefore be granted

5 Ex parte grant of leave to appeal

An *ex parte* order granting leave to appeal is liable to be rescinded if it is obtained by any misrepresentation or concealment of fact which ought

Note 4

1 (1901) 23 All 415 (416) 28 Ind App 182 (P C)

2 (1921) 1921 P C 25 (26) 41 Mad 293 48

Ind App 31 (P C)

[See also 1921 P C 123 (126) 46 Ind

App 376 (P C)]

3 (1902) 29 Mad 194 (195) 33 Ind App 67

(P C)

4 (1897) 15 Beng L R 221 (226) 2 Ind App 205

(I C)

5 (1890) 13 Moo Ind App 85 (95) (P C)

6 (1921) 1921 P C 50 (52) 48 Cal 110 47 Ind

App 255 (P C)

(1916) 1916 P C 18 (0) 38 All 433 43 Ind

App 167 (P C)

[See also (1922) 1922 P C 257 ()

41 Mad 475 43 Ind App 11 (P C)

Order of Council dated 9-2-1920

shows certificate not conclusive as

to valuation]

7 (1925) 1925 P C 174 (175) (P C) Reverse

1924 Lb 225

to have been disclosed¹

6 Non prosecution of petition

The petition is liable to be struck off for default if the applicant does not prosecute it diligently¹ The Court can however restore the petition on *sufficient cause* being shown²

The Privy Council may also dismiss an appeal presented to it for want of prosecution where no further proceedings are taken in the High Court, as required by the rules³

7 Letters Patent Appeal

No appeal lies under Cl 15 of the Letters Patent from an order granting¹ or refusing² a certificate for leave to appeal

8 Review

An order granting or refusing leave to appeal can be reviewed¹

9 Form—See Appendix C Form No 12

R 4 [New] *For the purposes of pecuniary valuation, suits involving substantially the same questions for determination and decided by the same judgment may be consolidated, but suits decided by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same questions for determination*

Synopsis

	Note No	Judgment	meaning of	Note No
Consolidation of suits	1	Costs		3
Inherent power to consolidate	2			4

1 Consolidation of suits

There was no provision under the old Code corresponding to this rule and there was a conflict of opinion as to whether, and when two suits could be consolidated together for the purpose of reaching the pecuniary limit necessary for an appeal to the Privy Council According to the High Court of Allahabad suits though decided by *separate* judgments could be consolidated provided the questions involved in them were substantially the same, and the property affected by the suits were also the same¹ According to the High Court of Calcutta such consolidation was not permissible unless the suits had been decided by the *same* judgment² The present rule gives effect to the latter view

3 (1854 57) 6 Moo Ind App 346 (347) (P C)

Note 7

1 (1890) 17 Cal 455 (458)
(18 6) 1 Cal 102 (103)
(1876) 25 South W R 599 (531)
(1845) 24 South W R 150 (151)

2 (1881) 7 Cal 339 (347)
(1875) 24 South W R 148 (149)

Note 8

1 (1884) 16 Cal 292 (294)
(1912) 17 Ind Cas 271 (272) 39 Cal 1037

Order 45 Rule 4—Note 1

1 (1886) 18 All 196 (198)
' (1901 02) 6 Cal W N 41 (42) (FB)
(1866) 5 South W R (PC) 34 (38)

Note 6

1 (1866) 12 Cal 608 (600)
(1897) 2 Cal W N 46 (47) (Notes)
(1840) 14 South W R O C 34 (38) On appeal

(But see (1866) 6 South W R 121 (121))

4, and no consolidation is permissible under the present Code unless the suits have been decided by the same judgment. The object of the rule is that where there are appeals from *one judgment* involving substantially the same question for determination before the Privy Council, they may be consolidated if, in the aggregate, the value of the appeals amount to the appealable minimum.³ But in interpreting the words "same judgment," the spirit of the rule should be observed and a narrow interpretation should not be given to it.⁴ Where the judgment in one suit is merely a copy of the other⁵ or where the judgment in one suit merely refers to the judgment in the other, and, adopting its reasons, passes a decree accordingly,⁶ the suits must for the purposes of this rule be regarded as having been decided by the *same judgment*. Where the evidence in the two suits was, at the request of the parties considered as a whole, and the Court came to a decision on the whole of the evidence in favour of a party, it was held by the High Court of Allahabad that it was a proper case to which the procedure sanctioned by this rule should be applied.⁷ But the rule allows consolidation only for the purpose of making good a defect in pecuniary valuation, and not a defect of any other kind. In the case cited below the same judgment affirmed the lower Court's judgment in part relating to one defendant and modified it in part relating to another defendant. In regard to the former part, there was no substantial question of law involved and in regard to the latter part the appealable value was less than Rs. 10,000. Both defendants applied jointly for leave to appeal. It was held that leave should be refused.⁸

The rule applies only to appeals to the King in Council and not to appeals to the High Court.⁹

2 Inherent power to consolidate

The rule does not limit the inherent power of the High Court to consolidate appeals to the Privy Council for the purpose of *security for the costs* and for *saving expenses*¹ though such power cannot be exercised for settling pecuniary valuation when the rule forbids it in cases governed by *different judgments*.²

3 Judgment meaning of

The word *judgment* refers to the judgment appealed against and not the judgment of the Court below.¹ The fact that there was a common judgment in two suits in the trial Court is no ground for consolidating the suits under this rule unless there is a common judgment in the High Court also.²

4 Costs

The effect of an order of consolidation of several appeals under this rule is to make them a single appeal, and if costs are awarded against the respondent

Note 2.

- 1 (1916) 1315 1st 100 (197) 3 1st L Jour
446
2. (1921) 12-1 1st 97 (99) 6 1st L Jour

Note 3

- 1 (1932) 1232 Mad 125 (126) 55 Mad 100
2. (1921) 1221 1st 37 (3) 6 1st L Jour

pondents they are jointly and severally liable for the whole costs¹

As to security for costs in consolidated appeals *see* Note 5 to R 7, below

R 5 [New] *In the event of any dispute arising between the parties as to the amount or value of the subject-matter of the suit in the Court of first instance, or as to the amount or value of the subject matter in dispute on appeal to His Majesty in Council the Court to which a petition for a certificate is made under Rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance, which last mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made*

1 Remission of dispute as to amount or value of the subject matter

This rule gives effect to the practice followed under the old Code a practice sanctioned by the Judicial Committee of ascertaining by evidence and enquiry as to the true value of the subject matter in appeal when there is a dispute regarding the same¹

A remand under this Rule is unnecessary and should not be made when an issue as to valuation was raised and decided in the trial Court and the parties acquiesced in the finding on that issue²

Where there is a remand under this rule the Court to which the remand is made should itself carry out the investigation and cannot remit it to some other officer³ But it has power to hold a local enquiry for the purpose of determining the value of the subject matter⁴ *See also* the undermentioned case⁵

Where a question of the value of the subject matter of the suit has been raised in the High Court and a report with reference to value has been made under this rule it is desirable that full information with reference to these proceedings be included in the record to be sent to the Privy Council⁶

Effect of refusal of certificate

R. 6. [S 601] *Where such certificate is refused, the petition shall be dismissed*
[1877—S 601]

Note 4

- 1 (1073) 1923 I at 215 (216)
Order 45 Rule 5—Note 1
1 (1905) 9 Cal W N 3 0 (371)
(1906) 33 Cal 893 (894) 33 I d App 106 (I C)
2 (1918) 1918 Bom 224 (225) 42 Bom 609
(1977) 1927 Cal 418 (419)
(1921) 1921 I at 9 (98) 6 Pat L Jour 97
[See also (1915) 1915 Oudh 166 (168)
Defendant not objecting as to plaintiff valuation—*Held* he cannot object
C P C 349 & 350

- in High Court]
3 (1916) 1916 Cal 102 (102) 43 Cal 220
4 (1925) 1925 Cal 414 (415)
5 (1934) 1934 Rang 292 (295) 12 Rang 355
Petition by creditor for adjudication of insolvency dismissed by High Court—Leave to appeal to Privy Council applied for—Question of value of subject matter should not be referred if respondent will be required to file schedule of his assets
6 (1933) 1933 P C 232 (232) 12 Pat 679 (P C)

Synopsis

Reasons for refusal
Costs

Note No	1	Appeal*
	2	Review

Note No	3
	4

1 Reasons for refusal

In the undermentioned case¹ the Judicial Committee observed as follows — Their Lordships desire to add that it would be convenient if the High Court on future occasions in refusing a certificate for leave to appeal would be good enough to state the grounds on which they refused it²

2 Costs

Where an application for leave to appeal is dismissed with costs, the proper Court to execute the order as to costs is the trial Court¹

3 Appeal

Under O 43, R 1, Cl (v) an appeal lies against an order made by any Court *other than a High Court* refusing the grant of a certificate under this rule and the period of limitation is 30 days from the date of the order under Art 153 of the Indian Limitation Act

4 Review — See Note 8 to R 3 *ante*R. 7. [S 602] (1) *Where the certificate is granted, the*

Security and depo
sit required on grant
of certificate

applicant shall, within ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date,—

(a) *furnish security in cash or in Government securities for the costs of the respondent, and*

(b) *deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit, except—*

(1) *formal documents directed to be excluded by any order of His Majesty in Council in force for the time being,*

(2) *papers which the parties agree to exclude,*

(3) *accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included; and*

(4) *such other documents as the High Court may direct to be excluded.*

Order 45 Rule 6—Note 1

Note 2

1 (1907) 24 Cal 600 (63)
[See however (1931) 6 Cal 201 (22) 1
Hill High Court can set a set- b
order]

1 (1906) 22 Mad 121 (190) 33 Ind App 67
(P C)

Provided that the Court at the time of granting the certificate may after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished

Provided further, that no adjournment shall be granted to an opposite party to contest the nature of such security

(2) Where the applicant prefers to print in India the copy of the record except as aforesaid, he shall also within the time mentioned in sub-rule (1) deposit the amount required to defray the expense of printing such copy

[1877—S 602]

Local Amendments

Oudh

In Rule (1) (a) Order XLV Code of Civil Procedure insert the words except when the Secretary of State for India in Council is the applicant between the words the respondent and and

Synopsis

	Note No		Note No
Amendments after 1908	1	Extension of time	7
Scope of the Rule	2	Record not to include unnecessary papers	8
Date of the decree meaning of	3	Delay	9
Security and deposit	4	Appeal	10
Security in case of consolidated appeal	5		
Form of security—Proviso	6		

1 Amendments after 1908

The following alterations have been introduced by the Amending Act XXVI of 1920 —

- (1) The words Ninety days or such further period not exceeding sixty days as the Court may upon cause shown, allow have been substituted for the words six months
- (2) The words in cash or in Government securities after the word security have been newly added
- (3) The proviso to sub R (1) is new

2 Scope of the Rule

The Rule prescribes the course to be followed by the applicant (appellant) after the issue of a certificate as to fitness of appeal. He should furnish security for the costs of the respondent and also deposit the expenses for translating, transcribing, indexing and transmitting the records within the time fixed by clause (1).¹ The Rule does not according to the Chief Court of Oudh apply to cases where *special leave* to appeal is granted by the Privy Council under S. 112, and the High Court has no jurisdiction to call upon the appellant to deposit security without any order of the Privy Council.² The High Court of Calcutta³ on the other hand has held in a case arising under the old Code that it has been the *practice* of that Court to

Order 45 Rule 7 Note 2

1 (18 5) 1 Juth W R 305 (306) 1 etio er

ca it deposit ng security amount only

Synopsis

Reasons for refusal
Costs

Note No	1	Appeal* Review
	2	

Note No	3
	4

1 Reasons for refusal

In the undermentioned case¹ the Judicial Committee observed as follows — Their Lordships desire to add that it would be convenient if the High Court on future occasions in refusing a certificate for leave to appeal would be good enough to state the grounds on which they refused it

2 Costs

Where an application for leave to appeal is dismissed with costs the proper Court to execute the order as to costs is the trial Court¹

3 Appeal

Under O 43 R 1 Cl (v) an appeal lies against an order made by any Court *other than a High Court* refusing the grant of a certificate under this rule and the period of limitation is 30 days from the date of the order under Art 153 of the Indian Limitation Act

4 Review — See Note 8 to R 3 a te

R. 7. [S 602] (1) *Where* the certificate is granted, the

Security and depo
sit required on grant
of certificate

applicant shall within *ninety days* or such *further period, not exceeding sixty days*, as the Court may upon cause shown allow from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date,—

(a) *furnish* security in cash or in Government securities for the costs of the respondent, and

(b) deposit the amount required to defray the expense of translating transcribing indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit, except—

(1) formal documents directed to be excluded by any order of His Majesty in Council in force for the time being,

(2) papers which the parties agree to exclude

(3) accounts or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included, and

(4) such other documents as the High Court may direct to be excluded

Order 45 Rule 6—Note 1

1 (1906) 29 Mad 194 (195) 33 Ind App 6
(1 C)

Note 2

1 (190) 34 Cal 860 (SG2)
[See also 1881) 6 Cal 201 (1934)
Hill High Court can execute sub
order]

Provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished:

Provided further, that no adjournment shall be granted to an opposite party to contest the nature of such security

(2) Where the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also within the time mentioned in sub-rule (1) deposit the amount required to defray the expense of printing such copy

[1877—S 602]

Local Amendments

Oudh

In Rule 7 (1) (a) Order XLV Code of Civil Procedure insert the words except when the Secretary of State for India in Council: the applicant between the words the respondent and and

Synopsis

	Note No		Note No
Amendments after 1908	1	Extension of time	7
Scope of the Rule	2	Record not to include unnecessary papers	8
Date of the decree meaning of	3	Delay	9
Security and deposit	4	Appeal	10
Security in case of consolidated appeal	5		
Form of security—Proviso	6		

1 Amendments after 1908

The following alterations have been introduced by the Amending Act XLVI of 1920 —

- (1) The words Ninety days or such further period not exceeding sixty days as the Court may, upon cause shown, allow have been substituted for the words six months
- (2) The words in cash or in Government securities after the word security have been newly added
- (3) The proviso to sub-R (1) is new

2 Scope of the Rule

The Rule prescribes the course to be followed by the applicant (appellant) after the issue of a certificate as to fitness of appeal. He should furnish security for the costs of the respondent and also deposit the expenses for translating, transcribing, indexing and transmitting the records within the time fixed by clause (1).¹ The Rule does not according to the Chief Court of Oudh apply to cases where *special leave* to appeal is granted by the Privy Council under S. 112, and the High Court has no jurisdiction to call upon the appellant to deposit security without any order of the Privy Council.² The High Court of Calcutta² on the other hand, has held, in a case arising under the old Code, that it has been the *practice* of that Court to

Order 45 Rule 7 Note 2

¹ (1875) 10 Suth. W. R. 305 (306) 1stitioner

erut depositing security amount only

- 7, treat the section as applicable, and that the High Court has power to extend the time for depositing the costs of transmitting the records under the section

3 Date of the decree meaning of

The words 'date of the decree' mean the date on which the decree is pronounced and not the date on which it is signed by the Judge¹

4 Security and deposit

The appellant should furnish security for the costs of the respondent¹ The security should after the amendment of the section by Act XXVI of 1920 be in cash or in Government securities unless the Court acting under the proviso² orders that some other form of security may be furnished Where Government securities are furnished as security, the market value thereof at the time of deposit should be taken into consideration² Solicitors for the respondent in England can claim payment of their bill of costs from the money deposited as security³ A Full Bench of the High Court of Allahabad⁴ has held that it is open to the decree holder by way of caution to attach the security deposited by the judgment-debtor so as to prevent him from dealing with it any further.

5 Security in case of consolidated appeal

When two appeals are consolidated for valuation, security has to be furnished in respect of each of the appeals It is not enough if security is given in one appeal alone¹

6 Form of security—Proviso

If an appellant to the Privy Council wishes to furnish a security in any other form than in cash or in Government bonds, he must apply for a special order to that effect and obtain it simultaneously with the order granting the certificate It cannot be applied for or granted afterwards¹

7 Extension of time

Prior to Act XXVI of 1920 the security or the deposit had to be furnished or made within six months from the date of the decree complained of or within six weeks from the date of the grant of the certificate, whichever

Note 3

1 (1910) 5 Ind Cas 844 (945) (Cal)

Note 4

(1896) 19 Mad 140 (143 144) Security bond can be enforced

(1866) 5 Suth W R Mis 47 (48) Security

is to securities that could be taken before the amendment see the following cases—

(1860) 12 Suth W R 187 (187) Widow's interest should not be taken as security

(1917) 1917 Pat 132 (139) 3 Pat L Jour 132 Decree offered as security for costs *Hell* acceptance of security does not operate as stay of execution of the decree

(1899) 26 Cal 216 (219) Surety not precluded from questioning the validity of the bond in execution

appellant deposits money and succeeds in the appeal the court of has no lien on it for his fee as the money is not subject matter of the suit and is also not fruit of the action]

4 (1900) 1930 All 225 (212) 52 All 619 On appeal from 1929 All 791

Note 5

1 (1919) 1919 Pat 22 (23) 4 Pat L Jour 132

Note 6

1 (1925) 1925 Mad 419 (450) 19 Mad 200
(1920) 1920 Raj 44 (44)
(1921) 1921 L B 35 (37) 11 L L R 213

was the later date. The period of six months has, under the Rule as now amended, been reduced to 90 days; but the Court may extend the said period by a further period of sixty days "on cause shown." Under the Rule, as it originally stood, it had been held by the Privy Council and by the High Courts that the period of six months could be extended by the High Court for "cogent reasons."¹ It was held that the misapprehension of the appellant as to the date of the re-opening of the High Court could not be considered to be a "cogent reason" justifying an extension of time.² As to whether the poverty of the appellant was a "cogent reason," it was held by the High Court of Madras and the Chief Court of Lower Burma that it was not;³ while the Chief Court of Punjab held that it was a sufficient ground for extending time.⁴ Even under the present Rule, the High Courts of Madras and Rangoon have followed their earlier view on the point.⁵

Can the period of six weeks or the period of sixty days be extended by the High Court? It has been held that the period of six weeks cannot be extended by the High Court.⁶ There is a conflict of opinion as to whether the period of sixty days could be enlarged by the High Court. According to the High Court of Bombay, the High Court has by virtue of R. 9 of the Privy Council rules, such power,⁷ while according to the High Courts of Allahabad,⁸ Lahore,⁹ Madras,⁹ Patna,¹⁰ Rangoon¹¹ and the Chief Court of Oudh¹² the High Court has no such power and cannot extend the time beyond that which is provided in this Rule.

8 Record not to include unnecessary papers

The Judicial Committee has repeatedly pointed out and condemned the practice of printing an enormous mass of wholly irrelevant and unnecessary matter in the preparation of the record.¹ Only so much of the records as are

N. 7

(See also (1922) 1922 All 57 (SS) 44
All 242 Act 26 of 1920 not retros-

(1875-76) 1 Cal 142 (143)
(1876-77) 2 Cal 272 (273)
(1900) 4 Ind Cas 919 (920) 1903 Pun Re
No 57

9 (1932) 1932 Mad 484 (485, 486) 55 Mad
835

(1891) 1881 All W N 76 (76)
(1892) 1882 All W N 55 (55)

Note 8

1 (1933) 1933 Rang 212 (212) Party cannot
include in record of appeal to Privy
Council documents and statements
which were not proved and which
are clearly inadmissible
(1922) 1922 P C 317 (321) 44 All 435. 49
Ind App 262 (P C)
(1928) 1923 P C 44 (44) (P C)
(1919) 1919 P C 83 (84) 47 Cal 415: 46

No 44

1 Re

material to the appeal should be printed and transmitted to the Privy Council.² It has been held in the undermentioned cases³ that where there is an appeal against the regular decree such proceedings as application for review of the judgment and orders thereon ought not to form part of the record to be transmitted to England.

The Registrar of the High Court should determine in the first instance what papers should be included in the paper book.⁴

9 Delay

Where there was a great delay of three years in the preparation of the records, the office was called on to report the reason for the delay so that if the delay was due to inaction on the part of the appellant, the appeal may be certified as not being effectually prosecuted by the appellant.¹ If there is great delay, the Judicial Committee will peremptorily order the Courts in India to transmit the records at once.²

10 Appeal

An order refusing to extend the time for furnishing security is not a "judgment" within the meaning of Cl. 15 of the Letters Patent and is not appealable as such.¹

Local Amendments

BOMBAY

After R 7 the following Rule shall be inserted, namely—

7 A No such security as is mentioned in R 7 (1) Cl (a) shall be required from the Secretary of State for India in Council or where the Local Government has undertaken the defence of the suit from any public officer sued in respect of an act alleged to be done by him in his official capacity.

NAGPUR

Insert the following as new R 7 A—

7 A No such security as is mentioned in R 7 (1) Cl (a) shall be required from the Secretary of State for India in Council or where the Local Government has undertaken the defence of the suit from any public officer sued in respect of an act alleged to be done by him in his official capacity.

SINDH

Insert the following as Rule 7 A in the first Schedule—

7 A No such security as is mentioned in Cl (i) of sub rule (1) of Rule 7 shall be required from the Secretary of State for India in Council or where the Local Government has undertaken the defence of the suit from any public officer sued in respect of an act alleged to be done by him in his official capacity.

2

(P C)

(1891) 21 Cal 476 (479) On an application that a certain limited meaning should be placed on an endorsement by a Bench clerk on certain

- (1867) 7 Suth W R 30 (31)
 3 (1841 46) 3 Moo Ind App 1 () (P C)
 (1863) 11 Suth W R 145 (145)
 (1868) 10 Suth W R 1 (4) (1 B)
 4 (1971) 1921 Pat 124 (124) 61st L Jour
 114
 [See (1922) 1922 Cal 4 3 (431 4)
 43 Cal 96 Any application to alter
 the Registrar's order must be made
 to the Bench who granted leave and
 not to the Bench who heard the ap-
 peal—Convenience in practice]

(1867) 7 Suth W R 291 (292) Records should be translated into English wherever necessary
 [See also (1867) 12 Moo Ind App 130 (130) (P C)]

Note 10

1 (1891) 19 Cal 182 (182)

Admission of appeal
and procedure there
on

R. 8. [S 603] Where security has been furnished and deposit made to the satisfaction of the Court, the Court shall—

(a) declare the appeal admitted,

(b) give notice thereof to the respondent,

(c) transmit to His Majesty in Council under the seal of the Court a correct copy of the said record, except as aforesaid and

(d) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them

Synopsis

	Note No		Note No
To the satisfaction of the Court	1	Form of notice	4
Notice to respondent Cl (b)	2	Transmission of record	5
Effect of omission to notify	3		

1 To the satisfaction of the Court

A deposit made out of time is not one made to the satisfaction of the Court¹

2 Notice to respondent—Clause (b)

Under Cl (b) of the rule the respondent should be served with the notice of the appeal. Notice by substituted service can also be ordered¹

3 Effect of omission to notify

The accidental omission to notify to the respondents of the admission of an appeal to the Privy Council is not a sufficient ground for a rehearing of the appeal decided by the Privy Council provided such respondents in fact knew of the admission¹

4 Form of notice—*See App G Form No 10*

5 Transmission of record—*See Note 8 to R 7 ante*

R. 9. [S 604] At any time before the admission of the appeal the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon

R. 9-A. [New] Nothing in these Rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did

Revocation of acceptance of security

Power to dispense with notices in case of deceased parties

O 45 R 8 Note 1

1 (1923) 1923 All 5 2 (573)

Note 2

1 (1837 41) 2 100 Ind App 263 (26^a) (P C)

Note 3

1 (1921) 59 Ind Cas 7 (8) (P C)

(1897) 19 All 209 (211) 24 Ind App 49 (P C)

9.A not appeal either at the hearing in the Court whose decision is complained of or at any proceedings subsequent to the decision of that Court

Provided that notices under sub-rule (2) of Rule 3 and under Rule 8 shall be given by affixing the same in some conspicuous place in the Court house of the Judge of the District in which the suit was originally brought, and by publication in such newspapers as the Court may direct

Local Amendment

RANGOON

Substitute the following for Rule 9 A —

9 A Nothing in these Rules requiring any notice to be served on or given to opposite party or respondent shall be deemed to require any notice to be served on or given to an opposite party or respondent who did not appear either at the hearing in the Court whose decision is complained of or at any proceedings subsequent to the decision of that Court or on or to the legal representative of any such opposite party or respondent if deceased

Provided that notices under sub rule (2) of R 3 and under Rule 8 shall be given by affixing the same in some conspicuous place in the Court house of the Judge of the District in which the suit was originally brought and by publication in such newspapers as the Court may direct

R 10 **R. 10. [S 605]** *Where at any time after the admission of an appeal but before the transmission of the copy of the record, except as aforesaid, to His Majesty in Council, such security appears inadequate,*

or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid,

the Court may order the appellant to furnish, within the time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment

Synopsis

Scope of the Rule

Note No 1

Other Topics

Application for enforcement where to be made See Note 1 lit (1)

1 Scope of the Rule

An application for the enhancement of the amount of security for costs furnished by an appellant to the Privy Council, *after admission* of the appeal, ought to be made under this rule and not under R 9 The latter rule is applicable to applications *before admission* of the appeal¹

R. 11. [S 606] *Where* the appellant fails to comply with such order, the proceedings shall be stayed, and the appeal shall not proceed without an order in this behalf of *His Majesty* in Council and in the meantime execution of the decree appealed from shall not be stayed
[1877—S 606]

1 Fails to comply —See Notes to R 7 above

R. 12. [S 607] When the copy of the record, except as aforesaid has been transmitted to *His Majesty* in Council, the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under *Rule 7*

R. 13. [S 608] (1) Notwithstanding the grant of a certificate³ for the admission of any appeal, the decree appealed from shall be unconditionally executed unless the Court² otherwise directs

(2) The Court may if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—

(a) impound any moveable property in dispute or any part thereof, or

(b) allow the decree appealed from to be executed, taking such security from the respondent⁴ as the Court thinks fit for the due performance of any order which *His Majesty* in Council may make on the appeal, or

(c) stay the execution of the decree appealed from, taking such security from the appellant⁵ as the Court thinks fit for the due performance of the decree appealed from, or of any order which *His Majesty* in Council may make on the appeal, or

(d) place any party seeking the assistance of the Court under such conditions or give such other direction¹⁰ respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver¹¹ or otherwise

[1877—S 608]

Synopsis

	Note No.		Note No.
Legislative changes	1	Stay of execution after special leave	
Court	2	to appeal is granted by the Privy Council	7
Stay of execution if can be ordered before the granting of certificate	3	Stay of execution by Privy Council	8
Taking such security from the respondent	4		9
Stay of execution on taking security from the appellant Cl (c)	5		10
Stay of execution in view of application for special leave	6	Appeal	11
			12
			13

Other Topics

Application for stay—Practice See Note 8

Extent of Security See Note 4 I N (?) and Note 5 F N (2)

1 Legislative changes

- 1 The words the grant of a certificate for the admission in Cl (1) have been substituted for the words the admission of any appeal under this chapter
- 2 The words admitting the appeal which occurred after the word Court in the old section have been omitted in Cl (1) of the present Rule (As to the effect of this omission see Note 3)
- 3 The words by the appointment of a receiver or otherwise have been newly added in Cl (c)

2 Court

The word Court in this rule means the High Court and not the Subordinate Court of original jurisdiction. A subordinate Judge or a District Judge has no jurisdiction to stay execution of a decree of the High Court. The provisions of this Rule are meant entirely to govern all questions regarding the execution of the decree under appeal before the Privy Council and the provisions of O 41 R 6 do not apply thereto¹

3 Stay of execution if can be ordered before the granting of certificate

In cases decided under the old Code it was held by the High Courts of Allahabad¹ Calcutta² and Madras³ that an application for stay of execution could not be granted before the appeal to the Privy Council was finally admitted. The reason for such a view was the wording of para 1 of the corresponding S 608 of the old Code which referred to the Court *admitting the appeal*. The High Court of Bombay⁴ on the other hand held that the words admitting the appeal had no reference to the time when the Court was to give directions but merely descriptive of the Court which was to give them and that the High Court could stay execution of its decree although the appeal had not yet been admitted. The words admitting the appeal have now been omitted in this rule but the omission has been held not to affect the construction of the rule and that even now no stay can be ordered under this rule before the certificate is granted⁵. It has been held in the cases cited below⁶ that the High Court has *inherent power* to stay execution in appropriate cases even before the certificate is granted.

4 Taking such security from the respondent

Under Cl (b) of the rule the Court may allow execution of the decree directing the respondent to furnish security for the due performance of any order which the Judicial Committee may make on appeal¹. The object of the security is to indemnify the appellant for any loss that may be occasioned by the execution being taken out².

Where the High Court orders execution to proceed on the decree—

Order 45 Rule 13—Note 2

- 1 (1917) 1917 Pat 85 (86) 31 at 2 Jour 10
- (1925) 13-5 Rang 951 (50) 3 Rang 158
- (1963) 05 Mad H C R 93 (93)

Note 3

- 1 (1920) 1920 All W N 93 (97)
- (1911) Cal W N 567 (563)
- (1871) 16 S th W R 29 (9)
- (1909) 4 Ind Cas 103 (10) (Mad)
- (190) 13 Ind 10 (11 1)
- (1912) 16 I d Cas 515 (516) 6 S d L R 86

- 6 (1925) 1925 S nd 916 (21)
- (1919) 18 Ind Cas 20 (709) 40 C 1955

Note 4

- 1 (1915) 2 Ind Cas 2 (53) (Lal)
 - (18 0)
 - (188)
 - (1909)
 - (1906) 6 Suth W R N 62 (62) 1 Ind Cas
- Security

holder furnishing security and the latter does not do so the order operates in fact as a stay of execution. The failure on the part of the respondent decree-holder to give security will not therefore deprive him of the benefit of S. 15 of the Limitation Act so as to bar a fresh application for execution after the Privy Council appeal is dismissed.³

5 Stay of execution on taking security from the appellant Cl (c)

The grant of an order for stay of the execution of the decree pending appeal is in the discretion of the Court and the appellant should show special cause for the exercise of the discretion in his favour. As a general rule execution ought not to be stayed unless it would so upset things that in the event of the appeal being successful the *status quo ante* could not be restored or could be restored only with great difficulty.¹ The principle underlying the granting of stay of execution is that the successful party in litigation is the ultimate successful party is to reap the fruits of that litigation and not obtain merely a barren success.

Proceedings between a preliminary decree and the final decree as for instance in partition suits are proceedings in the suit and not in execution. The High Court has therefore no power to stay such proceedings under this rule.² The Privy Council which has *seisin* of the appeal can alone stay such proceedings.³ Similarly proceedings in a Revenue Court to eject the defendant instituted after obtaining possession in execution of the decree of the High Court are not proceedings in execution of the decree within the meaning of this rule.⁴

When the Court orders security to be furnished it is advisable to specify definitely the time within which the security must be tendered and to give such further directions as may be necessary to ensure the intention of the Court being carried out.⁵

6 Stay of execution in view of application for special leave

The High Court of Calcutta¹ has held that it has inherent power to order stay of execution of its decree in view of an application for special leave to appeal to the Judicial Committee.

7 Stay of execution after special leave to appeal is granted by the Privy Council

It has been held by the Privy Council in *Nityamani v. Madhusudan Sen*¹ that the High Court has power to stay execution of a decree although an appeal against that decree has been admitted by special leave of the Privy Council. Their Lordships observed: "The learned Judges of the High Court are

³ (1920) 19 O Pat 2 & (3 G) 5 Pat L Jour 39
 [See also (1873) 19 Suth W R 186
 (15 J)]

Note 5

(1909) 1 Ind Cas 812 (812) (Cal)
 [See also (1928) 1928 Bom 159 (160)
 Stay of suit refused pending appeal
 as to maintainability of suit].
 [See (1934) 1934 Lah 258 (28 289)
 pro]

(15 G) 4 Cal L Rep 125 (129)
 [See also (1860) 6 Suth W R Mis 17
 (17)]

(1500) 14 Suth W R 361 (61) Security for
 future mesne profits generally taken
 for three years

³ (1919) 19 All 14 (15) 19 All LJ 142
 40 All 10

¹ (1913) 18 Ind Cas 20, (209) 40 Cal 355
 Holmwood J. however dissenting

Note 7

¹ (1911) 11 Ind Cas 384 (384) 38 Cal 335 38
 Ind App 74 (P C)

13,

Other Topics

Application for stay—Practice See Note 8

Extent of Security See Note 4, F N (2) and Note 5 F N (2)

1 Legislative changes

- 1 The words 'the grant of a certificate for the admission' in Cl (1) have been substituted for the words 'the admission of any appeal under this chapter'
- 2 The words 'admitting the appeal which occurred after the word 'Court' in the old section have been omitted in Cl (1) of the present Rule (As to the effect of this omission see Note 3)
- 3 The words 'by the appointment of a receiver or otherwise' have been newly added in Cl (c)

2 Court

The word 'Court' in this rule means the High Court and not the Subordinate Court of original jurisdiction. A subordinate Judge or a District Judge has no jurisdiction to stay execution of a decree of the High Court. The provisions of this Rule are meant entirely to govern all questions regarding the execution of the decree under appeal before the Privy Council and the provisions of O 41, R 6 do not apply thereto¹

3 Stay of execution, if can be ordered before the granting of certificate

In cases decided under the old Code it was held by the High Courts of Allahabad,¹ Calcutta² and Madras³ that an application for stay of execution could not be granted before the appeal to the Privy Council was finally admitted. The reason for such a view was the wording of para 1 of the corresponding S 608 of the old Code which referred to the Court *admitting the appeal*. The High Court of Bombay⁴ on the other hand, held that the words "admitting the appeal" had no reference to the time when the Court was to give directions but merely descriptive of the Court which was to give them and that the High Court could stay execution of a decree although the appeal had not yet been admitted. The words 'admitting the appeal' have now been omitted in this rule but the omission has been held not to affect the construction of the rule and that even now no stay can be ordered under this rule before the certificate is granted⁵. It has been held in the cases cited below⁶ that the High Court has *inherent power* to stay execution in appropriate cases even before the certificate is granted.

4 Taking such security from the respondent

Under Cl (b) of the rule the Court may allow execution of the decree directing the respondent to furnish security for the due performance of any order which the Judicial Committee may make on appeal¹. The object of the security is to indemnify the appellant for any loss that may be occasioned by the execution being taken out².

Where the High Court orders execution to proceed on the decree—

1	6 (1925) 1925 Sind 216 (217) (1913) 19 Ind Cas 207 (209) 40 Cal 15
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Note 4

1 (1915) 27 Ind Cas 573 (573) (Lah)

2 (1870) . . .

(1872) . . .

(1879)

(1886) G Suth W R Mis 62 (w2) 1 extent security

4 (1872) 19 Ind Cas 10 (11, 12)

6 (1912) 16 Ind Cas 515 (516) G Suth L R 86

holder furnishing security and the latter does not do so the order operates in fact as a stay of execution. The failure on the part of the respondent decree-holder to give security will not therefore deprive him of the benefit of S 15 of the Limitation Act so as to bar a fresh application for execution after the Privy Council appeal is dismissed.³

5 Stay of execution on taking security from the appellant Cl (c)

The grant of an order for stay of the execution of the decree pending appeal is in the discretion of the Court and the appellant should show special cause for the exercise of the discretion in his favour. As a general rule execution ought not to be stayed unless it would so upset things that in the event of the appeal being successful the *status quo ante* could not be restored or could be restored only with great difficulty.¹ The principle underlying the granting of stay of execution is that the successful party in litigation is the ultimate successful party is to reap the fruits of that litigation and not obtain merely a barren success.

Proceedings between a preliminary decree and the final decree as for instance in partition suit are proceedings in the suit and not in execution. The High Court has therefore no power to stay such proceedings under this rule. The Privy Council which has *sum* of the appeal can alone stay such proceedings.² Similarly proceedings in a Revenue Court to eject the defendant instituted after obtaining possession in execution of the decree of the High Court are not proceedings in execution of the decree within the meaning of this rule.⁴

When the Court orders security to be furnished it is advisable to specify definitely the time within which the security must be tendered and to give such further directions as may be necessary to ensure the intention of the Court being carried out.⁵

6 Stay of execution in view of application for special leave

The High Court of Calcutta¹ has held that it has inherent power to order stay of execution of its decree in view of an application for special leave to appeal to the Judicial Committee.

7 Stay of execution after special leave to appeal is granted by the Privy Council

It has been held by the Privy Council in *Nityamani v Madhusudan Sen*¹ that the High Court has power to stay execution of a decree although an appeal against that decree has been admitted by special leave of the Privy Council. Their Lordships observed: The learned Judges of the High Court are

3 (1920) 120 Pat 374 (376) 5 Pat L Jour 39
(See also (1873) 19 Suth W R 186
(154))

N. S.

(1909) 1 Ind Cas 812 (812) (C11)

(1879) 4 Cal L Rep 12, (129)
(See also (1866) 6 Suth W R 17
(17))

Note 6

(1870) 14 Suth W R 361 (361) Security for
future meane profits generally taken
for three years

1 (1913) 18 Ind Cas 207 (200) 40 Cal 955
Holmwood J however dissenting

Note 7

3 (1919) 191 J All 14 (15) 19 All L J 142
42 All 170

1 (1911) 11 Ind Cas 384 (384) 38 Cal 335 38
Ind App 74 (P C)

in a much better position than the members of the Board to determine in any particular case whether execution ought to be stayed and if so upon what terms and conditions and to what extent stay of execution ought to be granted.

The contrary view taken in the earlier decisions^{1a} are no longer good law

8 Stay of execution by Privy Council

As a general rule, in appeals pending before the Privy Council an application to stay proceedings in execution ought always to be made in the first instance to the High Court which has ample power to deal with the matter according to the circumstances of the particular case, and has knowledge of the details which the Judicial Committee cannot possess on an interlocutory application¹ But if the High Court refuses to grant stay, the Privy Council may if it thinks fit, either order stay itself² or direct the appellant to apply again to the High Court with its opinion as to the advisability of granting stay³

9 Security after execution

The High Court can under sub-R (1) direct the respondent to furnish security for the due performance of any order which may be made by His Majesty in Council, even in cases where the decree has been executed¹ But the party seeking to obtain such security must show *special cause* such as waste or improper dealing with the property on the part of the respondent²

10 To give such other directions

Where a mortgage suit decreed *ex parte* was directed by the High Court to be re heard and during the pendency of an appeal to the Privy Council against that order one of the parties applied for stay, it was held by the Calcutta High Court that it had power under this rule as well as under its *inherent* powers to stay further proceedings in the suit¹

11 By the appointment of a Receiver

Under Cl (d) of the rule the Court has power to appoint a Receiver to safeguard the interests of the appellant But the principles on which a Receiver should be appointed are the same as those contained in O 40 In the absence of any allegation of waste or risk of loss, no Receiver ought to be appointed under this rule¹ The High Court has power to appoint a Receiver even in cases where special leave to appeal is granted by the Judicial Committee²

12 Powers of the High Court pending appeal to the Privy Council

Power to amend decree—According to the High Courts of Calcutta¹

1a (1900) 27 Cal 1 (4)	23 Ind App 281 (PC)	(1901) 11 All High Court has no such
(1904) 4 Ind Cas 452 (453) (Cal)		"
(1910) 7 Ind Cas 153 (154) (All)		"
[See (1866) 6 South W R Mis 111		
(113) 1 case of restitution]		
Note 8		
1 (1906) 29 Mad 373 (381)	33 Ind App 192	
(1906) 13 Cal 1		
2		
3		
	C)	
Note 9		
1 (1906) 19 Cal 423 (427)	50 Bom 453	
(1906) 13 Mad 140 (142)		
[1st sec (1866) 2 South W R Mis 23		
		Note 12
		1 (1910) 5 Ind Cas 723 (724) (Cal)

and Lahore² the decree can be amended even after leave to appeal is granted and Lahore the records are transmitted to the Privy Council. The High Court of Allahabad³ on the other hand seems to hold a contrary view, namely that it cannot amend the decree which is the subject of an appeal to His Majesty in Council. See Note 9 to S 152 under the heading Amendment pending appeal against decree.

Power to add parties—The High Court has no power to direct the addition of parties after leave to appeal to the Privy Council is granted.⁴ (Compare also Note 32 to O 1, R 10)

Power to implead legal representatives or to order abatement—Where legal representatives have to be brought on record on the death of a party pending appeal to the Privy Council, the practice of the Judicial Committee is that, on an application, the High Court will make an enquiry, take evidence and transmit the same to the Privy Council with its own opinion as to the substitution of parties.⁵ The same rule of practice would appear to hold in the case of abatement.⁶

Power to stay proceedings—This rule has no application where the party applies for stay of proceedings in the Court below as distinct from the stay of the execution of a decree.⁷ See also points 3 and 4 in Note 5 ante.

Power to record compromise—Where after the certificate has been granted and the appeal declared to have been admitted, the parties compromise the suit and apply to the High Court to pass a decree in accordance therewith, it has been held by the Court of Bombay that it has no power to do so.⁸ The reason is that the Court having once made a decree cannot even by consent make a second one superseding the first.

13 Appeal

An order refusing to stay execution in the exercise of the discretion under this rule is not a "judgment" under Cl (15) of the Letters Patent and is not appealable.¹

R. 14. [S. 609.] (1) Where at any time during the pendency of the appeal the security furnished by either party appears inadequate, the Court may, on the application of the other party, require further security

Increase of security found inadequate

2 (1929) 1929 Lah 427 (427)
3 (1916) 1916 All 170 (170) (F B)

to do so
(1934) 1934 Cal 823 (824) But High Court has inherent power to do so
(1934) 1934 Lah 238 (239) (Do)
8 (1933) 1933 Bom 244 (244 245) 57 Bom 369

Note 13

(393 395)
6 (1902) 4 Ind Cas 456 (457) (Cal)
[See also (1924) 1924 Rang 217 (218)
2 Rang 91]
7 (1934) 1934 All 535 (536) 56 All 907 Nor has the Court inherent jurisdiction

1 (1901) 24 Mad 353 (359)
(1934) 21 Cal 473 (475)
[See also (1872) 17 Suth W R 464 (464) Order of District Judge releasing surety—Held no appeal lies therefrom].

(2) In default of such further security being furnished as required by the Court,—

- (a) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed from as if the appellant had furnished no such security,
- (b) if the original security was furnished by the respondent the Court shall, so far as may be practicable, stay the further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject matter of the appeal as it thinks fit

R. 15. [S 610] (1) Whoever desires to obtain execution² of any order of *His Majesty in Council* shall apply by petition,³ accompanied by a certified copy of the decree⁴ passed or order made in appeal and sought to be executed to the Court from which the appeal to *His Majesty* was preferred⁵

(2) Such Court shall transmit the order of *His Majesty in Council* to the Court⁸ which passed the first decree appealed from or to such other Court as *His Majesty in Council* by such order may direct and shall (upon the application of either party) give such directions⁶ as may be required for the execution of the same, and the Court to which the said order is so transmitted shall execute it accordingly, in the manner and according to the provisions applicable to the execution of its original decrees

(3) When any monies expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange⁷ for the time being fixed at the date of the making of the order by the Secretary of State for India in Council with the concurrence of the Lords Commissioners of *His Majesty's Treasury* for the adjustment of financial transactions between the Imperial and the Indian Governments

(4) Unless *His Majesty in Council* is pleased otherwise to direct no order of *His Majesty in Council* shall be inoperative on the ground that no notice has been served on or given to the legal representative of any deceased opposite party or deceased respondent in a case where such opposite party or respondent did not appear either at the hearing in the Court whose decree was complained of or at any proceedings subsequent to the

decree of that Court, but such order shall have the same force and effect as if it had been made before the death took place

[1877—S 610.]

Local Amendment

ALLAHABAD

For Rule 15 (1) substitute —

15 (1) Whoever desires to obtain —

(a) execution of any order of His Majesty in Council or

(b) where an appeal has been dismissed by His Majesty in Council for want of prosecution an order of the Court from which the appeal to His Majesty was preferred terminating proceedings and determining the costs shall apply to the said Court by a petition accompanied by a certified copy of the decree passed or order made by His Majesty in Council of which execution is desired or to which effect is to be given and a memorandum of all costs incurred in India that are claimed in pursuance thereof

Synopsis

	Note No		Note No
" " " "	1	Application by assignee of order in	
" " " "	2	Council	9
" " " "	3	Liability of surety	10
" " " "	4	Restitution	11
" " " "	5	Mesne profits	12
" " " "	6	Interest	13
" " " "	6	Costs	14
Material	7	Rate of exchange—Sub Rule (3)	15
To what Court order should be transmitted	8	Letters Patent Appeal	16
" Shall give such directions etc	8a	Dismissal for want of prosecution	17
		Limitation	18

Other Topics

Execution against persons not party to appeal See Note 11 Its (1) and (2)

Interest on costs—See Note 13 Pt (1)

1 Legislative changes —

1 The provision contained in Paragraphs 3 and 1 of the corresponding section in the old Code which related to the enforcement of the liability of the surety for costs have been omitted under the present Rule in view of S 14a of the Code

2 Paragraph 4 has been newly introduced by Act XVI of 1920

2 Whoever desires to obtain execution

It is not necessary in all cases that each person interested in the execution of a particular order of His Majesty in Council should obtain a separate transmission of the order when it has been already transmitted to the lower Court at the instance of one of the successful parties¹ Under O 21, R 15 it is open to some of the decree holders who have obtained permission, to execute the Privy Council decree on behalf of all the decree-holders² But where the decree is in favour of several persons declaring that each is entitled to a separate and distinct share each plaintiff is bound to apply separately for execution and an order of transmission obtained by some of the plaintiffs alone cannot be taken advantage of by the others³ Where a party having obtained an order in council delays or refuses to lodge the order, the opposite party can apply under this rule asking for a summary order against that party

Order 45 Rule 15—Note 2

(1924) 1924 Mad 95 (9a)

2 (1920) 1920 Pat 672 (673)

3 (1917) 1917 Pat 253 (256) 2 Pat L Jour 496

1 (1932) 1932 Mad 440 (443)

15. to lodge the order so that execution might follow in terms of the judgment of the Board ⁴

3 Shall apply by petition

The provisions of the rule are mandatory and an execution application filed without having filed a petition for transmission under this rule is incompetent. But where no such objection was taken in previous execution proceedings it cannot be allowed at a later stage of the proceedings ¹

4 Accompanied by a certified copy

A certified copy of the *decree* sought to be executed should be filed along with the petition ¹ A production of a copy of the *judgment* is not enough ² But the object of the requirement of a *certified* copy of the decree is only to ensure that proper intimation upon the subject of any order in council should be supplied to the Courts in India. The rule should not be construed as restricting the only possible evidence of the decree or order to the certified copy ³ Where, therefore, along with an application for the execution of the decree of the Privy Council a plain print copy of the decree was filed with an affidavit showing that it was the decree of the Privy Council, it was held that it must be held to be a true copy of the decree within the meaning of this rule ⁴

The practice in regard to Privy Council decrees is that the original decree is given to the successful party or to one of the successful parties and it is the duty of that person to file that original decree in the High Court ⁵

5 To the Court from which the appeal to His Majesty was preferred

The application under sub-R (1) should be made to the Court from whose decree the appeal was preferred to the Privy Council. An application made to any other Court is not competent ¹

6 Jurisdiction of Patna High Court

The High Court of Patna has no jurisdiction to execute an order in Council passed in an appeal from the Calcutta High Court. The proper Court to which an application for execution should be made is the High Court of Calcutta ¹

7 Functions under the Rule merely ministerial

The duties of the High Court in receiving and transmitting orders of His Majesty in Council under this rule are purely ministerial ¹ It is thus not competent for the High Court to consider and discuss the effect or propriety of the order in Council and disallow costs or interest ² or to hold

4 (1926) 126 P C 31 (31) 51 at 161 53 Ind (1572) 18 Suth W R 175 (179) 18 2 Ind
 1 P 59 (P C) Re No 3 (P C)
 (1867) 7 Suth W R 225 (225)
 Note 3
 1 (1924) 124 1 at 576 (579) 3 Pat 500
 Note 4
 1 (1918) 1918 1 at 393 (383) 2 Pat L Jour 61
 Note 7
 1 (18 1) 6 Cal 594 (605)
 (1893) 22 Cal 960 (972)
 Note 5
 1 (1874) 22 Suth W R 102 (102) 2 (1874) 2 Suth W R 102 (102)

that the decree of the Privy Council is void and incapable of execution on the ground that one of the appellants died during the pendency of the appeal³ If a party feels aggrieved by the order, the proper course for him is to apply to the Privy Council for redress.⁴

8 To what Court order should be transmitted

The High Court should transmit the order for execution to the Court which passed the decree. Where however, such Court ceases to have territorial jurisdiction over the matter the order can be transmitted to the Court which has jurisdiction to execute it¹

8a. Shall give such directions etc

Under Sub R (2) of the Rule it is the High Court that can give necessary directions in regard to execution¹ But it has been held that neither the High Court nor the Subordinate Court has power to stay execution or adjourn an application for execution on the ground that an application for review of the decree was pending before the Privy Council²

9 Application by assignee of order in Council

Where an order of the Privy Council is transmitted under this rule to the District Court as the Court which passed the first decree the latter Court has jurisdiction to entertain an application made by an assignee of the decree under O 21 R 16 to recognise the assignment and to allow him to execute the decree¹

10 Liability of surety

The liability of the surety can be enforced under S 145 of the Code. But the surety is not precluded from questioning the validity of the security bond in execution proceedings¹ Where the surety bond amounts to a mortgage it should be enforced by a separate *suit* and not by way of execution²

11 Restitution

Where during the pendency of an appeal to the Privy Council certain property which had been decreed to the plaintiff and which had been delivered to him was attached and sold away in Court auction in execution of another decree against the plaintiff and subsequently the Privy Council allows the appeal of the defendant and dismisses the suit the defendant is entitled to recover back the property by way of restitution. His right to restitution is not affected by the fact that the auction purchaser is not a party to the Privy Council appeal¹ The fact that the party applying for restitution is not a party

3 (1900) 19 O Pat 62 (673)

[See (1892) 4 All 137 (140)]

4 (1914) 1914 Mad 222 (221) 38 Mad 882

Note 8

1 (1893) 20 Cal 105 (106)

(1910) 1915 Mad 602 (602)

[See 20 South W R 419 (419)]

Note 8a

1 (1920) 1922 Oudh 81 (87)

(1872) 17 South W R 340 (341) Where the Privy Council left the amount due to plaintiff to be determined by the High Court

(1873) L R 1 Ind App 342 (345) (P C)

The Privy Council itself gave directions in the following cases —

C P C 351 & 352

(1874) 22 South W R 101 (101)

(1866) 5 South W R 271 (25)

2 (1931) 1931 Pat 203 (203)

Note 9

1 (1914) 1914 Mad 222 (221) 38 Mad 882

Note 10

1 (1898) 26 Cal 216 (219)

2 (1905) 22 Cal 491 (498) (500)

(1934) 1934 Oudh 139 (140) 3 Luck 534

Personal liability can be enforced under S 145—But liability against hypothecated property can be enforced only by a separate suit

Note 11

1 (1906) 28 All 337 (339)

Council was passed² By the introduction of the words "at the date of the making of the order in sub-rule 3 of this Rule legislative recognition has been given to the Calcutta view.

16 Letters Patent Appeal.

An appeal lies from an order of a single Judge of the High Court refusing to transmit for execution the order of His Majesty in council. Such an order is a 'judgment' within the meaning of Cl. 15 of the Letters Patent¹

17. Dismissal for want of prosecution

Where an appeal preferred against the decree of the High Court is dismissed by the Judicial Committee for want of prosecution, the order is not a judicial determination at all and limitation for execution of the High Court's decree runs from the date of the decree of the High Court¹

18 Limitation

An application to execute the decree or order of the Privy Council under this Rule is governed by Article 183 of the Limitation Act¹

R. 16. [S. 611.] The orders made by the Court which executes the order of His Majesty in Council, relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees.

Appeal from order relating to execution

NOTE—For "The Rules of the Judicial Committee", see Appendix.

ORDER XLVI.

REFERENCE.

R. 1. [S. 617.] *Where*, before or on the hearing of a suit or an appeal in which the decree is *not subject to appeal*, or *where*, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.

[1877—S. 617; 1861—S. 28.]

2 (1886) 8 All 650 (652)

Note 16

(1914) 1914 P C 65 (66) 86 All 284: 61 Ind App 101 (P C)

Note 18

(1910) 1916 Pat 251 (256): 1 Pat & Jour 386
(1916) 1916 Cal 488 (492): 48 Cal 908.

(1882) 8 Cal 218 (228) (P C). Art 180 of Act N of 1877

Note 17

1 (1914) 1914 P C 66 (67) 39 All 350 (P C)

Synopsis

	Note No		Note No
Legislative changes	1	Court meaning of	
Scope of the Rule	2	No reference on question of fact	
Reference lies only where question arises in suit, appeal or execution of decree	3	Reasonable doubt	
"Decree not subject to appeal	4	Statement of facts and Court's opinion	
		Reference by Presidency Small Cause Courts	

Other Topics

Applicability of the Rule See Note 3

Pts. (3) to (8b)

See Note 5 Pt (5)

Practice and procedure See Note 8

Reference by Court without jurisdiction

1 Legislative changes

1 The word *final* which occurred in the old section has now been substituted by the words *not subject to appeal* (See Note 4)

2 The words *or the construction of a document . . . merits* have been omitted

2 Scope of the Rule

A right of reference is fundamentally distinct from the right of appeal the former vests in the *Court* and the latter vests in the *sutor*¹ The object of the provision for reference is to enable the subordinate Courts to obtain, in non appealable cases, the opinion of the High Court *in advance* on a question of law and thereby avoid the commission of an error which could not be remedied later on² But the right of reference is subject to the conditions prescribed by this Rule and unless they are fulfilled, the High Court cannot entertain a reference from a subordinate tribunal³ The Rule requires the following conditions to be satisfied to enable a subordinate Court to make a reference —

(1) There must be a *pending* suit or appeal in which the decree is *not subject to appeal* or a pending proceeding in execution of such decree (See Note 3)

(2) A *question of law* or usage having the force of law must arise in the course of such suit, appeal or proceeding, and

(3) The Court trying the suit or appeal or executing the decree *must entertain a reasonable doubt* on such question (See Note 7)

The provisions of this Order are made applicable to proceedings under the special or local Acts mentioned hereunder⁴

3 Reference lies only where question arises in suit appeal or execution of decree

A reference can be made only in a *suit or appeal* or in *execution of a decree*¹ and only on a matter about which the parties are *litigating* that is on a matter wherein the Court is called on to adjudicate on the opposite

Order 46 Rule 1—Note 2

1 (1923) 1928 All 371 (375) 50 All 839

2 (1921) 1921 Cal 262 (264) 48 Cal 766

them]

4 The U P Municipalities Act No II of 1916 S 319 The Dekkhan Agriculturists Relief Act XVII of 1879 S 54 The Cantonments Act No II of 1924 S 81 The Indian Succession Act XXXIV of 1925 Ss 384 and 388

Courts of the necessity of deciding difficult questions arising before

Note 3

1 (1901) 25 Bom 327 (329)

*contentions of the parties*² Thus no reference can be made under this Rule in the following cases —

- (1) In a proceeding against a pleader under the Legal Practitioners Act, 1879³
- (2) In a proceeding under the Land Acquisition Act, 1894⁴
- (3) In an application for review⁵
- (4) In an application for a new trial⁶
- (5) In an application for sanction to prosecute⁷
- (6) In an enquiry as to the proper Court-fee payable on a memorandum of appeal⁸
- (7) In an enquiry in an application under S 15 of the Calcutta Rent Act^{8a} or in any proceedings under the Agra Tenancy Act^{8b} or in an application under S 93 of the Bengal Tenancy Act⁸

The question on which a reference can be made must have arisen *before* or *at* the hearing of a suit or an appeal or in a *pending* proceeding in execution of a decree. A question arising *subsequent* to the hearing of a suit or appeal cannot be the subject of a reference under this Rule unless it arises in execution of the decree⁹.

The question must also be one which *actually* arises for decision in the proceedings before the Court. The Rule is not intended to provide for suppositious cases which do not actually arise for decision¹⁰.

The right of reference is analogous to a right of appeal in that it is not a mere matter of *procedure*, and, consequently, cannot be exercised in proceedings other than those referred to in the section by the application of S 141 of the Code which only makes the *procedure* of the Code in respect of suits applicable to miscellaneous proceedings¹¹ (See Note 7 S 141).

4 Decree not subject to appeal

No reference can be made in a suit or appeal unless the decree that might be passed therein is one against which *no appeal lies*¹. Similarly no reference can be made in a proceeding in execution of a decree unless the *decree* is a non-appealable one². The reason is that in appealable cases a remedy to correct possible errors is provided by the appeal³.

2 (1843) 10 Bom 73 (79 80)

3 (1833) 12 Bom 33 (35 80)

4 (1882) 188 Bom 1 (199 239)

5 (1872) 17 Suth W R 91 (94)

(1872) 17 Suth W R 95 (96 97)

(1869) 11 Suth W R 75 (729)

6 (1892) 15 Mad 179 (181)

[But see (1869) 11 Suth W R 525 (523)]

7 (1924) 1924 Lah 566 (567)

8 (1906) 1906 All W N 180 (180)

8a (1925) 1925 Cal 291 (292)

8b [See S 111 List I of the Agra Tenancy

Note 4

1 (192) 1927 Mad 1179 (1180)

(1933) 1933 Lah 402 (103)

(1931) 1931 Pat 353 (353) 10 Pat 471

(1897) 11 Bom 57 (58)

(1917) 1917 Lah 135 (136) 1916 Pun Re No 180

(1916) 1916 Lah 350 (351)

(1885) 7 All 815 (816)

(1878) 1878 Pun Re No 40

(1880) 5 Cal 756 (756) Probate application — Decision not final order — No reference

2 (1888) 12 Bom 30 (31)

(1880) 1880 Pun Re No 100 Order in execution appealable — No reference

(1893) 17 Bom 735 (736)

(1910) 5 Ind Cas 581 (584) (All)

3 (1880) 7 Cal L Rep 144 (144)

1. 5 Court, meaning of

The word Court in this Rule means a Court of Civil Judicature. Thus a Collector executing a decree transferred to him under S 68 of the Code² or a Rent Controller enquiring into an application under S 15 of the Calcutta Rent Act³ or a Registrar acting under the Indian Registration Act⁴ is not a Court and cannot make a reference under this Rule. Where a Court refuses to entertain an appeal on the ground that it has no jurisdiction to do so it has no power to make a reference on that matter under this Rule⁵ (See also Note 1 to S 114, ante)

6 No reference on question of fact

A reference is allowed only on a question of law or usage having the force of law. No reference can be made on a question of fact¹

7 Reasonable doubt

A reference can be made on a question of law only if the Judge entertains a *reasonable* doubt about it¹. There cannot ordinarily be a reasonable doubt on a question clearly decided by the rulings of the High Court to which the Judge making the reference is subordinate unless the authority of those rulings can be questioned in view of a more recent decision of the Privy Council². Where however, the ruling of a High Court is doubted in a later decision of the same Court and has been dissented from by the other High Courts, there may be room for a reasonable doubt sufficient to enable a subordinate Court to make a reference on the question². But even in such a case the referring Court must entertain a reasonable doubt about the question and the mere fact that there are conflicting rulings is not by itself sufficient³. Similarly the Court cannot make a reference on a question on which it entertains no doubt merely because the *partes* apply for it⁴.

A reference is not bad merely because the question arises out of the action of a third person not a party to the suit⁵.

8 Statement of facts and Court's opinion

In making the reference the Court should draw up a statement of the facts of the case, formulate the precise question of law or usage having the force of law on which opinion is sought for and must also give its opinion on the question¹.

Note 5

- 1 (1911) 1919 Oudh 18 (19) 22 Oudh Cas 319
2 (1919) 1919 Oudh 18 (19) 22 Oudh Cas 319

- 3 (1925) 1925 Cal 331 (331)
4 (1906) 1906 Bom P J 496 (497)

- 5 (1889) 4 Cal 21 (1889)
(1918) 18 Ind Cas 811 (315) 1913 1 Ind Re 100 b1

- (1914) 1914 Lah 147 (1) (147) 90 Ind Cas 194 (191) 1914 Pun Re No 8
(1889) 18 Bom 54 (55)
(1927) 1927 Mad 1186 (1187)
(1931) 1931 Mad 71 (72) Subordinate Court
c; not committal to the Court of the

Note 6

- 1 (1911) 11 Ind Cas 671 (677) (1911)

Note 7

- 2 (1926)
3 (1913) 18 Ind Cas 977 (977) 15 Oudh Cas

Note 8

- 1 (1902) 1902 Pun L R No 93 at 180-181
(1891) 15 Bom 316 (333) Case under the
1 residency Small Cause Courts Act
(1906) 20 Bom 779 (783) (Do)

Where there was no statement of the case, no statement that the question arose on the trial of a suit and no statement of the Court's opinion, the High Court refused to answer the reference and sent it back for amendment.

9 Reference by Presidency Small Cause Courts

See S. 69 of the Presidency Small Cause Courts Act (XV of 1882) as amended by Act IV of 1906 and the undermentioned cases¹

R. 2. [S. 618] The Court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or *make an order* contingent upon the *decision* of the High Court on the point referred;

Court may pass decree contingent upon decision of High Court

but no *decree or order* shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference.

[1877—S. 619, 1861—S. 29.]

R. 3. [S. 619] The High Court, *after hearing* the parties *if they appear and desire to be heard*, shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the reference was made, and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court

Judgment of High Court to be transmitted and case disposed of accordingly

[1877—S. 619, 1861—Ss. 32 and 33]

1 Dispose of the case in conformity with the decision of the High Court

Upon receipt of the decision of the High Court, it is the duty of the referring Court to dispose of the case in conformity therewith. Thus, where a Small Cause Court passed a decree for the plaintiffs, contingent on the opinion of the High Court and the High Court gave the opinion that the plaintiffs could not recover, it is not open to the referring Court after the receipt of the opinion to allow the suit to be withdrawn by the plaintiff, judgment should be entered for the defendant¹. The judgment by the High Court on a reference under this rule is not, by itself, a decree but simply a statement of the grounds in conformity with which the referring Court is to dispose of the case as provided by this rule. Therefore the High Court cannot review its judgment passed on a reference made to it².

2 (1877) 7 Suth W R 160 (160)

Note 9

1 (1893) 40 Cal 103 (162) Condition of this

condition precedent to a reference (1891) 15 Bom 316 (33) The precise question of law or usage must be formulated

(1892) 16 Bom 618 (614) Reference must be made before the Judge has delivered judgment

Order 46 Rule 3—Note 1

a question of law or usage or construction as the case mentioned is a

1 (1897) 21 Cal 129 (132)

2 (1886) 10 Bom 68 (69)

**Costs of reference
to High Court**

R. 4. [S 620] *The costs (if any) consequent on a reference for the decision of the High Court shall be costs in the case*

[1877—S 620, 1861—S 34]

1 Costs of reference

The costs of reference to the High Court cannot be dealt with separately but must be dealt with when awarding the costs of the suit¹ The High Court of Calcutta is however, of opinion that the award of the costs of the reference is in the *discretion* of the Court² This does not seem to be correct on principle The rule requires that the costs of reference *shall* be costs in the case and S 35 which gives the Court a discretion to award costs is expressly made subject to the conditions and limitations prescribed by the rules of the first schedule

R. 5. [S 621] *Where a case is referred to the High Court under Rule 1, the High Court may return the case for amendment, and may alter, cancel or set aside any decree or order which the Court making the reference has passed on made in the case out of which the reference arose, and make such order as it thinks fit*

[1877—S 621]

1 Scope of the Rule

Where the lower Court has not complied with the conditions laid down in R 1 of this order the High Court has power under this rule to return the case for amendment in proper form¹ The rule is also wide enough to enable the High Court to quash the order of reference itself made by the lower Court²

R. 6. [S 646 A] (1) *Where at any time before judgment a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit*

(2) *On receiving the record and statement, the High Court may order the Court either to proceed with the suit or to return the plaint for presentation to such other Court as it may in its order declare to be competent to take cognizance of the suit*

1 At any time before judgment

No reference could be made under this rule *after* the passing of the

judgment in the case.¹ The rule refers only to such questions as arise during the trial of the suit and not to questions arising on an application for sanction to prosecute which cannot be considered as a trial of the suit.²

R. 7. [S 616-B] (1) *Where* it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable failed to exercise a jurisdiction vested in it by law or exercised a jurisdiction not so vested, the District Court may, and if required by a party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous.

(2) On receiving the record and statement the High Court may make such order in the case as it thinks fit.

(3) With respect to any proceedings subsequent to decree in any case submitted to the High Court under this Rule, the High Court may make such order as in the circumstance appears to it to be just and proper.

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this Rule.

Synopsis

	Note No		Note No
Scope of the Rule	1	Powers of the High Court under this Rule	5
Court subordinate thereto	2		
If required by a party shall	3		
District Court should state its reasons	4	(a) Interference with jurisdiction of	6

Other Topics

Doubt as to jurisdiction. See Note 1 It (1) Provincial Small Cause Courts Act S. 5 S. 10 Note 1 It (1)

1 Scope of the Rule

S. 16 of the Prov. Small Cause Courts Act, 1897 provides that a suit cognizable by a Court of Small Causes *shall not* be tried by any other Court having jurisdiction within the limits of the jurisdiction of the Court of Small Causes by which the suit is triable. Where an ordinary Court entertains a suit cognizable by a Court of Small Causes it *exercises* a jurisdiction *not vested in it* and if it refuses to entertain an original suit on the ground that it is cognizable by a Court of Small Causes, it *refuses to exercise* a jurisdiction *vested* in it. A reference under this rule is limited to those cases where the District Court is of the opinion that the Subordinate Court has *held*

7, that it has no jurisdiction over the suit, and that such order is erroneous.¹

The rule is only an enabling one and does not in any way cut down the jurisdiction of the appellate Court.² But a District Judge has power under this Rule to make a reference whether the case is, or is not, pending in appeal before him.³ Where a District Munsif returned a plaint as being cognisable only by a Court of Small Causes and the latter Court, however, returned it back as being cognisable only by the Munsif's Court, it was held that the correct procedure was either to proceed under R. 6 of this order itself or send the case to the District Judge for making a reference under this rule.⁴

2 Court subordinate thereto¹

The Court of Small Causes is a Court subordinate to the District Judge and O. 46, R. 7 contemplates and allows a reference to be made by the District Judge in cases tried by the Court of Small Causes.¹

3 If required by a party shall

Before a reference could be made under this rule it is a necessary condition that it must appear to the District Court that the subordinate Court has erroneously held upon the point of jurisdiction.¹ Where it does so appear and a party requires the District Court to make a reference, it is bound to do so.²

4 District Court should state its reasons

A District Court when making a reference under this rule should state its reasons for considering the opinion of the subordinate Court to be erroneous.¹

5 Powers of the High Court under this Rule

Where a suit which is cognisable only by a Court of Small Causes is tried as an original suit by a District Munsif and the decree is reversed by the Subordinate Judge on appeal there are two remedies open to the aggrieved party.

(1) A revision under S. 115 of the Code

(2) A reference under this rule

Where a revision is preferred to the High Court the latter is bound to set aside the decree of appellate Court as being passed in an appeal which was incompetent and therefore without jurisdiction.¹ It can also set aside the decree of both the Courts and return the plaint for presentation to the proper Court.²

is been held

13 Nig LR 1

1 h

¹ Note 2

1 (1916) 1916 Cal 422 (423)

² Note 3

1 (1911) 11 All 301 (301)

(1910) 13 M L J 311 (316)

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2 1916, 1916

1913

Let the High Courts of Calcutta³ and Patna⁴ that the High Court is not *bound* to set aside the proceedings in all cases but has full power to consider the matter of jurisdiction or to deal with the case on the merits so as to do substantial justice without necessarily putting the parties to the expense of a fresh trial

See also the undermentioned case⁵

6 Interference with questions of fact

On a reference under this rule the High Court will not as a rule interfere with findings of fact arrived at by the first Court on the evidence before it¹

Local Amendments

ALLAHABAD

After R 38 to O 46 —

8 Rule 38 of O 41 shall apply so far as may be to proceedings under this Order "

BOMBAY

The following shall be added as R 38 in O 46 —

Applicability of R 38 8 Rule 38 of O 41 shall apply so far as may be to proceedings under this Order

COCHIN

The following as R 38 —

8 Rule 38 of O 41 shall apply so far as may be to proceedings under this Order

SINDH

The following as R 38 in O 46

Applicability of R 38 8 Rule 38 of O 41 shall apply so far as may be to proceedings under this Order

ORDER XLVII

REVIEW.

Application for review of judgment

R. 1. [S 623] (1) Any person considering himself aggrieved²—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred⁶

(b) by a decree or order from which no appeal is allowed, or

(c) by a *decision* on a reference from a Court of Small Causes,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for review of judgment to the Court which passed the decree or made the order

3 (1915) 1915 Cal 619 (620)

(1891) 91 Cal 219 (252)

4 (1933) 1933 Pat 31 (31) 111 at 630

5

which rejected it — Appeal to District Judge against this order dismissed — High Court can revise the original order returning the plaint

Note 6

1 (1916) 1916 Cal 423 (423)

1. (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review

[1877—S 623; 1859—S. 376]

Synopsis.

	Note No		Note No
Legislative changes	1	Cases where review was not allowed	
Scope of the Rule	2	on the ground that there was no	
(a) Review and appeal—Distinction	3	sufficient reason	16b
(b) Review and amendment—Distinction	4	Review on the ground of subsequent events	17
Person considering himself to be aggrieved	5	No review on ground of decision being erroneous on merits	17a
Decree or order from which no appeal has been preferred	6	(a) Review on particular ground	18
(a) Filing of appeal pending application for review	7	See Note 2 to Rule 8	
Decree or order from which no appeal is allowed—Clause (b)	8	No review of fact after decision in second appeal	19
Decision on reference from Court of Small Causes—Clause (c)	9	Application of the Rule to miscellaneous proceedings under the Code	20
Discovery of new and important matter or evidence	10	Review in proceedings under other Acts	21
(a) Discovery of important matter of law	11	Review petitions by minors	22
(b) Exercise of due diligence	12	Consent decree	23
(c) Was not within his knowledge and could not be produced by him at the time	13	Ex parte decrees and orders of dismissal for default	24
(a) Decree rendered ineffectual by reversal See Note 10 <i>supra</i>	14	Judgment in Letters Patent Appeals	25
Mistake or error on the face of the record	15	Review of decision before signing decree	26
Any other sufficient reason	16	Commissioner cannot review	27
Cases where review was allowed on ground of sufficient reason	16a	Limitation	28
		Court fee	29
		Appeal by one party—Review application by another—Clause (2)	30
		Privy Council practice	31
		Appeal	32
		Revision	33

Other Topics

- Appeal preferred before review—Review application not maintainable See Note 6, Pt (1)
- Court's duty—Strict proof must be called for before grant of review See Note 13 Pt (2)
- Grant of review—Objections that can be raised in appeal See R 7, Note 4, Pt (c)
- New evidence—Whether should be conclusive See Note 10 Pt (3)
- Order by one Judge of High Court—Review by another is competent See R 2 No 9, Pt (20)
- Review in probate proceedings See Note 21 F A (1)
- Review under the old Code See Note 1 Stages in review application See R 2 No 1 Pt (1)
- Wrong exposition of law—Whether a ground for review See Note 15 Pt 7, No 16 (b) Pt, (1 a)

1 Legislative changes

Section 623 of the old Code provided that an application for review could be made to the Court which passed the decree or made the order, or to the Court (if any) to which the business of the former Court has been transferred. These latter words have been omitted in the present section in view of s 140 of the Code newly introduced

2 Scope of the Rule

It has been seen in Note 2 to S 96 *ante*, that a right of appeal does not exist and cannot be assumed unless expressly given by statute or by rules having the force of statute. The same principle applies to a right of review also. Such a right does not therefore exist unless granted by statute¹ S 114 of the Code and this order expressly gave such a right in certain cases the former being the substantive section containing a brief statement of the Court's general power of review and the latter providing the details of procedure². These provisions constitute an *exception* to the general rule that when once a judgment is signed and pronounced it cannot afterwards be altered or added to (see O 20 R 3), and as such a right of review is exercisable only in the circumstances where it is distinctly provided by the statute³.

This rule is in itself definitive of the limits within which a review is permitted by the Code⁴ and it follows from what has been stated above that where a case falls within the class of cases contemplated by this rule the Court cannot have an inherent power of review apart from the provisions of the rule⁵. Where however a case falls outside the class of such cases the Courts have of course inherent power to review their orders for the ends of justice or to prevent an abuse of the process of the Court⁶.

The existence of a right of review does not bar a suit for the same relief⁷. Nor does the fact that an appeal can be filed against the decree afford any ground for refusing a review. The reason is that where there are two remedies open to a party, they should not as a rule be construed so as to operate in derogation of each other⁸. But the availability of an appeal as an obvious remedy will be a ground for refusing in the exercise of the Court's discretion, an application for review⁹.

3 Review and appeal—Distinction

A review is not the same thing as or a substitute for an appeal¹. The two proceedings differ in very many particulars.

- (1) The primary intention of a review is the reconsideration of the subject of the suit by the *same Judge* under certain conditions while an appeal is a rehearing by another tribunal².

Order 47 Rule 1—Note 2

- 1 (1917) 1917 Mad 726 (726)
- 2 (1931) 1931 1st 409 (409)
See also Note 1 to S 114 *ante*
- 3 (1931) 1931 Pat 409 (409)
(1873) 70 South W R 160 (181)
- 4 (1922) 1922 P C 112 (115) 3 Lah 127 40
Ind App 144 (P C)
(1931) 1931 P C 213 (216) 56 All 634 (P C)
(1927) 1927 Mad 355 (356)
(1932) 1932 Lah 596 (597) 13 Lah 546
(1926) 92 Ind Cas 1013 (All)
- 5 (1927) 1927 Bom 232 (233)
(1927) 1927 Cal 900 (921)

- (1933) 1933 Lah 169 (171)
[See also (1924) 1924 Cal 1054 (1054)]
[See also (1934) 1935 Cal 336 (336)]
- (1934) 1934 All 250 (252)
- 6 (1929) 1929 Nag 185 (189)
(1930) 1930 Bom 204 (90) Order not falling within R 1
(1936) 1926 Pat 218 (227) 5 Pat 361 (F B)
(1924) 1924 1st 673 (677) 3 Pat 930
(1915) 1918 Cal 178 (175)
- 7 (1903) 2 Ind Cas 129 (143) (Cal)
- 8 (1909) 2 Ind Cas 125 (113) (Cal)
(1933) 1933 Lah 226 (226)
- 9 (1931) 1931 Mad 829 (830)

Note 3

- 1 (1931) 1931 Ma 1 608 (605)
(1922) 1922 U P 16 (17) 4 Lpp Bur R 27
- 2 (1865) 3 South W R 45 (47 48)
(1865) 9 South W R 151 (186)
[See also (1934) 1934 All 175 (176)]

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- (2) A point which may be a good ground of an appeal may not be a good ground for an application for review³ Thus an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal⁴
- (3) A review does not, of necessity, re open questions already decided between the parties. The matter in issue is only re opened when the application for review is accepted, while in the case of an appeal the matter is re opened as soon as an appeal is admitted⁵

4 Review and amendment—Distinction

A review and an amendment differ in the following particulars —

- (1) In the case of a review the correctness of the *judgment* and the *decree* is questioned, while in the case of an amendment of a decree the correctness of the judgment is assumed but the jurisdiction to amend arises from the fact that the decree is not in accordance with the judgment¹
- (2) Where an application for an amendment is allowed there is no need for a *re hearing* of a suit, while if an application for review is allowed, a re hearing of the suit becomes necessary²
- (3) Where an application for review is granted the result is a new decree superseding the original decree and not merely some amendment thereof³

5 Person considering himself to be aggrieved⁴

It is only a person aggrieved⁵ by a decree or order that can apply for a review. A person aggrieved means a person who has suffered a *legal grievance* a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully affected his title to some thing, it is not sufficient that he has lost something which he would have obtained if another order had been made¹ A decree or order against a person not a party thereto, is on general principles of law, not binding on him. Such a person therefore cannot have a legal grievance against the decree or order, and, consequently cannot apply, for a review of the decree or order under this rule² The Judicial Commissioner's Court of Nagpur has however, held that where an order has been made in a proceeding against a company which was

3 (1931) 1931 Mad 606 (608)
(1883) 5 All 14 (16)
(1883 1876) 1 Cal 181 (186)
(1922) 1922 Pat 308 (309)
(1926) 1926 Rang 89 (89)

(See also (1935) 1935 Lah 330 (330)
16 Lah 602 Grounds for petition for review are different from grounds for application for leave to appeal against judgment of single Judge of High Court.]

4 (1930) 1930 Cal 701 (703)

5 (1922) 1922 Oudh 148 (149) 21 Oudh Cas 280

Note 4

1 (1917) 1917 Mad 290 (292)
(1924) 1924 Mad 225 (226 227)
(1891) 6 Cal 22 (25)

2 (1917) 1917 Mad 290 (292)

3 (1919) 1919 Nag 78 (79) 15 Nag L L G
(1906) 28 All 240 (241)

Note 5

1 Halsbury's Laws of England 1st ed.
200

2 (1917) 1917 Mad 290 (292)
(1924) 1924 Mad 225 (226 227)
(1891) 6 Cal 22 (25)
[See also (1872) 18 South W R 465 (465) Application on the part of two of several parties. Court cannot modify the decrees in favour of others who have not applied.]

not properly a party to the proceeding, a director of the company can file an application for review of the order.³

A minor, who is aggrieved by a decree or order passed against him may apply for a review under the same circumstances as an adult.⁴ Similarly, the legal representatives of a deceased party who are materially affected by the decree are also entitled to apply under this rule.⁵ Where sanction was granted to the Public Prosecutor to prosecute an attorney and an order was made granting leave to the attorney to appeal to the Privy Council it was held that the Public Prosecutor was a person aggrieved by the order granting leave to appeal and was entitled to apply for a review thereof.⁶

6 Decree or order from which no appeal has been preferred

If before the making of an application for review, an appeal from the decree sought to be reviewed *has already been filed* and is pending the Court has no jurisdiction to entertain an application for review.¹ Where, however, the application for review is made first and *thereafter* an appeal is filed against the decree the jurisdiction to deal with the application is not affected by the pendency of the appeal. But where before the application is *heard* such appeal is disposed of on the merits² or under O 41 R 11⁴ the appellate decree supersedes the decree or order appealed from and the result of allowing the application would be to interfere with the decree of the appellate Court. Consequently the Court which passed the decree or order cannot proceed with the application for review. Compare Note 12 to S 96 *ante* and Notes 10 and 11 to O 9 R 13.

Where an appeal is withdrawn and *thereafter*, an application for review

3 (1929) 1929 Nag 185 (140)	see whether the applicant is made a party respondent and given opportunity and the appeal is heard]
4 (1871) 16 South W R 231 (232)	
5 (1905) 9 Oudh Cas 30 (37)	
6 (1914) 1914 Cal 557 (558) 41 Cal 731	3 (1923) 1923 Cal 113 (115)
N 1116	(1900) 4 Cal L Jour 560 (567)
	(1899) 70 J Mad H C R 464 (466)
	(1908) 1925 Cal 804 (805)
50	(1862) 131 Mal H C R 254 (255)
	(1932) 1932 Cal 171 (176) Review application filed after disposal of appeal
331)	(1927) 1927 Bom 292 (293)
	(1909) 1 Ind Cas 136 (137) (Cal) (Do)
	(1870) 14 South W R 438 (440) (Do)
	(1863) 11 South W R 511 (512) (Do)
	(1868) 9 South W R 471 (472) (Do)
	(1918) 1918 Lah 45 (46) 1918 Pun Re No 40 (Do)
under	See also (1934) 1934 All 200 (251)
	Dismissal of suit by trial Court—
	Appeal to sub Court and second appeal to High Court dismissed—
	Trial Court cannot review its order of dismissal]
	4 (1931) 1931 All 704 (704)
1103	(1922) 1922 Bom 130 (131) 46 Bom 1
	(1906) 30 Bom 625 (630)
	(1900) 4 Cal L Jour 566 (567)
	(1917) 1917 Cal 417 (419)
	[See also (1871) 6 Beng L R 333 (338, 339) Application for review filed in lower Court after dismissal of second appeal—Application does not lie]
[See also (1904) 7 Oudh Cas 299 (302) The Court should postpone the hearing of the application and	

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- (2) A point which may be a good ground of an appeal may not be a good ground for an application for review.³ Thus an erroneous view of evidence or of law is no ground for a review, though it may be a good ground for an appeal.⁴
- (3) A review does not, of necessity, re-open questions already decided between the parties. The matter in issue is only re-opened when the application for review is accepted, while in the course of an appeal, the matter is re-opened as soon as an appeal is admitted.⁵

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- (2) Where an application for an amendment is allowed there is no need for a *re-hearing* of a suit, while if an application for review is allowed, a re-hearing of the suit becomes necessary.
- (3) Where an application for review is granted the result is a new decree superseding the original decree and not merely an amendment thereof.²

5 Person considering himself to be aggrieved

It is only a person aggrieved by a decree or order that can apply for a review. A person aggrieved means a person who has suffered a *legal grievance*—a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully affected his title to something, it is not sufficient that he has lost something which he would have obtained if another order had been made.¹ A decree or order against a person not a party thereto, is on general principles of law, not binding on him. Such a person therefore cannot have a legal grievance against the decree or order, and, consequently, cannot apply, for a review of the decree or order under the rule.² The Judicial Commissioner's Court of Nagpur, has however held that where an order has been made in a proceeding against a company which was

3 (1931) 1931 Mad 608 (608)
(1883) 5 All 14 (16)
(1813 1876) 1 Cal 184 (186)
(1922) 1922 Pat 808 (809)
(1926) 1926 Rang 89 (89)

(See also (1935) 1935 Lah 330 (330)
16 Lah 602 Grounds for petition
for review are different from grounds
for application for leave to appeal
against judgment of single Judge of
High Court.]

4 (1930) 1930 Cal 701 (703)

5 (1922) 1922 Oudh 148 (148) 21 Oudh Cas
280

Note 4

1 (1917) 1917 Mad 290 (292)
(1924) 1924 Mad 220 (220 227)
(1881) 6 Cal 22 (25)

2 (1917) 1917 Mad 290 (292)

3 (1919) 1919 Nag 78 (79) 15 Nag L R 60
(1905) 29 All 240 (241)

Note 5

1 *Halsbury's Laws of England* 1st Ed II
page 301
(1917) 1917 All 160 (162) 39 All 152

(1879) 14 Ch D 458 Ex parte Sidebotham
—*Distinguished in* (1915) 1915 Mys
1177 (1178) 39 Mad 479

2 (1904) 8 Cal W N 469 (469)

(1921) 61 Ind Cas 534 (535) (Lab)
(See also (1872) 18 South W R 464
(465) Application on the part of
two of several parties. Court cannot
modify the decrees in favour of
others who have not applied.)

not properly a party to the proceeding, a director of the company can file an application for review of the order.³

A minor, who is aggrieved by a decree or order passed against him may apply for a review under the same circumstances as an adult.⁴ Similarly, the legal representatives of a deceased party who are materially affected by the decree are also entitled to apply under this rule.⁵ Where sanction was granted to the Public Prosecutor to prosecute an attorney and an order was made granting leave to the attorney to appeal to the Privy Council it was held that the Public Prosecutor was a person aggrieved by the order granting leave to appeal and was entitled to apply for a review thereof.⁶

6 Decree or order from which no appeal has been preferred

If before the making of an application for review, an appeal from the decree sought to be reviewed *has already been filed* and is pending, the Court has no jurisdiction to entertain an application for review.¹ Where however, the application for review is made first and *thereafter* an appeal is filed against the decree, the jurisdiction to deal with the application is not affected by the pendency of the appeal. But where before the application is *heard*, such appeal is disposed of on the merits² or under O 41 R 11⁴ the appellate decree supersedes the decree or order appealed from and the result of allowing the application would be to interfere with the decree of the appellate Court; consequently the Court which passed the decree or order cannot proceed with the application for review. Compare Note 12 to S 96 *ante* and Notes 10 and 11 to O 9 R 13.

Where an appeal is withdrawn and *thereafter* an application for review

3 (1909) 117 Neg 155 (1909)

4 (1911) 16 South W R 231 (1911)

5 (1906) 9 South Cas 9 (1906)

6 (1914) 1914 Cal 113 (113)

Note 6

1 (1931) 117 L J 232 (232)

(1923) 1923 L J 128 (128) 117 L J 232 (232)

Ind App 1-3 (1911)

(See also (1853) 13 Lom 370 (371))

see whether the applicant is made a party respondent and given opportunity and the appeal is heard]

1 (1909) 117 Cal 113 (113)

(1909) 4 Cal L J 500 (500)

(1907) 10 M J H C R 114 (106)

(1928) 19 S Cal 504 (509)

(1902) 11 M J H C R 254 (25)

(1917) 113 Cal 171 (171) Review applied to a file after disposal of 111

(192) 1927 Bom 232 (233)

(1909) 1 Ind Cas 136 (137) (Cal) (Do)

(1870) 14 South W R 498 (440) (Do)

(1870) 11 South W R 511 (510) (Do)

(1865) 9 South W R 471 (472) (Do)

(1918) 1918 Lah 40 (40) 1918 Lun Re No 40 (Do)

See also (1934) 1934 All 250 (251)

Dismissal of suit by trial Court—
Appeal to sub Court and second appeal to High Court dismissed—
trial Court cannot review its order of dismissal

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R 1, is filed, the application may be entertained and disposed of by the Court the reason being that an appeal once withdrawn must be treated as if it has never been preferred at all within the meaning of this rule.⁵ According to the High Court of Allahabad the principle is not affected by the fact that the application for review is filed first and the appeal is withdrawn later.⁶ But according to the High Court of Bombay there is no jurisdiction to entertain the application so long as an appeal is pending, and the fact that the appeal is withdrawn *subsequently* will not cure the initial defect in making the application.⁷

7 Filing of appeal pending application for review

As has been seen in Note 6, *ante* the subsequent filing of an appeal against the decree sought to be reviewed does not affect the jurisdiction of the Court to deal with the application for review but such jurisdiction ought in such cases to be exercised with the greatest care and only in a very strong case.¹ The fact that application for review of a judgment is pending will not however, preclude the appellate Court from granting in appeal the relief claimed in the application.²

8 Decree or order from which no appeal is allowed—Clause (b)

Any decree or order from which no appeal is allowed is open to review.¹

9 Decision on reference from Court of Small Causes—Clause (c)

Under the Code of 1859 no application lay for review of judgment by the High Court on a reference from a Court of Small Causes.¹ Even under this rule, the High Court has no power to review a judgment passed by it on a reference from a *Subordinate Judge* with Small Cause Court powers. The rule allows a review of judgment on a reference only from a *Court of Small Causes*.²

10 Discovery of new and important matter or evidence

Where a litigant has obtained a judgment in a Court of justice he is by law, entitled not to be deprived of that judgment without solid grounds. Where therefore a review of a judgment is asked for by a party, the greatest care ought to be exercised by the Court in granting a review especially where the ground of review is the discovery of fresh evidence. It is so easy to the party who has lost his case to see what the weak part of his case was, and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion upon that part of the case must be very strong.¹ The rule that permits a new trial to be granted on account of the discovery of new evidence has, therefore, been fenced round with many limitations.

new trial must show that there was *no*

(1930) 1935 Nag 174 (176)

Note 7

- 1 (1909) 2 Ind Cas 803 (804) 32 Mad 416.
2 (1929) 1929 Sinl 32 (36)

Note 8

- 1 (1929) 1929 All 123 (124) Order of dismissal for default

Note 9

- 1 (1863) 3 South W R 8 (8)
2 (1886) 10 Bom 68 (69)

Note 10

- 1 (1918) 1918 Cal 618 (621) 15 Cal 60

remissness on his part in adducing all possible evidence at the trial² Further, the new evidence must be such as is *presumably to be believed* and such that, if adduced, it would *practically be conclusive*, i. e., evidence of such a class as to render it probable almost beyond doubt that the judgment would be *different*³ Where it is *very doubtful* whether the evidence if produced, would have had any effect on the judgment, there is no ground for review⁴ In *Mahabir Prasad v Collector of Allahabad*⁵ where a suit was dismissed on two grounds namely, want of notice as required by law and the plaintiff being illegitimate and a review was applied for on the ground of discovery of new evidence tending to establish the legitimacy of the plaintiff, it was held that a review should not be granted inasmuch as the suit would still have to be dismissed on the question of notice But the case would be different where the effect of the evidence if adduced, would be to alter or cancel the decree Thus the discovery of a document containing an *admission of liability* by the defendant⁶ or the discovery of fraud⁷ would be a good ground for review Similarly where a decree for restitution of conjugal rights was passed and subsequently it was discovered that the parties were related as cousins such relationship rendering the marriage a nullity it was held that there was a good ground for review⁸ Again where the parties were not aware of a *previous* judgment passed in another case between them which if it had been placed before the Court would have resulted in different judgment there is a good ground for review⁹

In the undermentioned cases¹⁰ it has been held that it is not necessary for granting a review on the ground of the discovery of new and important matter that such evidence if admitted would be conclusive to show that the decision is wrong Thus view is against the general trend of decisions and cannot be accepted as correct

There is a conflict of opinion on the question whether the decision in another case between the same parties *after* the date of the judgment sought to be reviewed would be a sufficient ground for review in cases where such decision if it had been given before the date of the judgment sought to be reviewed would have resulted in a different judgment Before the date of the Privy Council decision in *Kotagiri v Vellanki*^{10a} the Bombay High Court answered the question in the affirmative¹¹ while the Allahabad and Calcutta High Courts

2 (1918) 1918 Cal 618 (676) 45 Cal 60
(1904) 31 Bom 351 (358) 34 Ind App 115
(P C)

3 (1920) 1920 Cal 467 (40) 47 Cal 68
4 (1900) 81 L T 531 Young v Kershaw -
Referred to in 45 Cal 60 1918 Cal
618 (622)

5 (1935) 1935 Rang 184 (185)
(1910) 1910 App Cas at p 374 Brown v
Dean *Cited in* 45 Cal 60 1918 Cal
618

6 (1918) 1918 P C 184 (185) (P C)
(1887) 10 Mad 73 (77) 13 Ind App 155
(P C)

7 (1929) 1929 All 545 (545)
(1875) 23 Suth W R 323 (324)
Bourke O C 115

8 (1917) 1917 Lat 340 (341)
9 (1902) 5 Oudh Cas 99 (64)

(1917) 1917 Pat 201 (204)

5 (1914) 1914 All 44 (45) 36 All 277

6 (1911) 11 Ind Cas 15 (16) (Lah)

*Put a subsequent admission as not a
ground for review See 5 Ind Cas 182 (183
184) (Cal) See also further down in the
commentary*

7 See Note 22 *infra*

8 (1930) 1930 Pat 63 (67)

9 (1930) 1930 All 621 (622)

(1919) 1919 Cal 46 (46)

(1897) 10 Mad 357 (360) Decision given
before but published after the deci

- 1, is filed, the application may be entertained and disposed of by the Court the reason being that an appeal once withdrawn must be treated as if it had never been preferred at all within the meaning of this rule.⁵ According to the High Court of Allahabad the principle is not affected by the fact that the application for review is filed first and the appeal is withdrawn later.⁶ But according to the High Court of Bombay there is no jurisdiction to entertain the application so long as an appeal is pending, and the fact that the appeal is withdrawn *subsequently* will not cure the initial defect in making the application.⁷

7 Filing of appeal pending application for review

As has been seen in Note 6 *ante* the *subsequent* filing of an appeal against the decree sought to be reviewed does not affect the jurisdiction of the Court to deal with the application for review but such jurisdiction ought in such cases to be exercised with the greatest care and only in a very strong case.¹ The fact that application for review of a judgment is pending will not, however, preclude the appellate Court from granting in appeal the relief claimed in the application.²

8 Decree or order from which no appeal is allowed—Clause (b)

Any decree or order from which no appeal is allowed is open to review.¹

9 Decision on reference from Court of Small Causes—Clause (c)

Under the Code of 1859 no application lay for review of judgment by the High Court on a reference from a Court of Small Causes.¹ Even under this rule the High Court has no power to review a judgment passed by it on a reference from a *Subordinate Judge* with Small Cause Court powers. The rule allows a review of judgment on a reference only from a *Court of Small Causes*.²

10 Discovery of new and important matter or evidence

Where a litigant has obtained a judgment in a Court of justice he is by law entitled not to be deprived of that judgment without solid grounds. Where therefore a review of a judgment is asked for by a party the greatest care ought to be exercised by the Court in granting a review especially where the ground of review is the discovery of fresh evidence. It is so easy to the party who has lost his case to see what the weak part of his case was and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion upon that part of the case must be very strong.¹ The rule that permits a new trial to be granted on account of the discovery of new evidence has, therefore, been fenced round with many limits

show that there was no

Vag 171 (176)

Note 7

Cas 802 (804) 32 Mad 416

5 n1 32 (30)

Note 8

111 123 (124) Order of dism & al fault

Note 9

1 W R 8 (8)

2 GS (60)

Note 10

1 (1918) 1918 Cal 618 (621) 45 Cal 60

⁵ (1921) 1921 All 197 (199) 43 All 288
(1931) 1931 Bom 232 (233)

remissness on his part in adducing all possible evidence at the trial² Further, the new evidence must be such as is *presumably to be believed* and such that, if adduced, it would *practically be conclusive*, i. e., evidence of such a class as to render it probable almost beyond doubt that the judgment would be *different*³ Where it is very *doubtful* whether the evidence, if produced, would have had any effect on the judgment there is no ground for review⁴ In *Mahabir Prasad v. Collector of Allahabad*⁵ where a suit was dismissed on two grounds namely, want of notice as required by law and the plaintiff being illegitimate and a review was applied for on the ground of discovery of new evidence tending to establish the legitimacy of the plaintiff, it was held that a review should not be granted inasmuch as the suit would still have to be dismissed on the question of notice But the case would be different where the effect of the evidence if adduced would be to alter or cancel the decree Thus the discovery of a document containing an *admission of liability* by the defendant⁶ or the discovery of fraud⁷ would be a good ground for review Similarly where a decree for restitution of conjugal rights was passed and subsequently it was discovered that the parties were related as cousins such relationship rendering the marriage a nullity it was held that there was a good ground for review⁸ Again where the parties were not aware of a *previous* judgment passed in another case between them which if it had been placed before the Court would have resulted in different judgment, there is a good ground for review⁹

In the undermentioned cases¹⁰ it has been held that it is not necessary for granting a review on the ground of the discovery of new and important matter that such evidence if admitted would be conclusive to show that the decision is wrong This view is against the general trend of decisions and cannot be accepted as correct

There is a conflict of opinion on the question whether the decision in another case between the same parties *after* the date of the judgment sought to be reviewed would be a sufficient ground for review in cases where such decision if it had been given before the date of the judgment sought to be reviewed would have resulted in a different judgment Before the date of the Privy Council decision in *Kotagiri v. Vellanki*^{10a} the Bombay High Court answered the question in the affirmative¹¹ while the Allahabad and Calcutta High Courts

2 (1918) 1918 Cal 619 (626) 45 Cal 60
(1907) 31 Bom 381 (308) 31 Ind App 115
(P C)

(1920) 1920 Cal 467 (410) 47 Cal 563
3 (1900) 81 L T 531 Young v. Kershaw -
Referred to in 45 Cal 60 1918 Cal
618 (627)

(1935) 1935 Rang 181 (180)
(1910) 1910 App Cas at p 374 Prown v
Dean Cited in 45 Cal 60 1918 Cal
618

(1918) 1918 P C 181 (188) (P C)
(1897) 10 Mad 73 (77) 13 Ind App 155
(P C)

(1929) 1929 All 545 (545)
(1875) 23 South W R 323 (324)
Bourke OC 115

(1917) 1917 Pat 340 (311)
4 (1902) 5 Oudh Cas 59 (64)

(1917) 1917 Pat 201 (201)

5 (1914) 1914 All 44 (45) 36 All 277

6 (1911) 11 Ind Cas 15 (16) (Lah)

Put a subsequent admission is not a
ground for review See 5 Ind Cas 182 (183
181) (Cal) See also further down in the
columnary

7 See Note 22 infra

8 (1930) 1930 Pat 63 (67)

9 (1930) 1930 All 621 (622)

(1919) 1919 Cal 46 (46)

(1887) 10 Mad 357 (360) Decision given
before but published after the deci

1. answered it in the negative¹² In *Kotagiri's* case it was held by their Lordships of the Privy Council that the section of the old Code corresponding to this rule did not authorise the review of a decree *which was right when it was made* on the ground of the happening of some *subsequent event*. It has accordingly been held since then that a subsequent decision in another case¹³ or the subsequent reversal of a decision on the basis of which a judgment was given is no ground for review under this rule^{13a}. There are however several decisions¹⁴ which have purported to follow the Bombay view, but no reference was made in any of them to *Kotagiri's* case. In the undermentioned case¹⁵ the High Court of Rangoon has further held that the Bombay view cannot be said to have been overruled by the decision of the Privy Council in *Kotagiri's* case and that it is still good law. The reasoning is, however, not very clear. It is submitted that these decisions cannot be accepted as laying down the correct law. The word 'evidence' in this rule is not confined to documentary evidence but includes *oral evidence*¹⁶.

11 Discovery of important matter of law

The words 'new and important matter' in this Rule refer to evidence or other matter *in the nature of evidence*, and not to a legal authority in existence at the date of the judgment but not brought to the notice of the Court. Hence no review can be asked for on the ground of the discovery of new authorities which show that the decision is not correct.² The contrary view expressed in the cases cited below³ is, it is submitted, not sound.

But the discovery of a *former* decision between the same parties which operates as *res judicata* is a discovery of new and important matter within

- 12 (1884) 6 All 292 (294)
 (1889) 8 Cal 700 (703)
 (1868) 9 Suth W R 102 (103)
 (1867) 7 Suth W R 400 (406)
 [But see (1871) 18 Suth W R 317
 \ R 151]

- (1918) 1918 Pat 647 (648)
 15 (1977) 1927 Rang 189 (189) 5 Rang 261
 16 (1928) 1928 Nag 279 (279)

Note 11

- 1 (1899) 21 All 152 (153)
The above view is submitted as being a sound principle. Because it is well held that a party is entitled to a full review on the ground of his discovery of

new and important matter referred to in this Rule must be something which existed at the date of the decree sought to be revised.

- (1922) 1922 Mad 227 (227)
 (1926) 1926 Nag 10 (10) Decree on which decision based subsequently amended
 [See also (1934) 1934 Oudh 440 (446)
 Appeal dismissed with observation that if decision of High Court in a similar case is reversed by the Privy Council appellant might apply for review—Such reversal by Privy Council—The new ground may be deemed to have been in contemplation at the date of decree]

to a matter which being a matter of law a party is always presumed to know—See *Holland's Jurisprudence* 3rd Ed., Page 92

- 2 (1925) 1925 Sind 53 (54) 19 Sind L R 30
 (1924) 1924 Pat 250 (253) 3 Pat 131

- 3 (1906) 1906 Pun Re No 124 page 167
 [See also (1926) 1926 Mad 704 (704)]

- 14 (1907) 31 Bom 128 (130)
 (1911) 10 Ind Cas 244 (245) 33 All 506
 (1913) 19 Ind Cas 214 (214)
 (1907) 1 Sind L R 227 (227)

this Rule.⁴

12 Exercise of due diligence

In *Kesson, & Issur v G I P Railway*¹ their Lordships of the Privy Council observed as follows — 'Now the Code of Civil Procedure permits such applications for review on the ground of such discovery, (*i e*, discovery of new and important matter or evidence) 'but it enacts very strict conditions so as to prevent litigants living on their oars when they ought to be looking for their evidence—' enjoins the Judge to require the facts as to the absence of negligence to be strictly proved. Applications for review on the ground of discovery of fresh evidence ought, therefore, to be refused when such evidence could have been produced if reasonable care and diligence had been exercised.² There must be strong evidence of diligence in getting all available evidence.³ When the trial had lasted three years the Privy Council refused to admit fresh evidence as there was no reason shown as to why the new evidence was not previously submitted.⁴ The fact that evidence was found subsequently cannot itself be taken to show that due diligence could not have been exercised otherwise there could not be any case coming within this Rule.⁵ The grounds of granting a review on account of the discovery of fresh evidence, may in certain cases be grounds for extending the time under S 5 of the Limitation Act.⁶

13 Was not within his knowledge and could not be produced by him at the time

It must be shown that after the exercise of due diligence the evidence was not within the applicant's knowledge or could not be produced by him at the time.¹ The Court in fact, has no power to grant a review without calling for strict proof of such allegations.² In the undermentioned case³ the High Court of Patna has expressed the view that the words 'or could not be pro-

⁴ See *Footnote 1* ante

Note 12

¹ (1907) 31 Bom 381 (383 380) 34 Ind App 115 (P C)

² (1857) 10 Mad 73 (77) 13 Ind App 155 (P C)

(1923) 1933 Oudh 323 (324)

(1923) 1933 Raj 184 (184)

(1923) 1 3 Sind 110 (111) Exercise of due diligence depends upon facts of particular case Burden of proof is on petitioner

(1902) 6 Cal W N 509 (516) (P C) Document could have been discovered from the opposite party

(1917) 1917 Pat 340 (341) Deliberate non-production

(1918) 1919 U B 27 (23) 2 Upp Bur R 126

(1903) 2 Sind L R 35 (F B) Found in the house

(1916) 1916 All 296 (257) 38 All 290 Certi- ficate of guardianship available in

could

(233)]

(186J) 12 Suth W R 536 (537) Where he knew previously where to find it

(1869) 19 Suth W R 130 (130) (Do)

(1870) 14 Suth W R 26 (26)

³ (1913) 1933 Sind 110 (111 112)

(1911) 9 Ind Cas 266 (267) (All)

⁴ (1915) 1915 P C 78 (78) (P C)

[See also (1975) 23 Suth W R 323 (324)]

⁵ (1930) 1930 Pat 63 (67)

⁶ (1921) 1921 Nag 174 (176)

Note 13

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[See also (1911) 9 Ind Cas 320 (321)

(Cal)]

³ (1924) 1924 Pat 809 (810)

duced by him at the time must refer to the words was not within his knowledge and that the whole clause means that the new matters alleged were not within the applicant's knowledge and *as such* could not have been produced by him at the trial. In other words, it seems to be of the opinion that the availability of a piece of evidence *within* the knowledge of the applicant, but which, even after the exercise of due diligence, could not be produced by him at the trial is not a ground for review. It is submitted that this view is against the language of this Rule and cannot be accepted as correct.⁴

14 Decree rendered ineffectual by reversal—See Note 10 *supra*

15 Mistake or error on the face of the record

In order that an error may be a ground for review it must be one *apparent on the face of the record*¹ i.e., an evident error² which does not admit of extraneous matter to show its incorrectness.³ The word error is not limited to errors of fact but includes also errors of law.⁴ But the law must be definite and capable of ascertainment.⁵ An erroneous view of the law on a debatable point⁶ or a wrong exposition of the law⁷ or a wrong application of the law⁸ cannot be considered a mistake or error on the face of the record.

A review has been held permissible in the following cases—

- (1) Where a judgment is passed without notice to the parties⁹ or in a form not legally correct¹⁰

- 4 (1874) 22 Suth W R 446 (446) Where applicant had full knowledge of the evidence but could not even with due diligence produce it it was held it was a good ground for review

Note 15

- 1 (1929) 1929 Rang 70 (70) 6 Rang 794
[See (1934) 1934 Nag 111 (111)]
Where mistake is only clerical and does not affect decision of the case

- (1929) 1929 Nag 58 (58)
(1928) 1928 Nag 277 (278)
(1922) 1922 Pat 308 (308) Error with regard to the basis of calculation of limitation period
(1932) 1932 Pat 275 (276) 11 Pat 519
[See also (1922) 1922 Pat 119 (120) 5 Pat LJ 314 Failure to raise a point of law]
(1930) 1930 Bom 317 (319)
[But see (1929) 1929 Cal 17 (19) Error of law by reason of which Court declines to enter into merits of case is error apparent on face of

292]]

insufficient—Review may be granted on the ground that the stamp was insufficient—This is other sufficient reason

- 5 (1892 96) 1892 96 Upp Bur R 237
(1902 03) 2 Upp Bur R Civ Pro Code page 3
6 (1929) 1929 Mad 209 (210 212)

- Suit dismissed on merits had not been directed to be present
(1929) 1929 Rang 70 (71) 6 Rang 91
(1926) 1926 All 384 (386) 43 All 201
Amendment without notice
(1932) 1932 Cal 265 (266) Order setting aside sale without notice
10 (1914) 1914 Oudh 332 (333)

- (2) Where a suit is dismissed for default in the presence of the plaintiff's pleader¹ or for non-joinder of parties²
- (3) Where a suit based on plaintiff's title is decreed simply on the ground that the defendant has not proved his title³
- (4) Where a woman is arrested in execution of a decree⁴
- (5) Where the Court fails to notice the provisions of S 21 or of S 98 of the Code⁵ or fails to notice the bar of limitation applicable to the facts appearing on the record⁶ or fails to apply the apposite law.^{6a}
- (6) Where an adjudication is annulled in the absence of a prayer by either party⁷
- (7) Where the Court has omitted to try a material issue⁸
- (8) Where the want of jurisdiction is apparent on the face of record⁹ But where the parties invite the jurisdiction of the Court deliberately, they cannot turn round and object to it when the judgment is unfavourable to them²⁰
- (9) Where the appellate Court reverses the finding of the lower Court without coming to a conclusion as to the incorrectness thereof¹
- (10) Where the judgment was not clear as to whether the defendants were liable individually or not²
- (11) Where a suit was, by mistake, dismissed where it ought to have been decreed on the findings of the Court²³
- (12) Where a calculation of an amount is wrongly made²⁴
- (13) Where the judgment used certain expressions wrongly when it plainly meant something different²⁵
- (14) Where the law was indisputable that a certain property was not exempt from liability for the suit claim and the defendants did not claim any such exemption but the judgment without any discussion on the point, exempted the property from liability²⁶ (Under the circumstances it was clear that the error

11 (1923) 1979 Sind 38 (39)
 (1929) 1223 All 811 (812)
 12 (1900) 5 Cal W N 83 (80)
 13 (1925) 1925 Oudh 320 (330)
 14 (1858) 12 Bom 228 (230)
 15 (1929) 1929 Nag 79 (74) 25 Nag T R 104

(1918) 1918 Cal 946 (946)
 20 (1919) 1919 Cal 525 (526)
 (1916) 1916 Oudh 104 (105)

one defendant on ground of want of jurisdiction—On appeal by other

(1933) 1933 Mad 631 (635)
 18 (1871) 16 Suth W R 134 (134)
 (1869) 12 Suth W R 223 (224)
 19 [See also (1911) 11 Ind Cas 15 (16) (Lah) Suit clearly cognisable by Small Cause Court—Small Cause Court dismissing suit on the ground that the suit was not Small Cause—Review lies]

was not the result of any exposition of law) *See also* the following cases ²⁷

Where the Court granted a claim for personal relief a prayer for which could not on a proper construction of a doubtfully worded clause in the plaint be made out, the error is not one apparent on the face of the record justifying a grant of review ²⁸ So also is the failure to give a formal finding on an issue tried and decided²⁹ or allowing the petitioner to prove fraud which was not pleaded³⁰ So also the consideration of the evidence by the Court in second appeal does not amount to an error apparent on the face of the record ³¹

It was held in the undermentioned cases³¹ that the fact that the Court had overlooked a previous ruling of the High Court on a point of law, may be an error apparent on the face of the record A contrary view has been taken in the cases noted below ³² It is submitted that the latter view is correct As was observed by the Madras High Court in *Babu Vaidyan v Murugesam Pillai* ³³ it is difficult to see how an error can be said to exist on the face of the record where you have to travel outside the record to see if the judgment is correct or not

Where the view of the law on which a judgment is based is *subsequently* overruled or modified by a superior Court it cannot be a mistake or error on the face of the record ³⁴

16 Any other sufficient reason

There has been a great diversity of judicial opinion as to the exact meaning of this expression any other sufficient reason In *Chajju Ram v Neki*¹ their Lordships of the Privy Council after reviewing the case law

- 27 (1870) 14 Suth W R 236 (236) Mistake about document
(1933) 1933 Lah 476 (477) 14 Lah 433
(1932) 1932 Mad 275 (279)
(1925) 1925 Mad 1031 (1032) Wrong statement about admission by party
(1924) 1924 Nag 130 (191) Where decree was in consonance with the judgment but there was the erroneous direction in the judgment that the pre-emption price should be paid to defendant No 1 instead of defendant No 3
(1909) 1 Ind Cas 1141 (1141) (Mad)
(1932) 1932 Nag 177 (179) 28 Nag L R 221
Omission to consider important

- and 1925 Cal 304 doubted
(1933) 1933 Lah 223 (223)
(1924) 1924 Pat 250 (253)
(1935) 1935 Rang 32 (33 34) 13 Rang 1 &
(1928) 1928 Mad W N 395 (598)
[See also (1933) 1933 Lah 223 (223)]

Note 16

- 1 (1922) 1922 I C 112 3 Luck 127 49 Ind An 144 (P C)

(See also (1887) 14 Cal 627 (630 631))

- (1869) 6 Bom H C R (A C) 238 (240)
Remand order passed by High Court — Ruling which will affect such order not brought to notice of Court — proper course is to apply for review

- 32 (1921) 13 Mad 998 (1000) 1924 Mad 93

ing that it would be open to the parties to apply in review if the view taken on a point of law by the High Court was overruled by the Privy Council and it so transpired that the point of law was overruled by the Privy Council held that it is a special circumstance *ex se* *generis* with the discovery of new and important matter

- (1929) 113 Ind Cas 55 (531) (1915)

declared that the expression should be interpreted as meaning a reason sufficient on grounds *at least analogous to those specified immediately previously*. (See in this connection Preamble Note 7 point 30) There is still a great diversity of opinion as to what is and what is not a reason "analogous" to the reasons specified. According to the High Court of Rangoon the word "analogous" is distinguishable from the expression *eiusdem generis*² and the former word, as used by the Privy Council, is wider than the expression "*eiusdem generis*".² The want of uniformity in the decisions on this subject even after the Privy Council decision is apparently due to the fact that in most cases it is a matter for argument whether any reason is analogous to the reasons specifically mentioned in the Rule.³ The case-law bearing on the subject has been summarised in Notes 16a and 16b *infra*.

16a. Cases where review was allowed on ground of sufficient reason

It has been held that a review can be granted in the following cases:—

- (1) Where the decree or order has been passed under a misapprehension of the true state of circumstances¹
- (2) Where a party has not had a fair opportunity of producing his evidence²
- (3) Where the Court has failed to consider important evidence³

(1922) 1922 Lah 506 (597) 13 Lah 246
 (1927) 1927 Nag 63 (136)
 (1932) 1932 All W N 102 (102)
 [But see (1934) 1894 All W N 145
 (145) No longer law after the Privy
 Council decision]
 (1926) 1926 All 361 (366) 47 All 961 Not
 good law

The words used in the corresponding provisions of the Code of 1879 are general and hence it was held that the Court's discretion in so far as it was sufficient reason for review was not limited in any way — See for instances, the following cases —

(1877) 2 Cal 131 (140 141)

(1877) 17 Suth W R 479 (479)

2 (1925) 1925 Rang 31 (32) 5 Rang 675

3 See the observations of Mcleod J in (1924) 1924 Cal 872 (874) where he said that the question whether a particular reason is analogous to either the one or the other of the reasons specified in the Rule may lead to very refined if not subtle arguments

Note 16a

- 1 (1925) 1925 Rang 314 (317) 3 Rang 961
 Where the Court thought that the Counsel agreed to consent order when as a matter of fact he did not — Held it was analogous
- (1924) 1924 Cal 572 (573) Mistaken impression that a party had waived a certain objection
- (1924) 1924 All 518 (520) Misunderstanding

or slip which had led to an erroneous statement of fact in a judgment

(1926) 1926 Cal 941 (943) Mistakenly holding that a certain question is not in dispute

(1896) 13 Cal 62 (66) Omission to notice contents of document

(1911) 11 Ind Cas 102 (103) (Cal) After appointment of Receiver decree granted to a party may be set aside on review

(1911) 9 Ind Cas 273 (274) (Mad) Court's misimpression as to the stamp

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— Court with a view to avoid the

ing suit — Witness subsequently

(1922)

(1925)

to rebut defendant's evidence is sufficient ground

(1872) 17 Suth W R 47 (47) Improper refusal to admit evidence

3 (1876 78) 1 Mad 396 (401)

- (4) Where the Court has failed to consider important facts on the record ⁴
- (5) Where the Court has failed to consider an important plea or issue ⁵
- (6) Where the case is an exceptional one⁶ as where the point involved is one of general importance ⁷
- (7) Where the Court has omitted to notice certain provisions of the Code ⁸

For other instances, see the undermentioned cases ⁹

16b Cases where review was not allowed on the ground that there was no sufficient reason

It has been held that review cannot be granted in the following cases —

- (1) Where it is asked for to enable the applicant to raise points which he could and ought to have raised at the former hearing ¹

- | | |
|--|--|
| <p>4 (1932) 1932 Nag 177 (179)</p> <p>5 (1869) 12 Suth W R 223 (224)</p> <p>(1871) 16 Suth W R 134 (134)</p> <p>(1871) 16 Suth W R 150 (151)</p> <p>(1911) 9 Ind Cas 545 (546) (Lab)</p> <p>6 (1926) 1926 Mad 764 (764)</p> <p>7 (1913) 19 Ind Cas 363 (364) 6 Sind L R 127</p> <p>(1891) 15 Bom 267 (274)</p> <p>[See also (1927) 1927 Rang 20 (23)</p> <p>4 Rang 265]</p> <p>8 (1919) 1919 Cal 94 (94) Omission to notice certain provisions of the Code—Review allowed</p> <p>9 (1930) 1930 Rang 162 (164) Taking too strict view of title of suit and its prayer and overlooking need for doing substantial justice</p> <p>(1933) 1933 All 517 (519) 56 All 975 Where the Court orders personal attendance of a party where the pleader did not refuse or was not unable to answer questions under O 10 R 4 and dismissed suit for default of appearance of the plaintiff held a review lies</p> <p>(1935) 1935 Nag 109 (110) Order summarily rejecting appeal filed out of time—Delay caused by wrong information given by copying department in copy of judgment supplied—Held it was sufficient reason analogous to error on face of record so as to justify granting of review</p> <p>(1932) 1932 Mad W N 153 (158) (F B) Ordering a thing not prayed for by either party</p> <p>(1933) 1933 Mad 5 (6) Discovery of a reasonable ground for adjournment is a sufficient ground for reviewing an order refusing to grant an adjournment</p> <p>(1925) 1925 Oudh 643 (644) Appeal dismissed under O 41, R 11 without notice to appellant as required by that Rule—Review lies</p> <p>(1901) 1 Cal W N 83 (85) Suit dismissed for</p> | <p>non joinder of parties—Review lies</p> <p>ocumen</p> <p>without</p> <p>) Oius</p> <p>of proof placed wrongly—Review lies</p> <p>(1868) 10 Suth W R 42 (43) Unfairness of trial—Review lies</p> <p>(1913) 19 Ind Cas 48 (50) (L B) Case decided on a point not raised by any party—Review lies</p> <p>(1884) 12 Ind App 47 (51) 11 Cal 379 (F C) Case disposed of on new point—Party surprised—Review lies</p> <p>(1921) 1921 Cal 393 (395) Compromise de res—Facts making compromise not binding on one of the parties—Review lies</p> <p>[See also (1884) 7 Mad 307 (303) While the discovery of a fresh authority may not entitle a party to</p> <p>ing to law]</p> <p>(1881) 1881 Pun Re No 128 page 317</p> <p>(1884) 9 All 36 (40 42)</p> <p>(1906) 24 Cal 334 (336) Review granted on ground of certain decisions not having been considered</p> <p>Note 16b</p> <p>1 (1886) 13 Cal 62 (65)</p> <p>(1934) 1934 Cal 131 (132 133)</p> <p>(1933) 1933 Mad 290 (292) Discovery of new argument based on fact or law is no ground for review</p> <p>(1922) 1922 Pat 119 (120) 5 Pat L J 311</p> <p>(1927) 1927 F R 15 (156)</p> |
|--|--|

- (2) Where the review is asked for on the ground that if another opportunity were given to the applicant to establish his case he could prove the judgment of the Court to be wrong²
- (3) Where the review is asked for on the ground that the case has been mismanaged by the party's counsel³
- (4) Where review of an *ex parte* decree or an order of dismissal for default is sought for on the ground that the case ought not to have been decided *ex parte* or dismissed for default⁴
- (5) Where the Court has proceeded on a wrong exposition of the law or has wrongly decided on a question of law^{4a} See also Note 15 *ante*

- (1925) 1925 All 552 (553) 47 All 881
 (1926) 13 Oudh L J 507
 (1917) 1917 Pat 201 (204)
 (1910) 5 Ind Cas 50 (55) (P C)
 (1864) 9 Suth W R 123 (124)
 (1870) 5 Lang L R 321 (323)
 (1914) 1914 Lah 419 (419)
 (1865) 9 Suth W R 553 (559)
 (1911) 19 Ind Cas 65 (689) (All)
 [See also (1878) 2 Mad 35 (60) 1 not abandoned. No review for that point]
- (1900) 3 Oudh Cas 279 (280) (Do)
 (1866) 1866 Rom Print Judgt 240 (241)
 Oversight committed by the plaintiff in the conduct of his case and whereby he apprehends adverse result in subsequent suit to be brought by him is no ground for amending the decree under this Rule
- (1925) 1928 P C 103 (103) 6 Rang 302 50 Ind App 161 (P C) *Quære* whether a party is entitled by a proceeding in review to take a point not taken by him at the original hearing
 [But see (1917) 1917 Lah 13 (14) Review cannot be rejected simply on the ground that the counsel of the applicant had neglected to press the matter at the time of argument]
- 2 (1924) 1924 Cal 774 (775) 51 Cal 70 Avail-
 able evidence not produced by Government who was a party—Fresh opportunity by means of a review before judgment notwithstanding his gross negligence]
- 3 (1918) 1918 Oudh 305 (306) Failing to produce evidence on account of wrong advice of counsel
 (1934) 1934 Nag 143 (144) 31 Nag L R 21 Decree certified as fully satisfied through negligence of agent or pleader—Order cannot be reviewed
 (1929) 1929 Nag 89 (90) Appellant's counsel unprepared—Court refusing adjournment
 (1926) 1926 Mad 980 (983) 50 Mad 67 Absence of pleader is not sufficient ground
 (1921) 1921 Nag 3 (4) (Do)
 [But see (1931) 1931 Sind 3 (4) 25 Sind L R 242 Misconception of pleader is sufficient reason]
- 4 (1912) 13 Ind Cas 318 (318) (Lah) *Ex parte* decree
 (1934) 1934 Cal 116 (117)
 (1933) 1933 Mad 345 (345 346)
 (1935) 1935 Oudh 405 (406)
 (1923) 1923 All 576 (577) Dismissal for default
- out hearing the parties there is mistake apparent on the face of the record]
- 4a (1922) 1922 I C 112 (113 114) 3 Lah 127 49 Ind App 144 (P C)
 (1933) 1933 Mad 662 (664)
 (1935) 1935 Pesh 22 (23)
 (1928) 107 Ind Cas 904 (Nag)
 (1929) 1929 Nag 89 (90) Omission to consider certain aspects or phases of question of limitation is no ground for review
 (1921) 1921 Oudh 260 (260) 24 Oudh Cas 154
 (1925) 1925 Oudh 644 (645) Error of law is no ground for review
 (1930) 1930 Oudh 392 (394)
 (1922) 1922 U B 16 (17 18) 4 Upp Bur R 27 Review applied for on the ground that judge had overlooked certain decisions—No review
- (1915) 1915 All 250 (251) 37 All 440

For other instances, see the following cases ⁵

17 Review on the ground of subsequent events

As has been seen in Note 10, *ante*, the happening of a subsequent event is not a valid ground for review ¹ Thus a subsequent legislation altering the law ² or a subsequent admission of a party as to the matter litigated ³ is not a ground for review Where a suit is decreed on condition of the plaintiff complying with certain requirements within a particular time and it is subsequently found that the period allowed by the decree is insufficient for the fulfilment of the conditions imposed, it has been held that the Court has jurisdiction to review the judgment and enlarge the period ⁴

17a No review on ground of decision being erroneous on merits

A review cannot be granted on the ground that the decision is erroneous on the merits, such a ground being appropriate for an appeal and not for an application for review ¹

18 Review on particular ground—See Note 2 to Rule 8

on certain provisions of the Law cannot be a ground for review

(1925) 1925 Pat 369 (369)

(1808) 9 Suth W R 161 (161)

(1875 76) 1 Cal 184 (185 186)

(1808) 9 Suth W R 158 (160)

1 (1931) 1931 Mad 828 (829 830) Execution against surety—Failure to give notice to surety to show cause why decree should not be executed against him is no ground for reviewing order for execution

(1932) 1932 Pat 275 (275) Rulings discovered by Court *suo motu*—No opportunity given to party to explain—No review

(1924) 1924 Pat 298 (299) 2 Pat 765 Omission to refer to certain evidence in the judgment is no ground for review

(1883) 5 All 14 (16) The fact that the High Court has in second appeal found a fact not determined by the lower Courts or wrongly imagined that an issue had not been tried by them is not a ground for review

(1917) 1917 Pat 659 (659) Pardanashin lady—Case neglected by agent—No

Ground

Review

purely technical matter, it is no ground for review

¹ Like O C 131 Erroneous decision on

immaterial point is not sufficient ground

(1872) 17 Suth W R 182 (182) New point allowed to be raised but no surprise caused to the other party—No review

(1885) 1885 All W N 123 (123) Inconsistent view by the same Judge is no ground for review

(1878 80) 2 Mad 10 (11 12) No review on ground of previous decision having done injustice

Note 17

1 [See also (1903) 4 Mad L Tim 86 (87) (1899) 13 Bom 330 must be deemed to be overruled by the decision in 24 Mad 1 (P C)]

(1918) 1918 Lah 10 (12) Subsequent review order

2 (1928) 1928 Bom 309 (310) 52 Bom 134 (1924) 1924 Nag 70 (71)

3 (1910) 5 Ind Cis 182 (183) (Cil)

4 (1925) 1925 All 364 (365) 47 All 361

(1926) 1926 Mad 1059 (1060)

(1932) 1932 Mad 223 (224)

(1925) 1925 Pat 452 (453)

Note 17a

1 (1863) 9 Suth W R 589 (589) Failure to re-mind case—No review lies on such ground

(1930) 1930 Oudh 392 (394) Deliberate order limiting purview of enquiry—No review

(1809) 12 Suth W R 403 (410) Application on the ground of improper remand—Review not granted

(1875) 24 Suth W R 410 (411)

(1875) 24 Suth W R 357 (357)

(1875 76) 1 Cal 137 (200)

(1916) 1916 Lah 261 (262)

(1852) 1852 All W N 102 (102)

(1879) 2 All 437 (503)

(1914) 1914 All 57 (58)

(1922) 1922 L L 16 (17, 13)

see the undermentioned cases¹ This rule does not apply to the following cases —

- (1) A decision on which becomes final under S 5 of the Court-Fees Act, 1870.²
- (2) A judgment delivered in an income-tax case on a statement made by the Commissioner of Income-tax. The reason is that it is neither a decree nor an order³
- (3) Orders under U P Act (VII of 1881)⁴
- (4) Orders under the U P Land Revenue Act⁵

Note 21

Judgment of Court of Small Causes can be reviewed —

- 1 (1881) 10 Cal 297 (298)
- (1935) 1935 All 435 (436) Decree of Small Cause Court — Revision to High Court dismissed—Lower Court is competent to entertain application for review of judgment as there is no merger of decree of Small Cause Court in the High Court

(1882) 8 Cal 287 (290)

(1881) 6 Cal 236 (237)

(1880) 5 Cal 699 (700)

(1879) 1879 Pun Re No 29, page 83 (F13)

Order rejecting application under S 76 of the Registration Act —

(1816 77) 2 Cal 131 (139) 3 Ind App 221 (1 C)

Order in insolvency can be reviewed by the Insolvency Court —

(1932) 1932 Mad 63 (65)

(1927) 1927 Mad 175 (176)

(1879 80) 4 Bom 489 (494)

(1908) 7 Cal L Jour 268 (269, 270)

(1924) 1924 Cal 83 (83)

Revenue Court acting under Bengal

Rent Act can review its orders —

(1872) 4 N W P H C R 171 (172)

(1871) 16 Suth W R 159 (160)

(1870) 14 Suth W R 414 (414)

(1870) 14 Suth W R 27 (28)

(1869) 11 Suth W R 108 (108)

[But see (1871) 3 N W P H C R 22 (23)

Under Act X of 1859 (Bengal) no general power of review]

Subordinate revenue Courts in Oudh can review their orders —

(1918) 1918 Oudh 213 (213) 21 Oudh Cas

Review lies —

(1868 69) 4 Mad H C R 251 (253)

Order of Financial Commissioner of Punjab—Chief Court if can review —

(1871) 1871 Pun Re No 16 Can review

(1891) 1891 Pun Re No 5, page 11 Can not review

Order under the Companies Act (1882) —

(1894) 16 All 53 (57)

Order of demand under S 12 of the Court Fees Act —

(1919) 1919 Pat 270 (276) 4 Pat L Jour 57.

Decision under S 16 of the Divorce Act

—Review lies —

(1881 82) 6 Bom 416 (435)

Decree of Special Judge under Dekhan

Agriculturists Relief Act —

(1898) 22 Bom 520 (524)

(1895) 10 Bom 116 (119)

(1895) 19 Bom 113 (115)

(1896) 20 Bom 281 (283)

(1898) 15 Bom 650 (652)

Orders of District Munsif under S 73 of the Madras Village Munsifs Courts Act —

(1917) 1917 Mad 157 (157)

Land Acquisition proceedings —

(1920) 1920 Pat 743 (744) 5 Pat L Jour 253

Proceedings under the Bengal Tenancy Act 1885 —

(1932) 1932 Cal 265 (266)

(1921) 1921 Pat 284 (286)

(1918) 1918 Cal 26 (27)

(1898) 25 Cal 146 (154)

Miscellaneous

(1903) 30 Cal 619 (623) Case under Public

Demands Recovery Act, I of 1835

(Bengal)—Open to review

(1895) 22 Cal 419 (424) Case under Public

Demands Recovery Act, Bengal

(1913) 18 Ind Cas 956 (956) 40 Cal 552

1919

Review lies

2 (1897) 20 Mad 395 (400)

(See also (1890) 12 All 129 (156 157)

(F B)]

3 (1930) 1930 All 202 (211)

4 (1897) 19 All 522 (523)

5 (1932) 1932 All 273 (301) (F B)

(418)]

Order in appeal from decision of Collector under Madras Act, I III of 1865—

- (5) Orders in proceedings under Ch 7 of the Presidency Small Cause Courts Act⁶
- (6) Proceedings under the Guardians and Wards Act appointing or refusing to appoint guardians⁷
- (7) Proceedings under S 8 of the Presidency Towns Insolvency Act⁸
- (8) Proceedings under the Bengal Estates Partition Act⁹
- (9) Orders passed by the commissioner under the Workmen's Compensation Act of 1923¹⁰

As to the applicability of this rule to proceedings under other Acts *see* the following —

- (1) S 17 Cl (2) of the Bengal Agra and Assam Civil Courts Act (VII of 1887) enacts that that section shall not be applicable to cases provided for by this rule
- (2) S 15 Cl (3) of the Gujarat Taluqdars Act (VI of 1888) makes this order applicable to the decisions of the Taluqdar Settlement Officer
- (3) Under S 153 A of the Bengal Tenancy Act (VIII of 1885) the applicant has to state in an application for review of a judgment or order under that Act the injury sustained by him and the Court cannot entertain the same unless the applicant deposits the amount if any due from him (*See* S 153 A of that Act)
- (4) S 251 of the Agra Tenancy Act (III of 1926) empowers the Courts to review their decisions in accordance with the provisions of this rule
- (5) S 265 sub S (3) of the Chota Nagpur Tenancy Act (VI of 1908) makes the provisions of this order applicable to proceedings under that Act in so far as they are not inconsistent with those contained in that Act
- (6) Under S 388 sub S (3) of the Succession Act (XXIX of 1925) the order of a District Judge subject to the provisions relating to review of judgment in the Civil Procedure Code is final

22 Review petitions by minors

A minor can apply for a review of a judgment passed against him on the ground that his guardian has conducted the case with gross negligence¹ or on the ground that no sanction had been obtained for a compromise entered into *item*² In all such applications he will be

Re

- (1902) 29 Cal 735 (737)
 (1912) 16 Ind Crs 543 (545) (Cal) Mar 2
 granted in special circumstances
 [See also (1884) 10 Cal 2 — — —]
 (1895) 22 Cal 8 (13)
 [But see (1906) 3 Cal — — — — —]
 (130) Minor can not apply
 merely on the ground
 [See also (1926) 10 — — — — —]
 Suit will lie
 2 (1920) 1920 Pat 750 (751) — — — — —
 (1889) 13 Bom 137 (146)

No 116

(1906) 1906 Ind Re No 143 page 514
 8 (1920) 1920 Rang 299 (931 232) 7 Rang

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Note 22

1 (1916) 1916 All 324 (325) 38 All 402

bound by the provisions of this Rule³ There is no provision in the Code empowering the Court when passing a decree against a minor, to reserve to the minor the right of questioning the decree after attaining majority, and the absence of such provision is not a ground for review of the judgment otherwise properly passed⁴ (See also O 32, R 3, Note 5 and O 32, R 7, Note 5)

23 Consent decree

Where facts are brought to the notice of the Court showing that a compromise ought to be treated as a *nullity*, an application for review is a proper mode of raising the question whether the compromise should be treated as a *nullity* or not¹ A compromise decree entered into by a *vakil* or agent might be set aside on the ground that the *vakil* or agent had no power² There is conflict of opinion as to whether the discovery of fraud or undue influence in obtaining the consent decree can be a valid ground of review, some cases holding that it is³ and some that it is not⁴ The true view, however, seems to be that in such cases a suit is the proper remedy in the generality of cases though motions for a new trial may be convenient in some cases⁵ An application for review may be made when the consent decree is sought to be impeached on the ground of a clerical error or when it does not represent what the Court intended to decide⁶

24 Ex parte decrees and orders of dismissal for default

See also Notes 8 and 9 to O 9, R 13 The rule applies to all cases whether they are disposed of in the presence of the parties or *ex parte* in the absence of the defendants¹ As to whether the fact that an application under O 9 R 13 could have been preferred and that it was barred on the date of the review application is a bar to review see Note 9 to O 9 R 13 But an application to set aside an *ex parte* decree cannot by itself be treated as one for review² A dismissal for default other than the failure to appear is also open to review³ Where the dismissal is for default of appearance the

(1906) 3 Cal L Jour 119 (130)

3 (1871) 16 Suth W R 231 (232)

4 (1890) 19 Lom 271 (275 276)

Note 23

1 (1915) 1915 Cal 622 (673)

(1911) 10 Ind Cas 894 (930) (Cal)

(1900) 2 Cal L Jour 503 (503)

[See also (1871) 15 Suth W R 23

(1911) 10 Ind Cas]

(1891) 15 Bom 534 (598)

(1926) 1926 All 50 (52 54) 48 All 160

(1924) 1924 All 398 (400) 46 All 245

(1906) 5 Suth W R 276 (226)

[See also (1919) 1919 Pat 232 (237

2331 4 Pat L Jour 900]

5 (1918) 1918 P C 154 (158)

6 (1909) 2 Ind Cas 179 (136) (Cal)

(1891) 15 Bom 534 (599)

Note 24

2 (1925) 1925 Rang 187 (189) 2 Rang 187
[See however (1910) 6 Ind Cas 422
(483) (Lah)]

3 [See (1926) 1926 Pat 27 (27) 4 Pat 201
(1920) 1920 Sind 34 (35) 14 Sind L R 237
Assumed

(1897) 24 Cal 350 (354) (F B)

(1911) 12 Ind Cas 351 (352) (354)

(1934) 25 Cal 649 (652)

(1901) 3 Cal L Jour 119 (120)

(1901) 2 Ind Cas 129 (132) (Cal)

failure to apply under O 9, R 9 or under O 41 R 19 will not, according to the High Courts of Madras Calcutta and Lahore, bar an application for review,⁴ though the reason for the failure to appear will not of itself amount to sufficient cause within the meaning of this rule and will not be a valid ground of review.⁵ The High Court of Allahabad^{5a} and Patna^{5b} have taken a contrary view. It has been held by the High Court of Lahore that where an application for restoration is *made and dismissed* an application for review thereafter will be barred.⁶

25 Judgement in Letters Patent Appeals—See Notes to Cl 15 of the Letters Patent and Note 1 to S 114 *ante*

26 Review of decision before signing decree

Where in order to be consistent in the decree finally passed the Court has to pass orders under O 41, R 33 the same relief can be given in a petition put in by way of review.¹

27 Commissioner cannot review

A Commissioner appointed for taking accounts may, in his discretion and on proper grounds reopen the inquiry into any one or more of the items before his report is made for until then he decides nothing that is final and conclusive.¹

28 Limitation

The period of limitation for applications of review of judgments of Provincial Small Cause Courts the High Courts in the exercise of their Original Civil Jurisdiction and other Courts are respectively 15 20 and 90 days from the date of the decree or order sought to be reviewed (See Arts 161 162 and 173 of the Limitation Act 1908). In computing the period of limitation the applicant is entitled to deduct under S 12 of the Limitation Act 1908 the time spent in obtaining a copy of the decree or order¹ though as will be seen in Note 29 *infra* such time cannot be excluded for the purposes of the Court-fee payable on the application. But he cannot exclude the time occupied by a previous application for review.^{1a} The Court may also under S 5 of the Limitation Act 1908 admit the application after the expiry of the period of limitation on sufficient cause being shown for not making the application within the prescribed period. No definite set of rules can be laid down to govern the discretion of a Court under S 5 of the Limitation Act

4 (1914) 1919 Mad 844 (544) Following 26 Cal JJS

(1899) 26 Cal 593 (601)

(1913) 19 Ind Cas 481 (485) 1913 Pun Re No 109

(1910) 6 Ind Cas 482 (483) (Lah)
[But see (1909) 1 Ind Cas 900 (901)
1909 Pun Re No 33]

(1896) 2 Cal W N 318 (319)

5 (1907) 1927 Mad 355 (356)

(1928) 1928 Mad 364 (365)

5a (1923) 1923 All 576 (577)

5b (1917) 1917 Lat 673 (673 674) 1 Pat L Jour 547

(1920) 1920 Pat 491 (491 492)

[See also (1933) 1933 Pat 557 (558)]

Where remedy under O 9 R 4 or R 9 is barred by limitation, applica

tion under O 47, R 1 merely to escape limitation is not maintainable]

6 (1873) 1873 Pun Re No 52 page 77

(1925) 1925 Lah 517 (518)

[But see (1933) 1933 Nag 39 (40) 23 Nag L R 290]

Note 26

1 (1923) 1923 Mad 392 (403)

Note 27

1 (1924) 1924 Bom 231 (232) 47 Bom 593

Note 28

42 Bom 295] -- -- -- 28 (220)

1. It depends on the circumstances of each case² The fact that an appeal is pending³ or that the applicant is a minor⁴ or that applicant's legal advisers were ignorant of the contents of a document in their possession at the time of the original hearing⁵ or that a new exposition of the law has been made since the decision⁶ is not a sufficient cause for excusing the delay in filing the application within time

There is nothing in this order to suggest that the application for review must be within the same period which is allowed to a party for the alternative remedy by way of appeal or application for restoration of suit which has been dismissed for default of appearance⁷

29 Court fee

An application for a review of a judgment of the trial Court if presented *on or after* the 90th day from the date of the decree is chargeable with the same fee as is leviable on the *plaint*. An application for review of an appellate judgment if presented *on or after* the 90th day from the date of the decree is similarly chargeable with the same fee as is leviable on the *memorandum of appeal*¹ Such applications presented before the 90th day from the date of the original or appellate decree, as the case may be, are chargeable with one half of the fee leviable on the *plaint* or the *memorandum of appeal*^{1a} (See Articles 4 and 5 of Schedule I of the Court-Fees Act, 1870) Under S 14 of the said Act the Court may, even in a case where the application is presented on or after the 90th day, order the refund of so much of the fee paid on the application as exceeds the fee which would have been payable had it been presented before such day^{1a} As to refund of Court-fees in other cases see S 15 of the Court-fees Act and also the undermentioned case^{1b} The fact that an application, filed actually beyond the 90 days, may be within the time for the purposes of limitation by virtue of the application of Ss 5 and 12

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|---|---|----------------|
| 2 (1885) 11 Cal 767 (776) | (1887) 10 Mad 73 (77) | 13 Ind App 155 |
| <i>See also the following cases —</i> | | |
| (1867) 5 Suth W R 483 (486) 12 years delay excused | (1878 80) 2 All 237 (239) | |
| (1921) 1921 Cal 393 (394) Decision under the Indian Soldiers Act IX of 1918—Limitation for review is three | 5 (1886) 13 Cal 62 (60) | |
| | [See also (1806) 5 Suth W R 276 (226) Review sought on the ground that the previous Munsif had extorted the compromise by undue pressure] | |
| | 6 (1868) 9 Suth W R 181 (180) (F B) | |
| | (1870) 13 Suth W R 120 (120) | |
| | (1868) 10 Suth W R 26 (26) | |
| | (1868) 9 Suth W R 102 (103) | |
| | (1867) 7 Suth W R 405 (406) | |
| | (1866) 6 Suth W R 167 (168) | |
| | (1872) 17 Suth W R 163 (163) | |
| | 7 (1929) 1929 Sind 38 (39) | |
| | Note 29 | |
| | 1 (1809) 11 All 176 (179) | |
| 3 (1932) 1932 Cal 171 (175) | 1a [See also (1924) 1924 Cal 881 (881)] | |
| (1884) 8 Bom 260 (263) | (1933) 1933 All 20 (21) | 54 All 1092 |
| (1871) 8 Bom II C R (A C) 234 (235) | Applic ⁿ judg ^t cation for review of appellate ⁿ tried | |
| [See also (1932) 1932 Cal 171 (175, 176) Period between the judgment of the High Court and the application for leave to appeal to P C could not be excused, under S 5 or S 14 Limitation Act] | | |
| 4 (1881 82) 6 Bom 107 (110) | | |

of the Limitation Act, does not exempt the applicant from paying the full fee chargeable on the plaint or memorandum of appeal the two Acts are not *in pari materia*²

As to the fee payable where a portion of the judgment is sought to be reviewed *see* the undermentioned cases³

The word judgment in Articles 4 and 5 above referred to does not include an *interlocutory order*. Consequently an application for review of an interlocutory order is chargeable only like any other ordinary application⁴

The presentation of an insufficiently stamped application for review is not a valid presentation⁵

No Court fee need be paid on an application for review presented in a suit *in forma pauperis*⁶ *See* O 33 R 8 of the Code. But the applicant must have been declared a pauper in the suit at the time of the application. Otherwise he would have to pay the full fee chargeable on the application under law⁷

30 Appeal by one party review application by another—Clause (2)

The fact that an appeal has been preferred by one party does not preclude the other parties from applying for review¹ except where—

- 1) The grounds of such appeal are common to the applicant and the appellant or
- 2) being a respondent he can present his case in the appellate Court

The expression where the ground of such appeal is common to the applicant and the appellant means that the *grounds of appeal* and the *grounds of review* are the same. Where a party who has not appealed applies for review on the ground of discovery of new and important matter after the appeal by another party is summarily dismissed the ground of review is different from the grounds of appeal and therefore the application is maintainable². Where the applicant has the opportunity to present his case before the appellate Court, the lower Court has no jurisdiction to proceed with the application³. A respondent in an appeal has the right to apply for review of appellate Court judgment⁴

31 Privy Council Practice

As to the powers of the Privy Council to rehear appeals *see* Note 9 to S 112

32 Appeal—*See* R 7 *infra*

33 Revision—*See* Note 27 to S 115 *ante* and Note 16 to R 7 *infra*

2 (1886) 5 Mad 134 (138)	4 (1909) 1 Ind Cas 999 (1000) 31 All 263
(1894) 7 C P L R 111 (112)	Application to High Court chargeable with fee Rs 2
3 (1909) 1 Ind Cas 209 (210) 31 All 294	(1892) 1892 Bom Pr nt Jdgt 383
Whole fee leviable on the plaint or	5 (1890) 12 All 57 (60)
if	6 (1898) 70 All 410 (411)
'	[But <i>see</i> (1930) 1930 Rang 280 (281) 8 Rang 423]
'	7 (1895) 1895 Lun Re No 91 page 435
	N 20

able if the review were granted and not necessarily on the whole value of the suit

(1879 80) 4 Lom 26 (28)

(1927) 1927 Mad 360 (361) 50 Mad 488 (Do)

(1933) 1933 Rang 203 (203 204) (Do)

C P C 355 & 356

R. 2. [S. 624.] *An application for review of a decree or order of a Court, not being a High Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in Rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree or made the order sought to be reviewed; but any such application may, if the Judge who passed the decree or made the order has ordered notice to issue under Rule 4, sub-rule (2), proviso (a), be disposed of by his successor.*

[1877—S. 624]

Synopsis

Legislative changes.

Note No

1

Review by successor in office

Note No

2

Other Topics.

Applicability of the Rule to Small Cause Courts See Note 2, Pt (21)

1 Legislative changes

There was no section in the Code of 1859 corresponding to this section. The cases decided under that Code are now only of academic importance.

2 Review by successor in office

This rule must be read as a proviso to R. 1¹. The policy underlying the rule is that an application for review should be entertained and considered by the very Judge who made the decree or order.² Reading Rr. 1 and 2 as they ought to be, it follows that—

- (1) every application for review on which notice has been ordered to issue by the Judge who passed the decree or made the order may be disposed of by his successor in office³
- (2) an application based on the ground of the discovery of new and important matter or evidence⁴ or the existence of a clerical or arithmetical mistake or error apparent on the face of the

Order 47, Rule 2—Note 1

- (1884) 1884 Pun Ro No 134, page 350
 (1885) 1885 Pun Ro No 97, page 210 (Note)
 (1894) 1894 Pun Ro No 7, page 10
 (1925) 1925 Lah 377 (377)
 (1933) 1933 Lah 130 (131)
 (1890) 13 Mad 178 (187, 188) (F D)
 (1914) 1914 All 57 (58)
 (1915) 1915 Mad 1068 (1069)
 (1900) 3 Oudh Cas 363 (365)
 [See also (1899) 12 Mad 503 (510)]
 (1887) 1887 Pun Ro No 6, page 10
 [See however (1882) 4 All 273 (281)]
 4 (1911) 10 Ind Cas 244 (245) 33 All 560
 (1889) 13 Bom 330 (335)
 (1913) 19 Ind Cas 214 (215) (Mad)
 (1918) 1918 Pat 647 (648) 3 Pat L Jour
 372
 [See (1924) 1924 Pat 803 (810)]

1 197

18

Note 2

- 1 (1885) 8 Mad 567 (568)
 2 (1857 59) 3 South W R 45 (48) (PC)
 3 (1892) 1892 All W N 103 (103)
 (1892) 16 Pom 603 (605)
 (1884) 10 Cal 60 (61)
 (1880) 13 Cal 231 (231)
 (1913) 20 Ind Cas 670 (672) (Cal)

record⁵ can be *entertained* and disposed of by the successor in office. An application made both under O 9, R 13 and O 47, R 1 and registered as one under O 47, R 1, may, however, be changed by the successor as one made under O 9, R 13 of the Code and disposed of on that basis.⁶ A successor in office may also entertain applications for amendment of the decree under S 152 of the Code.⁷

- (3) an application based on any *other ground* than those referred to in the paragraph above can be entertained only by the *Judge who made the order or passed the decree*^{7a}. Thus a successor in office cannot grant a review of the decree or order passed by his predecessor in office on the ground that such decree or order is incorrect⁸ or on the ground that *notice of hearing* was not given,⁹ or on the ground that the guardian *ad litem* of a minor party had no sanction to refer the matter to arbitration¹⁰ or on the ground that the case was wrongly dismissed by his predecessor for default¹¹ or on the ground that the right to proceed against other properties was not reserved by the original Judge¹². It will be illegal for a District Judge to transfer a review petition filed before a Subordinate Judge to his own file¹³ or to transfer an application for review filed before him to a Subordinate Judge¹⁴. A successor in office of a Judge who has been transferred¹⁵ or who has retired¹⁶ or who is dead¹⁷ cannot entertain such application for review. Similarly, where a Court has been abolished and suits have been transferred to another Court the Judge of that Court cannot grant a review except on the two grounds mentioned in this rule.¹⁸ But where a Judge of an Additional Sub-Court was transferred as the Subordinate Judge of the principal Sub-Court it was held that the latter could review his own order passed while he was the Additional Subordinate Judge.¹⁹
- (4) an application for review of a decree or order passed by a Judge of the High Court can be made to, or disposed of by, his

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| | (1876) 1 Cal 197 (199) |
| | (1877) 2 Mad 10 (11, 12) |
| | (1931) 1931 All 605 (606) |
| | 2 (1850) 14 Bom 101 (102) |
| | (1906) 1906 Pun Re No 82 |
| | 10 (1908) 8 Cal L Jour 294 (298) |
| (1932) 1932 1st 321 (322) | 11 (1909) 1 Ind Cas 900 (901) 1903 Pun Re No 33 |
| Pow. of suc-
cessor under S 152 is wider than | 12 (1910) 5 Ind Cas 725 (726) (Cal) |
| | 13 (1864) 1864 Suth W R (Gap) (Mis) 99 (29) |
| | 14 (1919) 1919 Nag 143 (143) |
| | 15 (1882) 4 All 278 (280) |
| | [See also (1927) 1927 Oudh 131 (131)] |
| (234) Decision by Sub Judge—Review application to District Judge—Latter should return it for presentation to proper Court] | 16 (1882) 1882 All W N 96 (96) |
| [But see (1909) 13 Cal W N xci (91n)] | 17 (1929) 120 Ind Cas 386 (386) (Oudh) |
| 8 (1850) 5 Cal 110 (112) | 18 (1885) 8 Mad 567 (568) |
| | 19 [See (1927) 1927 Cal 312 (313) 54 Cal 374] |
| | [But see (1925) 1925 All 804 (806) 47 All 751] |

2,
2

successor in office²⁰ This rule has no application to the High Court

The rule has no application to Courts of Small Causes²¹ See O 50 *infra*

The expression the Judge who passed the decree means the Judge who *decided the case* and not the Judge who merely *signed* the decree²²

3

Form of applica
tions for review

R. 3. [S 625] The provisions as to the form of *preferring* appeals shall apply, *mutatis mutandis*, to applications for review

[1877—S 625]

Synopsis

Applicability of the Rule Form contents and presentation of ap plication	Note No 1 2	Application by legal representative of party Limitation	Note No 3 4

1 Applicability of the Rule

This Rule is not applicable to Small Cause Courts See O 50 As to the powers of review of Small Cause Courts see S 17 of the Provincial Small Cause Courts Act and the undermentioned cases¹

2 Form contents and presentation of application

Applications for review should be drawn up in the same manner as appeals and should set forth concisely the grounds of objections to the decision of which a review is sought without argument or narrative and such grounds should be numbered consecutively¹ The Court should not travel beyond the grounds mentioned in the application^{1a} According to the High Court of Allahabad it is not necessary that it should be accompanied by the copy of the decree or judgment sought to be reviewed² while according to the High Court of Bombay it is necessary to do so³ The application should be presented to the Judge and not to the *Munsarum*⁴ The informalities in presenting a review petition cannot be raised after the decree is passed in terms of review⁵

The Rule only relates to the *form* of the application for review It does not extend the right of a party who goes for a review and give him a right of appeal against an order refusing to restore an application for review, by reason of the fact that an appellate order under such circumstances is appealable under O 43 R 1 (f)⁶ An application for execution made after 90 days from

20 (1917) 1917 Cal 184 (185)	44 Cal 28 1s	(1907) 9 Bom L R 833 (835) Case under Act XI of 1865 now repealed
21 (1905) 1905 Pun Re No 63		(1881) 1881 Pun Re No 60 page 140 (Do)
22 (1917) 1917 Cal 613 (673)		

Order 47 Rule 3—Note 1

1 (1894) 1894 Pun Re No 108 page 410
At the time of presenting the application are directory and not mandatory

- (1905) 32 Cal 333 (341 342) (Do)
- (1860) 14 Suth W R 42 (43)
- (1869) 11 Suth W R 245 (245 246)
- (1894) 1894 Pun Re No 5 page 7
- (1890) 13 Mad 178 (182) (F B)
- (1891) 18 Cal 83 (85)

- 1 (1862 65) 1 Bom H C R 185 (186)
- 1a (1900) 5 Cal W N 435 (486)
- (1933) 1933 Rang 151 (153)
- (1911) 1911 Pun Re No 73 11 Ind Cas 42 (428)
- (1928) 1928 Cal 73 (73)
- 2 (1893) 17 All 213 (216)
- 3 (18 9 60) 4 Bom 414 (415)
- 4 (1890) 12 All 57 (59)
- 5 (189) 1897 Pun Re No 17 page 63
- (1925) 1925 All 17 (7, 8)
- (1914) 1914 Bom 1 (7) 33 Bom 416
- G (1925) 1925 All 57 (59) 17 All 1

the date of the decree and which does not mention any circumstances to show why it could not be made within 90 days, cannot be treated as an application for review.⁷

3 Application by Legal representative of party

The legal representative of a deceased party to a suit can apply for a review in the circumstances in which the party himself could have applied.¹

4 Limitation

When filing an application for review of a judgment although it is *not necessary* to file a copy of the judgment the applicant is entitled to the benefit of S 12 sub S 2 of the Limitation Act if he does obtain a copy of the judgment.¹ A pauper may apply for review of judgment with the same indulgence under S 5 of the Limitation Act as to delay in making the application as a person who is not a pauper. The time occupied in prosecuting a prior application for review cannot be deducted in calculating the period of limitation.² Nor the time taken in prosecuting an appeal.⁴

R. 4. [S 626] (1) *Where it appears to the Court that there is not sufficient ground for a review it shall reject the application*
 (2) *Where the Court is of opinion, that the application for review should be granted, it shall grant the same.*²

Provided that—

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appeal and be heard in support of the decree or order, a review of which is applied for and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof⁶ of such allegation

[1877—Ss 626, 629, 1859—S 378]

Synopsis

	Note No		Note No
Legislative changes	1	Discovery of new matter or evidence	5
Where the Court is of opinion it shall grant the same	2	Strict proof	6
Review without notice to the opposite party	3	Second application for review—See O 47 R 7 below	7
Form of notice—See Appendix G Form No 14	4	Death of party pending review	8
		Appeal—See O 47 R 7	9
		Revision—See S 115 Note 27	10

7 (1931) 1931 All 218 (219)

Note 3

1 (1906) 9 Oudh Cas 35 (36)

Note 4

1 (1934) 1934 All 367 (368) 56 All 591

[But see (1899) 2 Oudh Cas 302]

2 (1878 80) 2 Mad 230 (231)

3 (1902) 26 Bom 485 (490)

4 (1881) 8 Bom 260 (263)

4, 1 **Legislative changes**

(a) The words and the Judge shall record with his own hand his reasons for such opinion which occurred in the concluding part of para 2 of the old section have been omitted

(b) Cl (c) of the old section has been transferred to R 2 of this Order

The other alterations do not involve any alteration in the law

By reasons of the change mentioned in (a) above the decisions mentioned below have been rendered obsolete ¹

2 **Where the Court is of opinion it shall grant the same**

Where an application for review is made on any of the grounds specified in R 1 and the Court is of opinion that the review should be granted it should be granted ¹ It is improper to admit a review petition and hear the case afresh and thereafter dismiss the petition, where, at the re-hearing, the Court comes to the conclusion that there is no reason to interfere, the proper course is not to pass an order dismissing the review application but to pass an order to the same effect as the one under review ²

3 **Review without notice to the opposite party**

Before granting an application for review it is necessary that notice of the application should be given to the opposite party Otherwise the order granting review will be a nullity ¹ A notice of an application by the plaintiff for review of an order passed in a suit must be served on *all* the defendants and not merely on the opposing defendants who had appeared when the decree or order sought to be reviewed was passed ² The reason is that the expression opposite party in proviso (a) of the Rule is not restricted to cases in which such party has actually appeared It includes all parties interested in supporting the order or decree sought to be set aside ³ There is a difference of opinion as to whether where an appeal is dismissed under O 41 R 11 or a suit is dismissed before summons to the defendant or an application for execution is summarily dismissed before notice to the judgment-debtor, the respondent defendant or judgment-debtor as the case may be is an opposite party within the meaning of this Rule The High Courts of Madras⁴ and Patna⁵ have held that he is, while the High Courts of Calcutta⁶ and Lahore⁷ have held that he is not

Order 47 Rule 4—Note 1

- 1 (1900) 27 Cal 333 (335) 27 Ind App 79
(P C)
(1900) 23 Mad 496 (498)
(1888) 3 All 316 (320)
(1895) 22 Cal 734 (737)
(1870) 13 South W R 439 (440)

Note 2

- 1 (1917) 1917 Lah 379 (380) 1916 Pun Ra No 115
2 (1923) 1923 Oudh 93 (94 95) 26 Oudh Cas 24

Note 3

- 1 (1915) 1915 Cal 666 (667) 42 Cal 433
(1933) 1933 Pat 643 (644)
(1923) 1923 Rang 49 (50) 1 L B R 394
(1903) 14 Mad L Jour 7 (7 8)
(1887) 11 Bom 591 (594 595)
(1913) 19 Ind Cas 864 (864) (Lah)
(1867) 8 South W R 304 (304)
(1926) 1926 Mad 133 (134)
(1913) 19 Ind Cas 275 (277) (Cal)

3 (1922) 1922 Pat 281 (283) 6 Pat L Jour 625

4 (1926) 1926 Mad 930 (931 932) 50 Mad 6

5 (1922) 1922 Pat 281 (283) 6 Pat L Jour 625

6 (1922) 1922 Cal 234 (235) Suit dismissed for non payment of deficiency in Court fees before summons to defendant

Summary dismissal of appeal under O 41 R 11

11-
ques

7 (1924) 1924 Lah 350 (351) Execution application—Dismissal for default [See however (1923) 1923 Lah 303 (304)]

4 Form of Notice—See Appendix G, Form No 11

5 Discovery of new matter or evidence

The expression means the same thing as the expression new and important matter of evidence¹ in R 1 above¹ See also Notes to R 1, *supra*

6 Strict proof

No application for review should be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be produced by him when the decree or order was passed or made, without *strict proof* of such allegation¹ Where a Court grants a review without calling for strict proof of the allegation that the new matter was not within the knowledge of the petitioner, the order is in contravention of this Rule and is without jurisdiction² Strict proof means anything which may serve directly or indirectly to convince a Court, and has been brought before the Court in legal form and in compliance with the law of evidence It is the formality of the proof which is prescribed and not the sufficiency in the result Hence the fact that the evidence adduced is not *sufficient* to prove the allegation does not make the order granting an application for review one in contravention of the provisions of this Rule within the meaning of R 7 *infra*³ It is within the jurisdiction of the appellate Court to say whether the strict proof is according to law or not⁴ though the question of the *sufficiency* or importance of evidence is for the Court admitting the review⁵

7 Second application for review—See O 47 R 7 below

8 Death of party pending review

The order granting review only holds the judgment in suspense The death of party does not, therefore, cause the suit or appeal to abate¹

9 Appeal.—See O 47 R 7

10 Revision.—See Note 27 to S 115 *ante*

Note 5

1 (1900) 1900 Cal 467 (469 471 472) 47 Cal 563 (F L)

Note 6

1 (1900) 31 Bom 381 (359 390) 31 Ind App 115 (P C)

(1903) 1933 Mad 217 (218)

(1917) 1917 All 107 (103)

(1916) 1916 All 286 (287) 38 All 980

(1860) 3 Agra H C R 69 (69)

Marsh J 3

Bourke O C 115

(1917) 1917 Lrb 379 (380) 1916 Pun Re No 115

(1918) 1918 U B 2 (28) (1916) 2 Upp Bur R 126

(1893) 1900 1893 1900 L B R 52

2 (1925) 1925 Mad 578 (578)

(1920) 1900 Cal 467 (469 471) 47 Cal 563

(1927) 1927 Mad 826 (826)

3 (1916) 1916 Cal 521 (523 524) 42 Cal 830

(1918) 1918 Cal 618 (621 623 625) 45 Cal

(1874) 29 Suth W R 446 (446)

(1873) 20 Suth W R 426 (426)

(1873) 19 Suth W R 130 (130)

(1869) 12 Suth W R 461 (462)

(1872) 17 Suth W R 458 (459)

(1870) 14 Suth W R 26 (26)

(1869) 12 Suth W R 530 (537)

(1872) 18 Suth W R 413 (414)

(1872) 17 Suth W R 230 (231)

(1865) 10 Suth W R 432 (432)

(1871) 16 Suth W R 7 (8)

(1870) 14 Suth W R 236 (237)

(1873) 20 Suth W R 84 (85) (F B)

(1860) 2 Suth W R 174 (175 176)

(1918) 1918 Cal 618 (621 625) 45 Cal 60

(1930) 1930 Cal 424 (425)

[See also (1911) 9 Ind Cas 532 (533) (Cal)]

Note 8

1 (1924) 1924 Bom 310 (310) 48 Bom 210

R. 5. [S 627.] *Where* the Judge or Judges, or any one of the Judges, who passed the decree or *made the* order a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same.

BOMBAY**Local Amendment.**

In R 5, for the word 'six' the word 'two' shall be substituted

Synopsis		Note No.	Note No.
Application for review in Court consisting of two or more Judges	1	"Attached to the Court"	2

Other Topics

Review by two Judges, one of whom is new See Note 1, Pt (1)

1 Application for review in Court consisting of two or more Judges

This Rule will apply only in the case of a Court consisting of more than one Judge^{1a} This Rule applies to High Court also It is not applicable to Small Cause Courts See O 50 A review heard and granted by two Judges of a Court one of whom only was the Judge who passed the decree, is illegal¹ Similarly where one Judge of a Bench of two Judges who disposed of an appeal leaves the Court on a *month's* leave, the other Judge has no jurisdiction to hear an application for review since the former Judge cannot be said to have ceased to be a member of the Court or to be precluded by absence or other cause for a period of six months next after the application for review² But where a Bench of two Judges of a Court has passed a decree or made an order and one of the Judges is absent on leave thus precluding him from considering the decree or order for a period of six months from the date of the application for review, the other Judge is competent to hear the application for review³ If a review is allowed by such single Judge, the matter should be reheard by a Bench of two Judges⁴ A District Judge cannot transfer an application for review to the Additional Judge⁵

Order 47, Rule 5—Note 1

- 1a (1933) 1933 Lah 130 (131) Under Punjab Courts Act, Court of Additional Judge is distinct from the Court of the District Judge
- 1 (1922) 1922 P C 112 (114) 3 Lah 127 49 Ind App 144 (P C)
- 2 (1919) 1919 Cal 1033 (1034)
- 3 (1928) 1928 Cal 634 (636) Absence for more than six months must be assumed to have existed in this case
- (1933) 1933 Pat 433 (433)

(1927) 1927 Rang 20 (23) 4 Rang 265

- 4 (1889) 16 Cal 788 (793)
 (1911) 9 Ind Cas 532 (533) (Cal)
 (1909) 2 Ind Cas 201 (205) (Mad)
- 5 (1930) 1930 All 765 (766)

2 Attached to the Court

A Judge who is absent on leave and for whom another is officiating is not attached to the Court and the review application may be disposed of by the remaining Judge who heard the appeal originally¹

R. 6. [S 628] (1) *Where the application for a review is heard by more than one Judge and the Court is equally divided the application shall be rejected*

Application where rejected

(2) *Where there is a majority, the decision shall be according to the opinion of the majority*

[1877—S 627, 1859—S 379]

Order of rejection of appeals by Objections to order granting appeal

R. 7. [S 629] (1) An order of the Court rejecting the application shall *not* be *appealable* but an order granting an application may be objected to on the ground that the

application was—

(a) in contravention of the provisions of *Rule 2*

(b) in contravention of the provisions of *Rule 1, 7* or

(c) after the expiration of the period of limitation⁸ prescribed therefor and without sufficient cause

Such objection may be *taken* at once by an appeal from the order granting the application or in any appeal from the final decree or order *passed or* made in the suit

(2) Where the application has been rejected in consequence of the failure of the applicant to appeal he may apply for an order to have the rejected application restored to the file, and *where* it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same

(3) No order shall be made under *sub rule* (2) unless notice of the application has *been* served on the opposite party

[1877—S 629]

Local Amendment

MADRAS

In sub rule (1) *substitute* the word *order* for the word *application* occurring after the words *on the ground that the*

7,

Synopsis

	Note No		Note No
	1	Second appeal from order granting	
	2	review	9
	3	Letters Patent appeal	10
appealable		Objections to order granting review	
Grounds of objection in appeal — See	4	may be taken in appeal from the	
Note 4 above		final decree	11
Application being in contravention of	5	Order granting review in insolvency	
R 2		proceedings if appealable	12
In contravention of the provisions of	6	Dismissal of application for review for	
R 4			13
After the expiry of the period of	7		14
limitation	8		15
			16

Other Topics

Appl. cability to Small Cause Court See Note 2 Pt (2)

1 Legislative changes

1 In sub rule (1) the word first which occurred in the old section has been substituted by the words shall not be appealable

2 The

3 The

the law

Under S 378 of the Code of 1859 the order of the Court granting or refusing the review was final

2 Scope and applicability of the Rule

Under this Rule an order *rejecting* an application for review is not appealable. An order *granting* an application for review is appealable only on three grounds of objections namely that the application was —

(a) in contravention of the provisions of R 2

(b) in contravention of the provisions of R 4

(c) presented after the expiration of the period of limitation prescribed therefor and without sufficient cause

Such objection may be taken—

(a) at once by an appeal from the order granting the application [O 43 R 1 (w)] or

(b) in an appeal from the final decree or order passed or made in the suit (S 105)¹

Where an application is dismissed for default of appearance it may be restored on sufficient cause being shown for such non appearance upon such terms as to costs or otherwise as the Court thinks fit and shall appoint a day for hearing the same. But no order of restoration should be made without notice to the opposite party.

This Rule being inconsistent with S 176 of the Agra Tenancy Act is not applicable to an order passed by an Assistant Collector Second Class relating to the trial of any suit or application.^{1a} This Rule does not apply to the Provincial Small Cause Courts.² Where the Court actually granted a review though it purported to act under S 112 it was held in the undermentioned

Order 47 Rule 7—Note 2
1 (1877) 1 All 363 (365)

1a (1915) 31 Ind Cas 912 (912) (All).
2 (1919) 1919 Mad 111 (111°).

case³ that it must be treated as an order under this order and that an appeal lay against the order.

3 Order rejecting review not appealable

An order rejecting an application for review is not appealable¹ As to whether and when the revision will lie in such a case, *see* Note 27 to S 115 and the undermentioned cases.² As to whether an order rejecting an application for review of judgment is an order made "on appeal" from which an appeal lies to the Privy Council, *see* Note 5 to S 109 and the cases cited below³ As to the powers of revision under S 25 of the Small Cause Courts Act, *see* the case cited below⁴

4 Order granting review, if and when appealable

Under the Code of 1859 there was no appeal even against an order granting a review¹ O 43, R 1 (w) gives a right of appeal against such an order.² This Rule enacts that in such an appeal only the three grounds of objections specified in this Rule can be raised Both the Rules must be read together² and so reading them it follows that there is no appeal even from an order granting a review in cases other than those specified in this Rule³ Thus

3 (1921) 1921 Lah 250 (251)

Note 3

1 (1904) 23 All 572 (573)
(1904) 1904 Pat 177 (178) Order refusing
review in insolvency proceedings

(1899) 4 Cal W N 30 (40)

(1888) 10 Cal 432 (435)

(1872) 20 South W R 81 (85)

(1870) 13 South W R 167 (168)

(1869) 11 South W R 264 (265)

(1869) 11 South W R 181 (185)

(1866) 5 South W R 89 (90)

(1864) 1 South W R (Mis) 7 (7)

(1864) 1864 South W R (Mis) 20 (21)

(1862 64) 1862 64 South W R Sp 11 (12)

(1866) 5 South W R 93 (96) (F B)

(1866) 2 Mad 253 (251, 256)

(1906) 30 Bom 56 (61)

(1906) 26 Mad 599 (602)

2 (1910) 6 Ind Cas 707 (707) (All) No revision
lies against an order refusing
to grant review

[See also (1911) 10 Ind Cas 725
(725) (Lah) No revision]

(1929) 1929 Sind 38 (39) Orders disallowing
review application are revisable

(1900) 4 Ind Cas 23 (24) 31 All 610

Refusal to entertain an application
—Revision lies

(1911) 12 Ind Cas 172 (173) (Mad) No revision
lies

(1875 78) 1 All 296 (297) Case under the
old Code

3 [See (1869) 11 South W R 145 (145)]

(1864) 1 South W R (Mis) 13 (14)

(1866) 5 South W R (Mis) 17 (17)

4 (1929) 1929 Mad 56 (56)

Note 4

1 (1868) 9 South W R 125 (125)

[See (1866) 6 South W R 18 (19)

The order is final]

(1874) 22 South W R 288 (290),

(1870) 13 South W R 82 (83)

1a (1934) 1934 Oudh 445 (445) Order of single
judge of Chief Court granting re-
view—appeal lies to Bench of two
judges under S 12 (1) of the Oudh
Courts Act

[See also (1921) 1921 (Lah) 250
(250)]

2 (1930) 1930 All 126 (127)

(1920) 1920 All 112 (114) 42 All 626

(1934) 1934 Lah 617 (619) Right of appeal
under O 43, R 1 is controlled by
this Rule

(1932) 1932 Oudh 63 (65) 7 Luck 350

(1921) 1921 Cal 66 (66)

(1918) 1918 Cal 618 (625) 45 Cal 60

(1916) 1916 Cal 521 (521) 19 Cal W N 504

42 Cal 830

3 (1917) 1917 Mad 965 (966) Right of appeal
under O 43, R 1 is controlled by
O 47, R 7

3 See the cases cited in foot note (2) above
and also —

(1933) 1933 All 778 (778, 779)

(1933) 1933 Bom 183 (185) Insufficiency
of Court fee stamps on review ap-
plication is no ground of appeal
against review

(1933) 1933 Cal 727 (727)

(1934) 1934 Lah 575 (575) Order granting
of

(1917) 1917 All 76 (77)

where a Court grants a review for *sufficient reason* the order is not open to appeal⁴ In Bombay O 43, R 1 (w) has been deleted by a rule made by the High Court under S 122 of the Code In Bombay therefore an order granting a review is in any view appealable, only if it falls under this Rule^{4a}

Where a decree passed on review cannot be attacked on a ground recognised under this Rule the case cannot be certified as a fit case under S 109, Cl (c) of the Code⁵ nor will the mere fact that an appeal is permitted under this Rule make it a fit case for appeal to His Majesty in Council⁶

It is open to the appellant to prefer an appeal against an order granting a review, without taking any steps regarding the decree itself⁷

As to an appeal from an order granting a review in suits of a Small Cause nature, *see* Note 19 to S 102 and the undermentioned cases⁸

(1909) 2 Ind Cas 834 (834) 12 Oudh Cas 151 (1922) 1922 All 366 (367) Inability to

(1896) 18 All 44 (45)

(1888) 12 Bom 171 (173)

(1930) 1930 Cal 424 (425)

(1926) 1926 Cal 259 (260)

(1919) 1919 Cal 1072 (1073)

(1913) 21 Ind Cas 943 (944) (Cal)

(1914) 1914 Cal 632 (632)

(1910) 5 Ind Cas 725 (726) (Cal)

(1899) 3 Cal W N cxxxv (cxxxvi) (Note)

(1897) 1 Cal W N 338 (339)

(1899) 21 All 152 (154) Subsequent Full Bench ruling not brought to its notice

(1930) 1930 All 126 (127) Review allowed on ground that judgment was unfair to one of the parties

(1923) 1923 Cal 450 (451) Dismissal for default restored on sufficient cause

(1919) 1919 Cal 94 (94)

(1910) 5 Ind Cas 182 (183) (Cal) Review granted on basis of subsequent admission

(1897) 24 Cal 878 (880)

(1928) 1928 Cal 73 (73)

(1929) 1929 Lah 26 (27) Contravention of provisions of R 1—No appeal lies.

(1928) 1928 Lah 755 (757)

(1917) 1917 Lah 379 (380) 1916 Pun Re 115

(1916) 1916 Lah 420 (420)

(1912) 16 Ind Cas 995 (995) 1913 Pun Re

(1892) 13 J A 120 (121) 1892 Cal 101 (101)

(1903) 16 O P L R 151 (153)

(1904) 7 Oudh Cas 345 (346)

(1925) 1925 Oudh 266 (267) 25 Oudh

Nag L R 1041

(1906) 1906 Bom 121 (121)

(1926) 1926 Cal 217 (218)

(1925) 1925 All 364 (365) 47 All 361
Where the Court on being satisfied that the plaintiff was prevented from complying exactly with the terms of a decree originally passed owing to causes beyond his control granted a review

(1914) 10 Ind Cas 200 (200)

(1910) 7 Ind Cas 1015 (1016) 13 Oudh Cas 243

An appeal will lie also from an order granting a review of an order passed in execution proceedings⁹

5 Grounds of objection in appeal—See Note 4 above

6 Application being in contravention of R 2

An appeal will lie from an order granting a review on the ground that there is a contravention of R 2¹ *A*, a District Judge passed an order dismissing an appeal. While *A* was absent, an application for review of the order was presented to the Sub-Judge who ordered notice to issue. Subsequently *A* died and his successor granted a review of the order of dismissal. It was held that the Sub-Judge had no jurisdiction to order notice to issue on the application for review and that an order by the successor of *A*, granting a review of *A*'s order was under such circumstances in contravention of the provisions of R 2 and an appeal therefore lay under this Rule²

7 In contravention of the provisions of R 4

It has been seen in Note 6 to R 4 *ante* that where a Court grants a review without notice to the opposite party or in cases coming under Cl (b) of sub R 2) of that Rule without calling for strict proof of the allegations referred to therein it acts in contravention of that Rule. An appeal will therefore lie from such order under the provisions of this Rule¹. As to the meaning of the words 'strict proof' and to the powers of the appellate Court to go in to the question of the *sufficiency* of the evidence see Note 6 to R 4 *ante*

8 After the expiry of the period of limitation

An appellate Court cannot entertain an appeal from an order granting review simply on the ground that the application was time-barred. There must also be want of *sufficient cause* for the delay¹. When an application made beyond the prescribed period is admitted without the Court satisfying itself that there is sufficient cause for delay then the Court acts without jurisdiction². The appellate Court can look into the *sufficiency* of the cause for the delay alleged³.

9 Second appeal from order granting review

No second appeal lies from the order of an appellate Court whether it confirms or reverses the order of the Court of the first instance granting an

9 (1910) 5 Ind Cas 483 (484) (Cal)

Note 6

1 (1910) 5 Ind Cas 725 (726) (Cal)

2 (1910) 16 Ind Cas 203 (204) (Cal)

Note 7

1 (1920) 1920 Cal 407 (470) 47 Cal 568

(1933) 1933 Mad 217 (218)

(1924) 1924 Lat 250 (253)

See also generally the cases cited in Note 6 to Rule 4 *ante*

Note 8

(1870) 13 Suth W R 33 (33)

(1870) 11 Suth W R 22 (22)

(1869) 12 Suth W R 94 (94)

(1868) 10 Suth W R 42 (43)

(1867) 8 Suth W R 184 (188)

(1876) 1876 Pun Re No 101 page 215

(1871) 1871 Run Re No 51

[See however (1913) 18 Ind Cas 309 (311) (Lah). There was no objection by opposite party]

3 (1874 75) 2 Ind App 58 (69) (P C)

(1876) 25 Suth W R 343 (344)

(1875) 24 Suth W R 294 (295)

(1872) 18 Suth W R 286 (286)

(1872) 17 Suth W R 230 (231)

(1864) 1864 Suth W R Cap 287 (287)

(1871) 1871 Pun Re No 51

(1901) 5 Cal W N 485 (486)

(1932) 1932 Cal 552 (555)

(1874) 11 Beng L R 427n (428)

7, application for review¹ See S. 104, sub-S (2).

10 Letters Patent appeal

An order refusing an application for review is not a 'judgment' within the meaning of S 15 of the Letters Patent and is not appealable as such¹ An order *granting* an application for review may amount to a 'judgment' within that clause but an appeal will lie on the grounds specified in this Rule²

Where a single Judge disposed of an application for review, when the other Judge was on a month's leave it was held that the order was without jurisdiction and that an appeal lay under Cl 15 of the Letters Patent³

11 Objection to order granting review may be taken in appeal from the final decree

The propriety of an order granting review can also be questioned in the appeal against the final decree but only on the grounds specified in this Rule¹

12 Order granting review in insolvency proceedings, if appealable

A Court exercising powers under the insolvency jurisdiction has the same powers as any other Court under the Code^{1a} If a review is granted, the order can be objected to in appeal only on the grounds mentioned in this Rule¹

13 Dismissal of application for review for default—No appeal

An order under O 47, R. 7 refusing to re-admit an application for review, dismissed for default is not an appealable order However, the High Court could in such a case interfere in revision.¹

14 Appeal from decree passed on review

An appeal lies against the decree passed on review¹ (See also Note 3 to R 8)

Note 9

(1878) 2 Cal L Rep 257 (258)
(1873) 20 Suth W R 426 (426)
(1873) 20 Suth W R 84 (85 86) (F D)
(1913) 19 Ind Cas 481 (485) 1913 Pun Re
No 109
(1905) Pun Re No 62 page 317
(1929) 1929 Mad 261 (261)

(1885) 11 Cal 236 (236)
(1880) 5 Cal 711 (712, 713)
(1889) 12 Mad 125 (126)
(1918) 1918 Mad 1011 (1012) Question left
open
(1882) 1882 Pun Re No 133 page 396
Under the Punjab Courts Act, a
second appeal lies

Note 10

1 (1923) 1923 All 356 (357) 45 All 535
(1886) 9 Mad 253 (256)
(1917) 1917 Cal 88 (89)
(1905) 9 Cal W N 502 (503)
(1869) 12 Suth W R 459 (460)
2 (1929) 1929 Mad 261 (263)
(1889) 16 Cal 789 (793)
(1870) 13 Suth W R 439 (440)
3 (1919) 1919 Cal 1033 (1034)

Note 11

1 (1913) 20 Ind Cas 670 (670) (Cal)
[See also the following cases —
(1931) 1931 All 329 (330)
(1926) 1926 Cal 213 (215)
(1919) 1919 Cal 287 (290, 291)
(1835) 22 Cal 984 (989)
(1893) 22 Cal 734 (737 738)
(1908) 8 Cal L Jour 294 (297)

(1884) 6 All 292 (294)
(1876 80) 2 All 287 (289)
(1875 78) 1 All 363 (364)
(1876) 25 Suth W R 324 (325)
(1876) 25 Suth W R 63 (64)
(1875) 24 Suth W R 186 (188)
(1874) 22 Suth W R 399 (399)
(1874) 22 Suth W R 183 (183)]

Note 12

1a (1935) 1935 Pat 177 (178) Order rejecting
application for review is not appeal-
able
1 (1922) 1922 All 206 (207) 41 All 605

Note 14

In such appeal the Court has full power to go into the merits of the case and see whether the decree was properly passed.² It could be urged in such an appeal that the Court which admitted the application for review had no jurisdiction to do so.³

15 Second application for review

There is nothing in the Code of Civil Procedure preventing a second application for review where a previous application for review was made and rejected, provided such second application is based on grounds different from those taken in the first application.¹

16 Review without jurisdiction—Revision

The High Court will not interfere with the order of an appellate Court dismissing an appeal against the grant of review unless there is a want of jurisdiction or there is an illegality or material irregularity in passing such an order¹ nor will it interfere with an interlocutory order granting review for a sufficient reason² But where the first appellate Court allows an appeal against an order granting review on the grounds other than those mentioned in this Rule it acts without jurisdiction and the order is liable to be set aside in revision³ Where a Court subordinate to the High Court rejects an application for review of judgment refusing to consider the grounds of the same and thus fails to perform its duty it is competent to the High Court under its general powers of superintendence to direct such Court to proceed according to law^{3a} (*See also* No c 27 to S 115 *ante* and the undermentioned cases)⁴

- 2 (1915) 1918 Cal 618 (624) 45 Cal 60
(1924) 1924 Mad 602 (602)
(1929) 1329 Mad 261 (264)
3 (1904) 27 Mad 602 (607)
(1911) 11 Ind Cas 313 (343) 14 Oudh Cas
103
[See also (1869) 6 Bom II C R 1 C
25 (2101)]

Note 15

- (1860) 10 Suth W R 415 (415)
 (1860) 5 Suth W R 93 (95)
 (1864) 1864 Suth W R 91 (92) (Gap)
 (1865) 2 Suth W R 61 (62)
 (1864) 1 Suth W R 257 (287)
 (1852) 1892 Pun Re No 57 page 297
 (1853) 1553 Pun Re No 107
 [See also (1906) 4 Cal L Jour 46
 (43)]
 [See however (1885) 16 Cal 719
 (752)]

Note 16

- 1 (1925) 1925 Oudh 223 (224)
[See (1839) 11 All 383 (385) No in
terference in revision as there is a
remedy by way of appeal from the
final decree at the rehearing]
2 (1912) 16 Ind Cas 935 (995) 1913 1 un Re
No 11
(18r0) 13 Suth W R 439 (440)
3 (1929) 1929 Rang 105 7 Rang 157
(1925) 1925 All 395 (396)

- (1916) 1916 Mad 544 (544)
[See also (1889) 1889 All W N 179
(181)]
- (1875 78) 1 All 296 (297)
- (1934) 1934 All 971 (971)
- (1909) 2 Ind Cas 489 (468) (Mad) Small
Cause Court
- (1924) 1924 All 759 (760) (Do)
- (1890) 13 Mad 178 (181) (Do)
- (1934) 1934 All 250 (251) Order allowing
review by trial Court—High Court
can revise such order even if on
appeal to lower appellate Court
order has been modified
- (1919) 1919 Mad 111 (112) Although O 47
R 7 of the C P Code is not appli-
cable to Small Cause Courts its
provisions will guide the discretion
which the High Court possesses
under S 25 of the Provincial Small
Cause Courts Act
- (1904) 1904 Pun L R No 38 page 126 In ap-
plication for a review wrongly granted
by the Small Cause Court is subject
to revision by the High Court
- (1929) 1929 All 375 (376) Order of the lower
Court is not subject to revision
by the High Court
- (1927) 1927 Rang 204 (205) 5 Rang 121
- (1923) 1928 All 392 (394) 50 All 801
Review granted on a ground not
good in law—No revision lies
- (1932) 1932 Nag 177 (179) 23 Nag L R 221

7. application for review¹ See S 104, sub-S (2)

10 Letters Patent appeal

An order refusing an application for review is not a 'judgment' within the meaning of S 15 of the Letters Patent and is not appealable as such.¹ An order *granting* an application for review may amount to a judgment within that clause but an appeal will lie on the grounds specified in this Rule²

Where a single Judge disposed of an application for review, when the other Judge was on a month's leave it was held that the order was without jurisdiction and that an appeal lay under Cl 15 of the Letters Patent³

11 Objection to order granting review may be taken in appeal from the final decree

The propriety of an order granting review can also be questioned in the appeal against the final decree but only on the grounds specified in this Rule¹

12 Order granting review in insolvency proceedings if appealable

A Court exercising powers under the insolvency jurisdiction has the same powers as any other Court under the Code^{1a} If a review is granted, the order can be objected to in appeal only on the grounds mentioned in this Rule¹

13 Dismissal of application for review for default—No appeal

An order under O 47, R 7 refusing to re-admit an application for review, dismissed for default is not an appealable order. However, the High Court could in such a case interfere in revision¹

14 Appeal from decree passed on review

An appeal lies against the decree passed on review¹ (See also Note 3 to R 8)

Note 9

- 1 (1899) 11 All 383 (385)
(1918) 1918 All 229 (229) 40 All 68
(1889) 18 Bom 496 (499)
(1907) 6 Cal L Jour 225 (225)
(1894) 24 Cal 319 (319)
(1885) 11 Cal 296 (298)
(1880) 5 Cal 711 (712 713)
(1899) 12 Mad 125 (126)
(1918) 1918 Mad 1011 (1012) Question left open
(1892) 1892 Pun Re No 133 page 396
Under the Punjab Courts Act a second appeal lies

Note 10

- 1 (1923) 1923 All 358 (357) 45 All 535
(1886) 9 Mad 253 (256)
(1917) 1917 Cal 88 (89)
(1905) 9 Cal W N 502 (503)
(1869) 12 Suth W R 459 (460)
2 (1929) 1929 Mad 261 (263)
(1889) 16 Cal 783 (793)
(1870) 13 Suth W R 439 (440)
3 (1919) 1919 Cal 1033 (1034)

Note 11

- 1 (1913) 20 Ind Cas 670 (670) (Cal)
(See also the following cases —
(1931) 1931 All 323 (330)
(1906) 1926 Cal 213 (215)
(1913) 1913 Cal 287 (290 291)
(1895) 22 Cal 934 (989)
(1895) 22 Cal 734 (737 738)
(1904) 8 Cal L Jour 291 (297)

- (1878) 2 Cal L Rep 257 (259)
(1873) 20 Suth W R 426 (426)
(1873) 20 Suth W R 84 (85 86) (F D)
(1913) 19 Ind Cas 181 (185) 1913 Pun Re No 103
(1895) Pun Re No 62 page 317
(1929) 1929 Mad 261 (264)
(1908) 31 Mad 49 (50)
(1900) 23 Mad 496 (497)
(1898) 7 Moo Ind App 233 (307) (P C)
(1875) 2 Cal 131 (141) 3 Ind App 221 (P C)
(1894) 6 All 292 (291)
(1876 80) 2 All 287 (289)
(1875 78) 1 All 363 (364)
(1876) 25 Suth W R 324 (325)
(1876) 25 Suth W R 63 (64)
(1875) 24 Suth W R 186 (189)
(1874) 22 Suth W R 379 (399)
(1874) 22 Suth W R 183 (183) 1

Note 12

- 1a (1930) 1935 Pat 177 (178) Order refusing application for review is not appealable
1 (1922) 1922 All 206 (207) 41 All 605

Note 14

In such appeal the Court has full power to go into the merits of the case and see whether the decree was properly passed.² It could be urged in such an appeal that the Court which admitted the application for review had no jurisdiction to do so.³

15 Second application for review

There is nothing in the Code of Civil Procedure preventing a second application for review where a previous application for review was made and rejected, provided such second application is based on grounds different from those taken in the first application.¹

16 Review without jurisdiction—Revision

The High Court will not interfere with the order of an appellate Court dismissing an appeal against the grant of review unless there is a want of jurisdiction or there is an illegality or material irregularity in passing such an order¹ nor will it interfere with an interlocutory order granting review for a sufficient reason. But where the first appellate Court allows an appeal against an order granting review on the grounds other than those mentioned in this Rule it acts without jurisdiction and the order is liable to be set aside in revision.³ Where a Court subordinate to the High Court rejects an application for review of judgment refusing to consider the grounds of the same and thus fails to perform its duty, it is competent to the High Court under its general powers of superintendence to direct such Court to proceed according to law.^{3a} (See also Note 27 to S 115 *ante* and the undermentioned cases).⁴

2 (1916) 1918 Cal 618 (624) 45 Cal 60

(1924) 1924 Mad 602 (602)

(1929) 1 J. 9 Mad 261 (264)

3 (1904) 27 Mad 602 (607)

(1911) 11 Ind Cas 343 (343) 14 Oudh Cas 105

[See also (1603) 6 Bom H C R 1 C 2, S (940)]

Note 15

[See also (1906) 4 Cal L Jour 46 (4)]

[See however (1888) 10 Cal 749 (752)]

Note 16

1 (1925) 1925 Oudh 223 (224)

[See (1839) 11 All 383 (385) No interference in revision as there is a remedy by way of appeal from the final decree at the rehearing]

2 (1912) 10 Ind Cas 995 (995) 1913 Pun Re No 11

(1830) 13 Suth W R 439 (440)

3 (1929) 1929 Rang 105 7 Rang 187

(1925) 1925 All 395 (396)

(1916) 1916 Mad 514 (514)

[See also (1889) 1889 All W N 179 (181)]

3a (1875) 78 1 All 296 (297)

(1934) 1934 All 971 (971)

4 (1909) 2 Ind Cas 488 (489) (Mad) Small Causes Court

(1921) 1924 All 759 (760) (Do)

(1830) 13 Mad 178 (181) (Do)

(1934) 1934 All 250 (251) Order allowing review by trial Court—High Court can revise such order even if on appeal to lower appellate Court order has been modified

(1919) 1919 Mad 111 (112) Although O 47 R 7 of the C P Code is not applicable to Small Cause Courts its provisions will guide the discretion which the High Court possesses under S 25 of the Provincial Small

to revision by the High Court

(1929) 1929 All 375 (376) Order of the lower appellate Court postponing consideration

(1923) 1928 All 392 (394) 50 All 801

Review granted on a ground not good in law—No revision lies

(1932) 1932 Nag 177 (179) 28 Nag L R 221

8

R. 8. [S 630] When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re hearing as it thinks fit

Registry of application granted and order for re hearing

[1877—S 630; 1859—S 380]

Synopsis

	Note No		Note No
Procedure on review	1	Effect of review on the original decree	3
What question may be gone into after the grant of review	2		

1 Procedure on review

The Rule applies to High Courts and Small Cause Courts There are three stages in the proceedings for review¹ —

(1) An *ex parte* application and notice thereon

(2) The hearing of the application after such notice

(3) Re hearing of the case after granting the application for review This Rule refers to the procedure to be followed when an order granting a review is passed The Court ought to make a record of the fact that the review has been granted² The Court can thereafter proceed to hear the case *at once*³ or may make such order as to re-hearing as it thinks fit⁴ This is clear from the Rule itself

2 What question may be gone into after the grant of review

A Court, in granting a review, can make a qualified order as to the *extent* to which the review should be carried out¹ It is not bound to hear the whole case² Nor on the other hand is it restricted to the particular ground on which the application was granted³ It depends upon the circumstances of each case whether the whole case should be re-opened or whether it should be re tried in part only⁴ When, on a review application an order dismissing an appeal under O 41 R 11 is set aside the whole appeal may be heard⁵ But grounds not mentioned in the memo of appeal cannot be held⁶ A party who

Appeal from order granting review
—Appellate Court confusing between reasons for review and order on review acts illegally—Revision lies

(1871) 11 Suth W R 105 (106)

(1910) 7 Ind Cas 1015 (1015 1016) 13 Oudh

(1913) 20 Ind Cas 60 (672) (Cal)

(1857) 12 Cal L Rep 64 (79)

[But see (1855) 24 Suth W R 12]

Oudh Cas

not only had an opportunity of raising a question but who did raise it in appeal and in the argument abandoned it cannot be allowed to agitate the question again on review.⁶ The Court has a discretion to receive at the hearing after review, documents which had not been tendered at the original hearing.⁷ But where a party obtained a review on the ground that upon the record he was entitled to full relief he sought, the other side cannot be allowed to adduce evidence.⁸ Whether certain documents which have been admitted as evidence were so admissible or not, is not a point which can be argued on review.⁹

3 Effect of review on the original decree

Where an application for review is *rejected*, the original decree stands.¹ Where an application for review is *granted*, the decree previously made is vacated. An appeal will lie therefore against such decree after the review is granted. If an appeal has been preferred it cannot after the review is granted be proceeded further.² Where after hearing on review a decree is passed *modifying or confirming the original decree it is a fresh decree and can be appealed against* within the time prescribed for an appeal.⁴ An order granting review is not a final order of the Court. So no leave to appeal to Privy Council can be obtained in respect of such an order.⁵

R. 9. [S. 629 Last Para] No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained

For
21011

[1877—S. 629]

Other Topics

Second review—*Paired* See Note 1 It (1)

1 Bar of certain applications

Review lies from—

- (1) an order granting or rejecting an application for review or
- (2) the decree or order passed or made at the hearing on review

A second review of the decree or order originally passed is barred

(F B)

(310) 48 Bom 210 The judgment

(1877) 1 Bom 546 (546)

6 (1874) 2 Mad 58 (60)

7 (1925) 1973 Cal 416 (416)

(1869) 12 South W R 223 (224)

8 (1873) 70 South W R 225 (225)

9 (1870) 74 South W R 186 (187)

Note 3

1 (1913) 70 Ind Cas 647 (648) (311)

(1906) 30 Bom 56 (60)

(1872) 18 South W R 404 (405)

(1914) 1914 Mad 270 (271)

(1866) 6 South W R (Misc) 102 (103) (F B)

(1922) 1973 Oudh 148 (148) 24 Oudh Cas

(1930) 1920 Lah 18 (19) 1919 Pun Re
No 166

(1970) 1920 Lah 333 (333) 1919 Pun Re
No 166

Period of

limitation for execution runs from date of revised decree given against persons who were not parties to the review application

(1913) 20 Ind Cas 647 (648) (311)

[See however (1924) 1924 Bom 310

4 (1928) 1928 Cal 418 (419)

(1880) G Cal 22 (25)

5 (1928) 1928 Cal 418 (419)

(1932) 1932 All 318 (318) 54 All 401

C P C 357 & 358

9 under this Rule as it is practically for the review of the order passed on review.¹

Local Amendments

10, ALLAHABAD

Add the following as R 10 —

10 Rule 38 of O 41 shall apply, so far as may be to proceedings under this Order¹

BOMBAY

The following shall be added as R. 10 —

Applicability of R 38 10 Rule 38 of O 41 shall apply so far as may be to proceedings under this order

OUDH

Add the following as R. 10 —

10 Rule 38 of O 41 shall apply so far as may be to proceedings under this Order

SIND

Add the following as R. 10 —

Applicability of R 38 10 Rule 38 of O 41 shall apply, so far as may be to proceedings under this Order

ORDER XLVIII.

MISCELLANEOUS

1

Process to be served at expense of party issuing

R. 1. [S 93] (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs

Costs of service

(2) The Court-fee *chargeable* for such service shall be paid within a time to be fixed before the process is issued

[1877—S 93, 1861—S 2]

Local Amendments

ALLAHABAD

Before the words Every process issued prefix the words Except as provided in O 4 R 1 (2)

CALCUTTA

Substitute for sub rule (2) the following —

(2) The Court fee chargeable for such service shall be paid when the process is filed for or within such time if any as the Court may when ordering its issue fix for the purpose

NAGPUR

To sub R (2) of R. 1 of O 43 prefix the words Except as provided in O 4 R. 1 (2) and substitute the word the for The

OUDH

In R 1 before the words Every process issued prefix the words Except as provided in O 4 R. 1 (2)

Order 47, Rule 9—Note 1

1 (1833) 16 Cal 742 (752) 16 Ind App 101 (1 C)
(1911) 10 Ind Cas 69 (631) (Lah)
(186) 7 South W R 461 (165)
(1854) 13 91 Lun Re No 6 page 64

(1863) 70 Mad H C R 33 (J 130)
(1893 1900) 1893 1900 L B R 3-0
[But see (1866) 5 South W R 73 ()
(186) 7 South W R 461 (165)
(1854) 13 91 Lun Re No 57 page 60 Cas
under Code of 1832

Other Topics

Remission of Court fee See N 1 1 t (6)
 Unless the Court otherwise directs See N 1 1 t (7)

1 Process to be served at the expense of the party applying

Ordinarily a party applying for a process on his behalf should pay for the expenses thereof. But the Court has power, under special circumstances, to direct that any other party shall bear the expenses¹ But the words unless the Court otherwise directs should not be construed as giving the Court any power to remit the fees leviable under the Court Fees Act² The Court should under Cl 2 of the rule *fix a time* for the payment of process fee and it is only in default of payment within such time that it can dismiss suit for default Where no such time is fixed in the order, a dismissal for non payment of process fees is not proper³ The time that a Court fixes for payment must be such as to give reasonable facilities to a litigant to obey such order and thus enable him to get the aid of the Court in the matter of summoning his witnesses an order to pay process *at once* is against the spirit of the Rule⁴

This Rule which applies to payment of process fees does not apply to filing of the process forms in the manner provided by the High Court Rules, and no time need be given for the same⁵ See also S 143 *ante*

R. 2. [S 94 Cf S 122] All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons

Orders and notices
how served

1 In the manner provided for the service of summons —See O 5 *ante*

This Rule is not applicable to suits for recovery of rent under the Bengal Tenancy Act (Act VIII of 1885 as amended by Act IV of 1928), *vide* S 148, sub S (a) thereof

R. 3. [S 644] The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned

Use of forms in
appendices

[1877—S 644]

Local Amendments

RANGOON

The following shall be added to O 48 R 3 —

The words or such forms as may be prescribed by the High Court of Judicature at Rangoon shall be inserted after the word *Appendices*

1 Use of forms in appendices —See the case noted below¹

Local Amendments

POUDH

The following is added as R 4 —

4 Except as otherwise provided in every interlocutory proceeding and in every

Order 48 Rule 1—Note 1

(1863) 11 Suth W R 290 (290)

1 (1899) 26 Cal 124 (126 171)

4 (1924) 1924 Nag 271 (275) 20 Nag L R 145

2 (1899) 26 Cal 124 (126)

5 (1921) 1921 Pat 428 (429)

(1927) 1927 Pat 318 (318)

Order 48 Rule 3—Note 1

3 (1924) 1924 Nag 298 (299)

1 (1897) 94 Cal 766 (772)

proceeding after decree in the trial Court the Court may either on the application of any party or of its own motion dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement

ORDER XLIX

CHARTERED HIGH COURTS

R. 1. [S 636] Notice to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial testamentary and intestate jurisdictions, except summonses to defendants, writs of execution and notices to respondents may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court by any rule or order, directs

[See Ss 116 to 120 and Ss 121 to 131]

1 Order by persons employed by them

Persons employed by attorney means persons in their *regular service* and not persons engaged for a special purpose. Thus a village headman specially employed for serving a notice is not a person employed by the attorney within the meaning of this Rule¹

Orders 49 to 51 are not applicable to the Rangoon Small Cause Courts vide S 111 Cl (d) of Act VII of 1920 (The Rangoon Small Cause Courts Act)

R. 2. [New.] *Nothing in this Schedule shall be deemed to limit or otherwise affect any Rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court*

[See S 157]

1 Scope of the Rule

S 633 of the old Code provided that the High Court shall take evidence and record judgments and orders in such manner as it by rule from time to time directs¹ Where Rules had been framed under that section and were in force at the time of the passing of this Code the Rules of the 1st Schedule as to the mode of taking evidence and of recording judgments would not affect those Rules²

Order 49 Rule 1—Note 1

1 (19-6) 1926 Cal 977 (975)

Order 49 Rule 2—Note 1

1 [See (1837) 9 All 93 (96)]

2 (1929) 1929 All 403 (403)

R. 3. [*Cr S 638*] The following *Rules* shall not apply to any *Chartered High Court* in the exercise of its ordinary or extraordinary original civil jurisdiction, namely —

Application of
Rules

- (1) *Rule 10 and Rule 11, Clauses (b) and (c) of Order VII*;
- (2) *Rule 3 of Order X*;
- (3) *Rule 2 of Order XVI*;
- (4) *Rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16* (so far as relates to the manner of taking evidence) of *Order XVIII*,
- (5) *Rules 1 to 8 of Order XX*, and
- (6) *Rule 7 of Order XXXIII* (so far as relates to the making of a memorandum);

and *Rule 35 of Order XLI* shall not apply to any such High Court in the exercise of its appellate jurisdiction
[*See Ss 116 to 120 and Ss 121 to 131*]

Local Amendment

BOMBAY

In R 3 the word and immediately preceding Paragraph (6) shall be omitted and the following Paragraph shall be inserted between Paragraphs (5) and (6) namely —
(a) R 72 A of Order 21 and

For the word and figures R 35 occurring below item (6) of R 3 the words and figures Rr 31 and 35 shall be substituted

The following clause shall be inserted as clause (1) namely —

- (1) R. 21 A of O 7

For the existing clause (1) the following shall be substituted namely —

- (1 a) Rr 10 and 11 clauses (b) and (c) and Rr 19 to 26 of O 7

Below clause (1 a) the following shall be inserted namely —

- (1 b) Rr 11 and 12 of O 8

Below clause (6) the following shall be inserted namely —

- (7) Rule 33 of O 41, and

The following shall be added as R 4 —

- 4 Under S 123 Paragraph 2 Clause (1) of the Civil Procedure Code of 1908 the following power is delegated to the Registrar of the High Court Appellate Side Bombay

Where on a memorandum of appeal presented within the time prescribed for the same the whole or any part of the fee prescribed by the law for the time being in force relating to Court fees has not been paid the Registrar may in his discretion allow the appellant to pay the whole or part as the case may be of such Court fees and may admit the appeal to the register even though the subsequent payment of Court fee may have been made after the time prescribed for presentation of the appeal

1 Application of O 41 R 10 to Chartered High Courts — See Note 3 to S 117 ante

ORDER L

PROVINCIAL SMALL CAUSE COURTS

R. 1. [*New*] The provisions hereinafter specified shall not extend to Courts constituted under the *Provincial Small Cause Courts Act, 1887*, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say—

Provincial Small
Cause Courts

(a) *so much of this Schedule as relates to—*

- (i) *suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits;*
- (ii) *the execution of decrees against immovable property or the interest of a partner in partnership property;*
- (iii) *the settlement of issues; and*

(b) *the following Rules and Orders,—*

- Order II, Rule 1 (frame of suit);*
Order X, Rule 3 (record of examination of parties);
Order XV, except so much of Rule 4 as provides for the pronouncement at once of judgment;
Order XVIII, Rules 5 to 12 (evidence);
Orders XLI to XLV (appeals);
Order XLVII, Rules 2, 3, 5, 6, 7 (review);
Order LI.

[See S. 7 and O. 20, R. 4.]

1 Provincial Small Cause Courts—See Notes to S. 7 and Note 8 to O. 20 R. 4, *ante*

ORDER LI.

PRESIDENCY SMALL CAUSE COURTS.

R. 1. [New.] *Save as provided in Rules 22 and 23 of Order V, Rules 4 and 7 of Order XXI, and Rule 4 of Order XXVI, and by the Presidency Small Cause Courts Act, 1882, this Schedule shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay.*

Presidency Small Cause Courts

Local Amendments

ALLAHABAD

Add the following as O. 52, R. 1 —

"1 Rule 39 of O. 41 shall apply, so far as may be to proceedings under S. 115 of the Code"

BOMBAY

The following shall be added as O. 52 —

Applicability of R. 38 of O. 41 to proceedings under S. 115

"1 Rule 39 of O. 41 shall apply, so far as may be, to proceedings under S. 115 of the Code"

POUDH

After O. 51 add the following as O. 52 —

"Rule 39 of O. 41 shall apply, so far as may be, to proceedings under S. 115 of the Code"

RANGOON

"Order 52—Rules of procedure to be followed in the Appellate Side of the High Court of Rangoon [Omitted]

Order 53—Rules for the conduct of suits in the Small Cause Court at Rangoon [Omitted]

Order 54—Rules for the classification and arrangement of Civil Records [Omitted]"

SIND

Add the following as O. 52 —

Applicability of R. 38 of O. 41 to proceedings under S. 115

"1 Rule 39 of O. 41 shall apply, so far as may be, to proceedings under S. 115 of the Code"

APPENDIX A

PLEADINGS

(1) TITLES OF SUITS

IN THE COURT OF

A B (*add description and residence*)

Plaintiff

against

C D (*add description and residence*)

Defendant

(2) DESCRIPTION OF PARTIES IN PARTICULAR CASES

The Secretary of State for India in Council

The Advocate General of

The Collector of

The State of

the A B Company Limited having its registered office at

A B a public officer of the C D Company

A B (*add description and residence*) on behalf of himself and all other creditors of
C D, late of (*add description and residence*)

A B (*add description and residence*) on behalf of himself and all other holders of
debentures issued by the Company Limited

The Official Receiver

A B a minor (*add description and residence*), by C D [or by the Court of Wards],
his next friend

A B (*add description and residence*), a person of unsound mind [or of weak mind],
by C D, his next friend

A B, a firm carrying on business in partnership at

A B (*add description and residence*), by his constituted attorney C D (*add description
and residence*)

A B (*add description and residence*), Shebait of Thakur

A B (*add description and residence*), executor of C D, deceased.

A B (*add description and residence*), heir of C D, deceased

(3) PLAINTS

No 1.

MONEY LENT

(Title)

A B, the above named plaintiff states as follows —

- 1 On the _____ day of _____ 19____, he lent the defendant _____ rupees repayable on the _____ day of _____ 19____.
- 2 The defendant has not paid the same except _____ rupees paid on the _____ day of _____ 19____.
- [If the plaintiff claims exemption from any law of limitation, say —]
3. The plaintiff was a minor [or insane] from the _____ day of _____ till the _____ day of _____.
- 4 [Facts showing when the cause of action arose and that the Court has jurisdiction]
- 5 The value of the subject matter of the suit for the purpose of jurisdiction is _____ rupees and for the purpose of Court fees is _____ rupees.
- 6 The plaintiff claims _____ rupees with interest at _____ per cent from the _____ day of _____ 19____.

No 2

MONEY OVERPAID.

(Title)

A B, the above named plaintiff, states as follows —

- 1 On the _____ day of _____ 19____, the plaintiff agreed to buy and the defendant agreed to sell _____ bars of silver at _____ annas per tola of fine silver.
- 2 The plaintiff procured the said bars to be assayed by E F, who was paid by the defendant [one hundred bars of flour, or the goods mentioned in the schedule hereto annexed, or sundry goods]. and F F, declared each of the bars to contain 1 200 tolas of fine silver and the plaintiff accordingly paid the defendant _____ rupees.
- 3 Each of the said bars contained only 1 200 tolas of fine silver, of which fact the plaintiff was ignorant when he made the payment.
- 4 The defendant has not repaid the sum so overpaid
[As in paras 4 and 5 of Form No 1, and relief claimed]

No 3

GOODS SOLD AT A FIXED PRICE AND DELIVERED

(Title)

A B, the above named plaintiff states as follows —

- 1 On the _____ day of _____ 19____ E F, sold and delivered to the defendant [one hundred bars of flour, or the goods mentioned in the schedule hereto annexed, or sundry goods].
- 2 The defendant promised to pay _____ rupees for the said goods on delivery [or on the _____ day of _____, some day before the plaint was filed].
- 3 He has not paid the same.
- 4 E F died on the _____ day of _____ 19____. By his last will he appointed his brother, the plaintiff, his executor
[As in paras 4 and 5 of Form No 1]
- 7 The plaintiff as executor of F F claims [relief claimed]

No 4

GOODS SOLD AT A REASONABLE PRICE AND DELIVERED

(Title)

A B, the above named plaintiff, states as follows —

- 1 On the _____ day of _____ 19____, plaintiff sold and delivered to the defendant [sundry articles of house furniture], but no express agreement was made as to the price.
- 2 The goods were reasonably worth _____ rupees.
- 3 The defendant has not paid the money
[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 5.

GOODS MADE AT DEFENDANT'S REQUEST, AND NOT ACCEPTED

(Title)

A B the above named plaintiff, states as follows —

1 On the _____ day of _____ 19____ E F agreed with the plaintiff that the plaintiff should make for him [six tables and fifty chairs] and that E F should pay for the goods on delivery _____ rupees

2 The plaintiff made the goods and on the _____ day of _____ 19____ offered to deliver them to E F and has ever since been ready and willing so to do

3 E F has not accepted the goods or paid for them

[As in paras 4 and 5 of Form No 1 and relief claimed]

No 6

DEFICIENCY UPON A RE-SALE [GOODS SOLD AT AUCTION]

(Title)

A B the above named plaintiff states as follows —

1 On the _____ day of _____ 19____ the plaintiff put up at auction [candry goods] subject to the condition that all goods not paid for and removed by the purchaser within [ten days] after the sale should be re-sold by auction on his account of which condition the defendant had notice

2 The defendant purchased [one crate of crockery] at the auction at the price of _____ rupees

3 The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [ten days] after

4 The defendant did not take away the goods purchased by him nor pay for them within [ten days] after the sale nor afterwards

5 On the _____ day of _____ 19____ the plaintiff re-sold the [crate of crockery] on account of the defendant by public auction for _____ rupees

6 The expenses attendant upon such re-sale amounted to _____ rupees

7 The defendant has not paid the deficiency thus arising amounting to _____ rupees

[As in paras 4 and 5 of Form No 1 and Relief claimed]

No 7

SERVICES AT A REASONABLE RATE

(Title)

A B the above named plaintiff states as follows —

1 Between the _____ day of _____ 19____ and the _____ day of _____ 19____ at _____ plaintiff [executed sundry drawings designs and diagrams] for the defendant at his request but no express agreement was made as to the sum to be paid for such services

2 The services were reasonably worth _____ rupees

3 The defendant has not paid the money

[As in paras 4 and 5 of Form No 1 and Relief claimed]

No 8

SERVICES AND MATERIALS AT A REASONABLE COST

(Title)

A B the above named plaintiff states as follows —

1 On the _____ day of _____ 19____ at _____ the plaintiff built a house [known as No _____ in _____] and furnished the materials therefor for the defendant at his request but no express agreement was made as to the amount to be paid for such work and materials

2 The work done and materials supplied were reasonably worth _____ rupees.

3 The defendant has not paid the money

[As in paras 4 and 5 of Form No 1 and Relief claimed]

No 9.
USE AND OCCUPATION.

(Title)

A B, the above named plaintiff executor of the will of *X Y*, deceased, states as follows —

1 That the defendant occupied the [house No , Street], by permission of the said *X Y*, from the day of 19 , until the day of 19 , and no agreement was made as to payment for the use of the said premises

2 That the use of the said premises for the said period was reasonably worth rupees

3 The defendant has not paid the money

[As in paras 4 and 5 of Form No 1]

6 The plaintiff as executor of *X Y* claims [Relief claim 1]

No 10
ON AN AWARD
(Title)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , the plaintiff and defendant, having a difference between them concerning [a demand of the plaintiff for the price of ten barrels of oil which the defendant refused to pay] agreed in writing to submit the difference to the arbitration of *E F* and *G H*, and the original document is annexed hereto

2 On the day of 19 , the arbitrators awarded that the defendant should [pay the plaintiff rupees]

3 The defendant has not paid the money

[As in paras 4 and 5 of Form No 1 and relief claim 1]

No 11
ON A FOREIGN JUDGMENT
(Title)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , at , in the State (or)

2 The defendant has not paid the money.

[As in paras 4 and 5 of Form No 1 and relief claim 1]

No 12
AGAINST SURETY FOR PAYMENT OF RENT.
(Title)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , *E F*, hired from the plaintiff for the term of years, the [house No , Street], at the annual rent of rupees, payable [monthly]

2 The defendant agreed, in consideration of the letting of the premises to *E F*, to guarantee the punctual payment of the rent

3 The rent for the month of 19 , amounting to rupees, has not been paid

[If, by the terms of the agreement, notice is required to be given to the surety, add —]

4 On the day of 19 , the plaintiff gave notice to the defendant of the non-payment of the rent, and demanded payment thereof

5 The defendant has not paid the same

[As in paras 4 and 5 of Form No 1 and relief claim 1]

No 13,

Breach of Agreement to Purchase Land

(Title)

A B, the above named plaintiff, states as follows —

1 On the _____ day of _____ 19____ the plaintiff and defendant entered into an agreement and the original document is hereto annexed

[r on the _____ day of _____ 19____ the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty bighas of land in the village of _____ rupees]

2 On the _____ day of _____ 19____ the plaintiff being then the absolute owner of the property (and the same being free from all incumbrances as was made to appear to the defendant) tendered to the defendant a sufficient instrument of transfer of the same (or was ready and willing and is still ready and willing and offered to transfer the same to the defendant by a sufficient instrument) on the payment by the defendant of the sum agreed upon

3 The defendant has not paid the money.

[As in paras 4 and 5 of Form No 1 and relief claimed]

Local Amendment

Bengal

Cancel the word _____ and substitute therefor the word _____ a la _____ bigha

No 14

NOT DELIVERING GOODS SOLD

(Title)

A B, the above named plaintiff, states as follows —

1 On the _____ day of _____ 19____ the plaintiff and defendant mutually agreed that the defendant should deliver (one hundred barrels of flour) to the plaintiff on the _____ day of _____ 19____ and that the plaintiff should pay therefor _____ rupees on delivery

2 On the (said) day the plaintiff was ready and willing and offered to pay the defendant the said sum upon delivery of the goods

3 The defendant has not delivered the goods and the plaintiff has been deprived of the profits which would have accrued to him from such delivery

[As in paras 4 and 5 of Form No 1 and relief claimed]

No 15

WRONGFUL DISMISSAL

(Title)

A B, the above named plaintiff, states as follows —

defendant
r in the
plaintiff

rupees [monthly]

2 On the _____ day of _____ 19____, the plaintiff entered upon the service of the defendant and has ever since been and still is, ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice

3 On the _____ day of _____ 19____, the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services

[As in paras 4 and 5 of Form No 1, and relief claimed]

No 16

BREACH OF CONTRACT TO SERVE

(Title)

A B, the above named plaintiff, states as follows —

[As in paras 4 and 5 of Form No 1, and Relief claimed]

(As in paras 4 and 5 of Form No 1, and Relief claimed)

[Is in paras. 4 and 5 of Form No. 1, and Relief claimed]

3. On the _____ day of _____ 19____, during the said term of _____, who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4 The plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend rupees in moving and lost the custom of *H*, and *I J* by such removal].

[As in paras 4 and 5 of Form No 1 and Relief claimed]

No 20

ON AN AGREEMENT OF INDEMNITY.

(Title)

1 *B* the above named plaintiff states as follows —

1 On the day of 19 the plaintiff and defendant being partners in trade under the style of *A B* and *C D* dissolved the partnership and mutually agreed that the defendant should take and keep all the partnership property *priv* all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the firm

2 The plaintiff duly performed all the conditions of the agreement on his part

2 On the day of 19 [a judgment was recovered against the plaintiff and defendant by *E F* in the High Court of Judicature at upon a debt due from the firm to *F F* and on the day of 19] the plaintiff paid rupees [in satisfaction of the same]

3 The defendant has not paid the same to the plaintiff

[As in paras 4 and 5 of Form No 1 and Relief claimed]

No 21

PROCURING PROPERTY BY FRAUD

(Title)

1 *D* the above named plaintiff states as follows —

1 On the day of 19 the defendant for the purpose of inducing the plaintiff to sell him certain goods represented to the plaintiff that [he the defendant was solvent and worth rupees over all his liabilities]

2 The plaintiff was thereby induced to sell [and deliver] to the defendant [dry goods] of the value of rupees

3 The said representations were false [or state the particular falsehoods] and were then known by the defendant to be so

4 The defendant has not paid for the goods [Or if the goods were not delivered] The plaintiff in preparing and shipping the goods and procuring their restoration expended rupees

[As in paras 4 and 5 of Form No 1 and relief claimed]

No 22

FRAUDULENTLY PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON.

(Title)

1 *D* the above named plaintiff states as follows —

1 On the day of 19 the defendant represented to the plaintiff that *E F* was solvent and in good credit and worth rupees over all his liabilities [or that *E F* then held a responsible situation and was in good circumstance and might safely be trusted with goods on credit]

2 The plaintiff was thereby induced to sell to *E F* [rice] of the value of rupees [on months credit]

3 The said representations were false and were then known by the defendants to be so and were made by him with intent to deceive and defraud the plaintiff [or to deceive and injure the plaintiff]

4 *E F* [did not pay for the said goods at the expiration of the credit aforesaid or] has not paid for the said rice and the plaintiff has wholly lost the same

[As in paras 4 and 5 of Form No 1 and relief claimed]

No 23

POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND

(Title)

1 *D*, the above named plaintiff, states as follows —

1 The plaintiff is, and at all the times hereinafter mentioned was possessed of certain land called _____ and situate in _____ and of a well therein, and of water in the well, and was entitled to the use and benefit of the well and of the water therein, and to have certain springs and streams of water which flowed and ran into the well to supply the same to flow or run without being fouled or polluted

2 On the _____ day of _____ 19____, the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water which flowed into the well

3 In consequence the water in the well became impure and unfit for domestic and other necessary purposes and the plaintiff and his family are deprived of the use and benefit of the well and water

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 24

CARRYING ON A NOXIOUS MANUFACTURE

(Title).

A B, the above named plaintiff, states as follows —

1 The plaintiff is and at all the times hereinafter mentioned was possessed of certain lands called _____, situate in _____

2 Ever since the _____ day of _____ 19____ the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands and corrupted the air, and settled on the surface of the lands

3 Thereby the trees, hedges, herbage and crops of the plaintiff growing on the lands were damaged and deteriorated in value, and the cattle and live stock of the plaintiff on the lands became

4 The plain
might have done

has been prevented

be otherwise would have had

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 25

OBSTRUCTING A RIGHT OF WAY

(Title)

A B, the above named plaintiff, states as follows —

1 The plaintiff is, and at the time hereinafter mentioned was, possessed of a house in the village of _____

2 He was entitled to a right of way from the [house] over a certain field to a public highway and back again from the highway over the field to the house, for himself and his servants [with vehicles, or on foot] at all times of the year

3 On the _____ day of _____ 19____, defendant wrongfully obstructed the said way, so that the plaintiff could not pass [with vehicles or on foot or in any manner] along the way [and has ever since wrongfully obstructed the same]

4 (State special damage if any)

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 26

OBSTRUCTING A HIGHWAY

(Title).

1 The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from _____ to _____ so as to obstruct it

was not entitled to attend to his business for a long time, and was not able to attend

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 27

DIVERTING A WATER COURSE

(Title)

A B, the above named plaintiff, states as follows:—

1 The plaintiff is and at the time hereinafter mentioned was possessed of a mill situated on a (stream) known as the in the village of district of .

2 By reason of such possession the plaintiff was entitled to the flow of the stream for working the mill

3 On the day of 19 the defendant by cutting the bank of the stream wrongfully diverted the water thereof so that less water ran into the plaintiff's mill

4 By reason thereof the plaintiff has been unable to grind more than sacks per day whereas before the said diversion of water he was able to grind sacks per day

[As in paras 4 and 5 of Form No 1 and relief claimed]

No 28

OPSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION

(Title)

A B the above named plaintiff states as follows

1 Plaintiff is and was at the time hereinafter mentioned possessed of certain lands situate c c and entitled to take and use a portion of the water of a certain stream for irrigating the said lands

2 On the day of 19 the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid by wrongfully obstructing and diverting the said stream

[As in paras 4 and 5 of Form No 1 and relief claimed]

No 29

INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD

(Title)

A B the above named plaintiff states as follows —

1 On the day of 19 the defendants were common carriers of passengers by railway between and

2 On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway

3 While he was such passenger at [or near the station of or between the stations of and] a collision occurred on the said railway caused by the negligence and unskillfulness of the defendants servants whereby the plaintiff was much injured (having his leg broken his head cut etc and state the special damage if any as) and incurred expense for medical attendance and is permanently disabled from carrying on his former business as [a salesman]

[As in paras 4 and 5 of Form No 1 and relief claimed]

[Or thus — 2 On that day the defendants by their servants so negligently and unskillfully drove and managed an engine and a train of carriages attached thereto upon and along the defendants railway which the plaintiff was then lawfully crossing that the said engine and train were driven and struck against the plaintiff whereby etc as in para 3]

No 30

INJURIES CAUSED BY NEGLIGENCE DRIVING

(Title)

A B the above named plaintiff states as follows —

1 The plaintiff is a shoemaker carrying on business at The defendant is a merchant of .

2 On the day of 19 the plaintiff was walking

and control of the defendant's servants was negligently suddenly and without any warning turned at a rapid and dangerous pace out of Middleton Street into Chowringhee The pole of the carriage struck the plaintiff and knocked him down and he was much trampled by the horses

3 By the blow and fall and trampling the plaintiff's left arm was broken and he was bruised and injured on the side and back as well as internally, and in consequence thereof

the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits
[Is in paras 4 and 5 of Form No 1, and relief claimed]

No 31

FOR MALICIOUS PROSECUTION

(Title.)

I B, the above named plaintiff, states as follows —

1 On the _____ day of _____ 19____, the defendant obtained a warrant of arrest from _____

[A Magistrate of the said city, or as the case may be] on a charge of _____, and the plaintiff was arrested thereon, and imprisoned for [days or hours and gave bail in the sum of _____ rupees to obtain his release]

2 In so doing the defendant acted maliciously and without reasonable or probable cause

3 On the _____ day of _____ 19____, the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff

4 Now supposing that of the said plaintiff sufficient injury was incurred and in

[Is in paras 4 and 5 of Form No 1, and relief claimed]

No 32

MOVABLES WRONGFULLY DETAINED.

(Title.)

I B the above named plaintiff states as follows —

1 On the _____ day of _____ 19____, plaintiff owned [or state fact showing a right to the possession] the goods mentioned in the schedule hereto annexed [or describe the goods] the estimated value of which is _____ rupees

2 From that day until the commencement of this suit the defendant has detained the same from the plaintiff

3 Before the commencement of the suit, to wit on the _____ day of _____ 19____, the plaintiff demanded the same from the defendant, but he refused to deliver them

[Is in paras 4 and 5 of Form No 1]

6 The plaintiff claims —

(1) delivery of the said goods, or cannot be had,

_____ rupees in case delivery

(2) _____ rupees compensation for the detention thereof

The Schedule

No 33

AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFEREE WITH NOTICE

(Title.)

A B, the above named plaintiff states as follows —

1 On the _____ day of _____ 19____, the defendant C D, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he was solvent and worth _____ rupees over all his liabilities]

2 The plaintiff was hereby induced to sell and deliver to C D [one hundred boxes of tea], the estimated value of which is _____ rupees

3 The said representations were false, and were then known by C D to be so [or at the time of making the said representations, C D was insolvent and knew himself to be so]

4 C D afterwards transferred the said goods to the defendant E F without consideration [or who had notice of the falsity of the representation]

[As in paras 4 and 5 of Form No 1]

7 The plaintiff claims—

- (1) delivery of the said goods or rupees in case delivery cannot be had
- (2) rupees compensation for the detention thereof

No 34

RESCISSIO OF A CONTRACT ON THE GROUND OF MISTAKE

(Title)

A B the above named plaintiff states as follows —

1 On the day of 19, the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at contained [ten bighas]

2 The plaintiff was thereby induced to purchase the same at the price of rupees in the belief that the said representation was true, and signed an agreement of which the original is hereto annexed But the land has not been transferred to him

3 On the day of 19, the plaintiff paid the defendant rupees as part of the purchase money

4 That the said piece of ground contained in fact only [five bighas]
[As in paras 4 and 5 of Form No 1]

7 The plaintiff claims—

- (1) rupees with interest from the day of 19
- (2) that the said agreement be delivered up and cancelled

No 35

AN INJUNCTION RESTRAINING WASTE

(Title)

A B, the above named plaintiff, states as follows —

1 The plaintiff is the absolute owner of [describe the property]

2 The defendant is in possession of the same under a lease from the plaintiff

3 The defendant has [cut down a number of valuable trees and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff

[As in paras 4 and 5 of Form No 1]

6 The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises

[Pecuniary compensation may also be claimed]

No 36

INJUNCTION RESTRAINING NUISANCE

(Title)

A B, the above named plaintiff, states as follows —

1 Plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of [the house No Street Calcutta].

2 The defendant is, and at all the said times was the absolute owner of [a plot of ground in the same street]

3 On the day of 19 the defendant erected upon his said plot a slaughter house, and still maintains the same, and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff]

[4 In consequence the plaintiff has been compelled to abandon the said house and has been unable to rent the same]

[As in paras 4 and 5 of Form No 1]

7 The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance

No 37

PUBLIC NUISANCE

(Title)

A B, the above named plaintiff, states as follows —

1 The defendant has wrongly heaped up earth and stones on a public road known as Street at so as to obstruct the passage of the public along the same and threatens and intends unless restrained from so doing, to continue and repeat the said wrongful act

2 The plaintiff has obtained the consent in writing of the Advocate General [or of the Collector or other officer appointed in this behalf] to the institution of this suit

[As in paras 4 and 5 of Form No 1]

5 The plaintiff claims—

(1) a declaration that the defendant is not entitled to obstruct the passage of the public along the said public road,

(2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid

No 38

INJUNCTION AGAINST THE DIVERSION OF A WATER COURSE

(Title)

A B the above named plaintiff, states as follows —

[As in Form No 27]

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid

No. 39

RESTORATION OF MOVEABLE PROPERTY THREATENED WITH DESTRUCTION, AND FOR AN INJUNCTION

(Title)

A B the above named plaintiff states as follows —

1 Plaintiff is and at all times hereinafter mentioned was, the owner of [a portrait of his grand father which was executed by an eminent painter], and of which no duplicate exists [or state any facts showing that the property is of a kind that cannot be replaced by money]

2 On the day of 19 , he deposited the same for safe keeping with the defendant

3 On the day of 19 , he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same

4 The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, cut or injure the same if required to deliver it up

5 No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting]

[As in paras 4 and 5 of Form No 1]

8 The plaintiff claims—

(1) that the defendant be restrained by injunction from disposing of, injuring or concealing the said [painting],

(2) that he be compelled to deliver the same to the plaintiff

No 40

INTER PLEADER

(Title)

1 *B* the above named plaintiff states as follows —1 Before the date of the claims hereinafter mentioned *G H* deposited with the plaintiff [describe the property] for [safe keeping]2 The defendant *C D*, claims the same [under an alleged assignment thereof to him from *G H*]3 The defendant *E F* also claims the same [under an order of *G H* transferring the same to him]of the defendants
for charges and costs, and is ready
to direct

6 The suit is not brought by collusion with either of the defendants

[As in paras 4 and 5 of Form No 1]

9 The plaintiff claims—

(1) that the defendants be restrained by injunction from taking any proceedings against the plaintiff in relation thereto

(2) that they be required to interplead together concerning their claims to the said property

[(3) that some person be authorized to receive the said property pending such litigation]

(4) that upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto

No 41

ADMINISTRATION BY CREDITOR ON BEHALF OF HIMSELF AND ALL OTHER CREDITORS

(Title)

1 *B* the above named plaintiff states as follows —1 *E F* late of _____ was at the time of his death and his estate still is indebted to the plaintiff in the sum of _____ [here insert nature of debt and security if any]2 *E F* died on or about the _____ day of _____ By his last will dated the _____ day of _____ he appointed *C D* his executor (or devised his estate in trust etc or died intestate as the case may be)3 The will was proved by *C D* [or letters of administration were granted etc]4 The defendant has possessed himself of the moveable [and immoveable or the proceeds of the immoveable] property of *E F* and has not paid the plaintiff his debt

[As in paras 4 and 5 of Form No 1]

7 The plaintiff claims that an account may be taken of the moveable [and immoveable] property of *E F* deceased and that the same may be administered under the decree of the Court

No 42

ADMINISTRATION BY SPECIFIC LEGATEE

(Title)

[Alter Form No 41 thus]—

[Omit paragraph 1 and commence paragraph 2] *E F*, late of _____ died on or about the _____ day of _____ By his last will, dated the _____ day of _____ he appointed *C D* his executor, and bequeathed to the plaintiff [here state the specific legacy]

For paragraph 4 substitute—

The defendant is in possession of the moveable property of *E F* and amongst other things of the said [*here name the subject of the specific bequest*]

For the commencement of paragraph 7 substitute—

The plaintiff claims that the defendant may be ordered to deliver to him the said [*here name the subject of the specific bequest*] or that etc

No 43

ADMINISTRATION BY PECUNIARY LEGATEE

(Title)

[*Alter I or II No 41 thus*]—

[*Of id paragraph 1 and substitute for paragraph 2*] *E F*, late of

, died on or about the day of By his last
will dated the day of he appointed *G D* his executor
and bequeathed to the plaintiff a legacy of rupees,

In paragraph 4 substitute legacy for debt

another form

(Title)

I F the above named plaintiff states as follows —

1 *I B* of *K* in the died on the day of
By his last will dated the day of he appointed the defendant
and *M N* [who died in the testator's lifetime] his executors and bequeathed his property
whether moveable or immoveable to his executors in trust to pay the rents and income there
of to the plaintiff for his life, and after his decease and in default of his having a son who
should attain twenty one or a daughter who should attain that age or marry upon trust as to
his immoveable property for the person who would be the testator's heir at law and as to his
moveable property for the persons who would be the testator's next of kin if he had died
intestate at the time of the death of the plaintiff and such failure of his issue as aforesaid

2 The will was proved by the defendant on the day of

The plaintiff has not been married

3 The testator was at his death entitled to moveable and immoveable property the
defendant entered into the receipt of the rents of the immoveable property and got in the
moveable property he has sold some part of the immoveable property

[*As in paras 4 and 5 of I or II No 1*]

6 The plaintiff claims—

(1) to have the moveable and immoveable property of *A B* administered in this
Court and for that purpose to have all proper directions given and accounts
taken

(2) such further or other relief as the nature of the case may require

No 44

EXECUTION OF TRUSTS

(Title)

I B the above named plaintiff states as follows —

1 He is one of the trustees under an instrument of settlement bearing date on or
about the day of made upon the marriage of *E F* and
G H the father and mother of the defendant [or an instrument of transfer of the estate
and effects of *F F* for the benefit of *C D* the defendant and the other creditors of
E F]

2 *A B* has taken upon himself the burden of the said trust and is in possession
of [or of the proceeds of] the moveable and immoveable property transferred by the said
instrument

3 *C D* claims to be entitled to a beneficial interest under the instrument

[As in paras 4 and 5 of Form No 1]

6 The plaintiff is desirous to account for all the rents and profits of the said immovable property [and the proceeds of the sale of the said or of part of the said immovable property or moveable or the proceeds of the sale of or of part of the said moveable property or the profits accruing to the plaintiff as such trustee in the execution of the said trust], and he prays that the Court will take the accounts of the said trust and also that the whole of the said trust estate may be administered in the Court for the benefit of C D the defendant and all other persons who may be interested in such administration in the presence of C D and such other persons so interested as the Court may direct or that C D may show good cause to the contrary

[N B—Where the suit is by a beneficiary the plaintiff may be labelled mutatis mutandis on the plaintiff's petition]

No 43

FORECLOSURE OR SALE

(Title)

A B the above named plaintiff states as follows —

1 The plaintiff is mortgagee of lands belonging to the defendant

2 The following are the particulars of the mortgage —

(a) (date)

(b) (names of mortgagor and mortgagee)

(c) (sum secured)

(d) (rate of interest)

(e) (property subject to mortgage)

(f) (amount now due)

(g) (if the plaintiff's title is derivative state shortly the transfers or devolution under which he claims)

(If the plaintiff is mortgagee in possession add)

3 The plaintiff took possession of the mortgaged property on the
day of and is ready to account as mortgagee in possession from that time

[As in paras 4 and 5 of Form No 1]

6 The plaintiff claims—

(1) payment or in default [sale or] foreclosure [and possession]

[Where Order 34 Rule 6 applies]

(2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff then that liberty be reserved to the plaintiff to apply for a decree for the balance

No 46

REDEMPTION

(Title)

A B, the above named plaintiff states as follows —

1 The plaintiff is mortgagor of lands of which the defendant is mortgagee

2 The following are the particulars of the mortgage —

(a) (date),

(b) (names of mortgagor and mortgagee),

(c) (sum secured)

(d) (rate of interest)

(e) (property subject to mortgage),

(f) (if the plaintiff's title is derivative state shortly the transfers or devolution under which he claims)

(If the defendant is mortgagee in possession, add)

3 The defendant has taken possession [or has received the rents] of the mortgaged property.

ix

[As in paras 4 and 5 of Form No 1]

6 The plaintiff claims to redeem the said property and to have the same reconvered to him [and to have possession thereof]

Local Amendment

Allahabad

In Forms Nos 45 and 46 of Appendix A, renumber Clause 6 as Clause 7 and insert the following as clause 6 —

"6 The persons, who, to the knowledge of the plaintiff, are interested in ' the mortgage security or in the right of redemption are as follows, namely —

No. 47

SPECIFIC PERFORMANCE (No 1).

(Title)

A B the above named plaintiff, states as follows —

1 By an agreement dated the _____ day of _____ and signed by the defendant, he contracted to buy of [or sell to] the plaintiff certain immoveable property therein described and referred to for the sum of _____ rupees

2 The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice

[As in paras 4 and 5 of Form No 1]

6 The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [or to accept a transfer and possession of the said property] and to pay the costs of the suit

No 48

SPECIFIC PERFORMANCE (No 2)

(Title)

A B, the above named plaintiff states as follows —

1 On the _____ day of _____ 19____, the plaintiff and defendant entered into an agreement in writing and the original document is hereto annexed

The defendant was absolutely entitled to the immoveable property described in the agreement

2 On the _____ day of _____ 19____, the plaintiff tendered _____ rupees to the defendant, and demanded a transfer of the said property by a sufficient instrument

3 On the _____ day of _____ 19____ the plaintiff again demanded such transfer [Or the defendant refused to transfer the same to the plaintiff]

4 The defendant has not executed any instrument of transfer

5 The plaintiff is still ready, and willing to pay the purchase money of the said property to the defendant

[As in paras 4 and 5 of Form No 1]

8 The plaintiff claims—

(1) that the defendant transfers the said property to the plaintiff by a sufficient instrument [following the terms of the agreement],

(2) _____ rupees compensation for withholding the same

No 40
PARTNERSHIP
(Title)

4 B, the above named plaintiff, states as follows —

1 He and C D, the defendant have been for _____ years [or months] past carrying on business together under articles of partnership in writing [or under a deed, or under a verbal agreement]

2 Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners [Or the defendant has committed the following breaches of the partnership articles, —

(1)

(2)

(3)

]

[As in paras 4 and 5 of Form No 1]

5 The plaintiff claims—

(1) dissolution of the partnership

(2) that accounts be taken

(3) that a receiver be appointed

(NB—In suits for the winding up of any partnership or if the claim for dissolution, and instead insert a paragraph stating the facts of the partnership having been dissolved)

(4) WRITTEN STATEMENTS

General defences

Denial

The defendant denies that (set out facts)

The defendant does not admit that (set out facts)

The defendant admits that _____ but says that _____

Protest

The defendant denies that he is a partner in the defendant firm of _____

The defendant denies that he made the contract alleged or any contract with the plaintiff

The defendant denies that he contracted with the plaintiff as alleged or at all

The defendant admits assets but not the plaintiff's claim

The defendant denies that the plaintiff sold to him the goods mentioned in the plaintiff or any of them

Limitation

The suit is barred by article _____ or article _____ of the second schedule to the Indian Limitation Act 1877

Jurisdiction

The Court has no jurisdiction to hear the suit on the ground that (set forth the grounds)

On the _____ day of _____ a diamond ring was delivered by the defendant to and accepted by the plaintiff in discharge of the alleged cause of action

Insolvency

The defendant has been adjudged an insolvent

The plaintiff before the institution of the suit was adjudged an insolvent and the right to sue vested in the receiver

Minority

The defendant was a minor at the time of making the alleged contract

Payment into Court

The defendant as to the whole claim (or as to Rs _____ part of the money claimed or as the case may be) has paid into Court Rs _____ and says that this sum is enough to satisfy the plaintiff's claim (or the part aforesaid)

Performance remitted

The performance of the promise alleged was remitted on the _____ (date)

Rescission

The contract was rescinded by agreement between the plaintiff and defendant

1 See now the Indian Limitation Act 1908 (1A of 1908)

Res judicata

The plaintiff's claim is barred by the decree in suit (*give the reference*)

Estoppel

The plaintiff is estopped from denying the truth of (*insert statements as to which estoppel is claimed*) because (*here state the facts relied on as creating the estoppel*)

Ground of defence subsequent to institution of suit

Since the institution of the suit that is to say on the day of (*set out facts*)

No 1**DEFENCE IN SUITS FOR GOODS SOLD AND DELIVERED**

- 1 The defendant did not order the goods
- 2 The goods were not delivered to the defendant
- 3 The price was not Rs

[*or*]

4 }
5 } Except is to Rs
6 }

same as { 1
2
3

7 The defendant [*or A B the defendant's agent*] satisfied the claim by payment before suit to the plaintiff [*or to C D the plaintiff's agent*] on the day of 19

8 The defendant satisfied the claim by payment after suit to the plaintiff on the day of 19

No 2**DEFENCE IN SUITS ON BONDS**

- 1 The bond is not the defendant's bond
- 2 The defendant made payment to the plaintiff on the day according to the condition of the bond
- 3 The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond

No 3**DEFENCE IN SUITS ON GUARANTEES**

- 1 The principal satisfied the claim by payment before suit
- 2 The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement

No 4**DEFENCE IN A SUIT FOR DEBT**

- 1 As to Rs 200 of the money claimed the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff
- Particulars are as follows:—

1907 January 25
February 1st

	Rs
	150
	50
Total	200

- 2 As to the whole [*or as to Rs* the defendant made tender before suit of Rs Court

part of the money claimed] and has paid the same into

No 5

DEFENCE IN SUITS FOR INJURIES CAUSED BY NEGLIGENT DRIVING.

1 The defendant denies that the carriage mentioned in the plaint was the defendant's carriage and that it was under the charge or control of the defendant's servants. The carriage belonged to _____ of _____ Street Calcutta livery

stable keepers employed by the defendant to supply him with carriages and horses and the person under whose charge and control the said carriage was was the servant of the said

2 The defendant does not admit that the said carriage was turned out of Middleton Street either negligently suddenly or without warning or at a rapid or dangerous pace

3 The defendant says the plaintiff might and could by the exercise of reasonable care and diligence have seen the said carriage approaching him and avoided any collision with it

4 The defendant does not admit the statements contained in the third paragraph of the plaint

No 6

DEFENCE IN ALL SUITS FOR WRONGS

1 Denial of the several acts [or matters] complained of

No 7

DEFENCE IN SUITS FOR DETENTION OF GOODS

1 The goods were not the property of the plaintiff

2 The goods were detained for a lien to which the defendant was entitled

Particulars are as follows —

1907 May 3rd To carriage of the goods claimed from Delhi to Calcutta —
45 maunds at Rs. 2 per maund Rs 90

No 8

DEFENCE IN SUITS FOR INFRINGEMENT OF COPYRIGHT

1 The plaintiff is not the author [assignee etc.]

2 The book was not registered

3 The defendant did not infringe

No 9

DEFENCE IN SUITS FOR INFRINGEMENT OF TRADE MARK

1 The trade mark is not the plaintiff's

2 The alleged trade mark is not a trade mark

3 The defendant did not infringe

No 10

DEFENCES IN SUITS RELATING TO NUISANCES

1 The plaintiff's rights are not ancient [or deny his other alleged prescriptive rights]

2 The plaintiff's rights will not be materially interfered with by the defendant's buildings

3 The defendant denies that he or his servants pollute the water [or do what is complained of]

[If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so and must state the grounds of the claim &c, whether by prescription grant or what]

4 The plaintiff has been guilty of laches of which the following are particulars —

- 1870 Plaintiff's mill began to work.
- 1871 Plaintiff came into possession
- 1883 First complaint

5 As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff [If other grounds are relied on, they must be stated, e.g., limitation as to past damage]

No. 11

DEFENCE TO SUIT FOR FORECLOSURE

- 1 The defendant did not execute the mortgage
- 2 The mortgage was not transferred to the plaintiff (if more than one transfer is alleged, say which is denied)
- 3 The suit is barred by article _____ of the second schedule to the Indian Limitation Act 1877
- 4 The following payments have been made, viz —

(Insert date)———,

Rs

1 000

(Insert date)———,

500

- 5 The plaintiff took possession on the _____ of _____, and has received the rents ever since
- 6 That plaintiff released the debt on the _____ of _____
- 7 The defendant transferred all his interest to A B by a document, dated _____

No 12

DEFENCE TO SUIT FOR REDEMPTION

- 1 The plaintiff's right to redeem is barred by article _____ of the second schedule to the Indian Limitation Act, 1877
 - 2 The plaintiff transferred all interest in the property to A B
 - 3 The defendant by a document dated the _____ day of _____ transferred all his interest in the mortgage debt and property comprised in the mortgage to A B
 - 4 The defendant never took possession of the mortgaged property, or received the rents thereof
- (If the defendant admits possession for a time only, he should state the time and any possession beyond what he admits)

No 13

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE

- 1 The defendant did not enter into the agreement
- 2 A B was not the agent of the defendant (if alleged by plaintiff)
- 3 The plaintiff has not performed the following conditions—(Conditions)
- 4 The defendant did not—(alleged acts of part performance)
- 5 The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reason of the following matter—(state why)
- 6 The agreement is uncertain in the following respects—(State them)
- 7 (or) The plaintiff has been guilty of delay
- 8 (or) The plaintiff has been guilty of fraud (or misrepresentation)
- 9 (or) The agreement is unfair
- 10 (or) The agreement was entered into by mistake
- 11 The following are particulars of (7), (8), (9), (10) (or as the case may be)

¹See now the Indian Limitation Act, 1908 (IX of 1903)

12 The agreement was rescinded under Conditions of Sale, No 11 (or by mutual agreement).

(In cases where damages are claimed and the defendant disputes his liability to damages he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on e.g., the Indian Limitation Act accord and satisfaction release fraud etc.)

No 11,

DEFENCE IN ADMINISTRATION SUIT BY PECUNIARY LEGATEE

1 A B's will contained a charge of debts, he died insolvent, he was entitled at his death to some immoveable property which the defendant sold and which produced the net sum of Rs. _____ and the testator had some moveable property which the defendant got in, and which produced the net sum of Rs _____

2 The defendant applied the whole of the said sums and the sum of Rs _____ which the defendant received from rents of the immoveable property in the payment of the funeral and testamentary expenses and some of the debts of the testator

3 The defendant made up his accounts and sent a copy thereof to the plaintiff on the _____ day of _____ 19____ and offered the plaintiff free access to the vouchers to verify such account but he declined to avail himself of the defendant's offer

4 The defendant submits that the plaintiff ought to pay the costs of this suit

No 12

PROBATE OF WILL IN SOLEMN FORM

1 The said will and codicil of the deceased were not duly executed according to the provisions of the Indian Succession Act, 1865 [or of the Hindu Wills Act 1870]

2 The deceased at the time the said will and codicil respectively purport to have been executed, was not of sound mind memory and understanding

3 The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him whose names are at present unknown to the defendant]

4 The execution of the said will and codicil was obtained by the fraud of the plaintiff such fraud so far as is within the defendant's present knowledge being [state the nature of the fraud]

5 The deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof [or of the contents of the residuary clause in the said will as the case may be]

6 The deceased made his true last will dated the 1st January 1873 and thereby appointed the defendant sole executor thereof

The defendant claims—

(1) that the Court will pronounce against the said will and codicil propounded by the plaintiff,

(2) that the Court will decree probate of the will of the deceased, dated the 1st January 1873, in solemn form of law

No 13

PARTICULARS (O G R 5)

(Title of suit)

The following are the particulars of (here state the matters in respect of which particulars have been ordered) delivered pursuant to the order of the

of _____

(Here set out the particulars ordered in paragraphs if necessary)

APPENDIX B.

PROCESS.

No 1

SUMMONS FOR DISPOSAL OF SUIT (O 5, Rr 1, 5)

(Title)

To

[Name description and place of residence.]

Whereas has instituted a suit
against you for you are hereby summoned to
appear in this Court in person or by a pleader duly instructed, and able to answer all
material questions relating to the suit, or who shall be accompanied by some person able
to answer all such questions on the day of 19, at
o'clock in the

and as the day fixed for your appearance is appoint
you must be prepared to produce on that day all the
the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit
will be heard and determined in your absence

Given under my hand and the seal of the Court, this
19 .

day of

Judge

NOTICE—1 Should you apprehend your witnesses will not attend of their own accord
you can have a summons from this Court to compel the attendance of any
witness and the production of any document that you have a right to call
upon the witness to produce on applying to the Court and on depositing the
necessary expenses

2 If you admit the claim, you should pay the money into Court together with
the costs of the suit to avoid execution of the decree, which may be against
your person or property, or both

Local Amendments.

Bengal

Insert the following form and number it as 1 A —

"No 1 A.

SUMMONS TO DEFENDANT FOR ASCERTAINMENT WHETHER THE SUIT
WILL BE CONTESTED (O 5, Rr. 1 and 5)

(Title)

To

[Name description and place of residence]

Where

instructed, .
of
div you in
or in part
or in part,
he filed a —
your defence are to be produced and also the document or documents upon which you intend
to rely

Take notice that in default of your appearance on the day before mentioned, the suit
will be heard and determined in your absence and take further notice that in the event of
your admitting the claim either in whole or in part the Court will forthwith pass judgment in
accordance with such admissions

GIVEN under my hand and the seal of the Court, this
Seal

day of
Judge

19 .

NOTICE—If you admit the claim either in whole or in part you should come prepared to pay into Court the money due by virtue of such admission together with the costs of the suit to avoid execution of any decree which may be passed against your person or property or both.

Bombay

The following notes shall be inserted in red ink in Forms Nos. 1, 2, 3, 5 and 6.

Also take notice that in default of your filing an address for service on or before the date mentioned you are liable to have your defence struck out.

Madras

In the following note —

Note—Also take notice that in default of your filing an address for service before the day before mentioned you are liable to have your defence struck out.

After Form 1 insert the following in Form No. 1 A —

No. 1 A

SUMMONS FOR ASCERTAINING WHETHER A SUIT IS CONTESTED OR NOT AND IF NOT CONTENDED FOR ITS IMMEDIATE DISPOSAL

(O. 5 Rr. 1)

(Title)

To

[Name and description of defendant]

WHEREAS [Name] has instituted a suit against you for [Cause] you are hereby summoned to appear in this Court in person or by a pleader duly instructed and able to answer all material questions relating to the suit (or who shall be accompanied by some person able to answer all such questions) on the [Day] day of [Month] 19[Year] at [Time] o'clock in the [Forenoon/Afternoon] noon and to state whether you contest or do not contest the claim and if you contest to receive directions of Court as to the date on which you have to file the written statement the date of trial and other matter.

Take notice that in the event of the claim not being contested the suit shall be decided at once.

Take further notice that in default of your appearance on the day and hour before mentioned the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court this [Day] day of [Month] 19[Year]

Judge

Seal

NOTICE—If you admit the claim you should pay the money into Court together with the costs of the suit to avoid execution of the decree which may be against your person or property or both.

Sind

Insert the following note in red ink in Forms Nos. 1, 2, 3 and 6 —

Also take notice that in default of your filing an address for service on or before the date mentioned you are liable to have your defence struck out.

No. 2

SUMMONS FOR SETTLEMENT OF ISSUES (O. 5 Rr. 15)

(Title)

To

[Name description and place of residence]

WHEREAS [Name] has instituted a suit against you for [Cause] you are hereby summoned to appear in this Court in person or by a pleader duly instructed and able to answer all material questions relating to the suit or who shall be accompanied by some person able to answer all such questions on the [Day] day of [Month] 19[Year] at [Time] o'clock in the [Forenoon/Afternoon] noon to answer the issues and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence.

Take notice that in default of your appearance on the day before mentioned the suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court this
19

day of

Judge

Scal

NOTICE —1 Should you apprehend your witnesses will not attend of their own accord you can have a summons from this Court to compel the attendance of any witness and the production of any document that you have a right to call on the witness to produce on applying to the Court and on depositing the necessary expenses

2 If you admit the claim you should pay the money into Court together with the costs of the suit to avoid execution of the decree which may be against your person or property or both

Local Amendments

Bombay

See the Local Amendment of Bombay for Form No 1 App B

Sind

See the Local Amendment of Sind for Form No 1 App B

No 3

SUMMONS TO APPEAR IN PERSON (O 5 R 3)

(Title)

To

[Vary description and place of residence]

WHEREAS

has instituted a suit against you for
summoned to appear in this Court in person on the
19 at

you are hereby
day of

noon to answer the claim and you are directed
to produce on that day all the documents upon which you intend to rely in support of your
defence

Take notice that in default of your appearance on the day before mentioned the suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court this
19

day of

Judge

Local Amendments

Bombay

See the Local Amendment of Bombay for Form No 1 App B

Sind

See the Local Amendment of Sind for Form No 1 App B

No 4

SUMMONS IN SUMMARY SUIT ON NEGOTIABLE INSTRUMENT

(O 37 R 2)

(Title)

To

[Vary description and place of residence]

WHEREAS has instituted a suit against you under Order XVIII of the Code of Civil Procedure 1908 for Rs balance of principal and interest due to him as the of a of which a copy is hereto annexed you are hereby summoned to obtain leave from the Court within ten days from the service hereof to appear and defend the suit and within such time to cause a

appearance to be entered for you In default whereof the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs _____ and the sum of Rs _____ for costs 1/2 [together with such interest if any, from the date of the institution of the suit as the Court may order]

Leave to appear may be obtained on an application to the Court supported by affidavit or declaration showing that there is a defence to the suit on the merits or that it is reasonable that you should be allowed to appear in the suit

Given under my hand and the seal of the Court, this _____ day of _____ 19 ____

Judge

No 5

NOTICE TO PERSON WHO THE COURT CONSIDERS SHOULD BE ADDED AS CO PLAINTIFF

(O 1 R 10)

(Title)

To

[Name description and place of residence]

Whereas _____ has instituted the above suit against _____ for _____ and whereas it appears necessary that you should be added as a plaintiff in the said suit in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved

Take notice that you should on or before the _____ day of _____ 19 ____ signify to this Court whether you consent to be so added

Given under my hand and the seal of the Court this _____ day of _____ 19 ____

Judge

Local Amendments.

Bombay

See the Local Amendment of Bombay for Form No 1, App B

Sind

See the Local Amendment of Sind for Form No 1 App B

No 6

SUMMONS TO LEGAL REPRESENTATIVE OF A DECEASED DEFENDANT

(O 22 R 4)

(Title)

To

Whereas the plaintiff _____ instituted a suit in this Court on the _____ day of _____ 19 ____ against the defendant _____ who has since deceased and whereas the said plaintiff has made an application to this Court alleging that you are the legal representative of the said deceased and desiring that you be made the defendant in his stead

You are hereby summoned to attend in this Court on the _____ day of _____ 19 ____ at _____ a.m. to defend the said suit and in default of your appearance on the day specified the said suit will be heard and determined in your absence

Given under my hand and the seal of the Court this _____ day of _____ 19 ____

Judge

Six

Local Amendments

Bombay

See the Local Amendment of Bombay for Form No 1, App B

Sind

See the Local Amendment of Sind for Form No 1, App B

No 7

ORDER FOR TRANSMISSION OF SUMMONS FOR SERVICE IN THE JURISDICTION
OF ANOTHER COURT (O 5 R 21)

(Title)

Whereas it is stated that

In the above suit is at present residing in
that a summons returnable on the

day of

19

defendant
witness
It is ordered
be forwarded
defendant
witness

to the

Court of

for service on the said

with a duplicate of this proceeding

The court fee of
realized in this Court in stamps

chargeable in respect to the summons has been

Dated

19

Judge

Local Amendment

Allahabad

Form No 7 — in order for transmission of summons for service in the jurisdiction of
another Court (O 5, R 21) is hereby cancelled

No 8

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PRISONER
(O 5, R 24)

(Title)

To

The Superintendent of the Jail at

Under the provisions of O 5, R 24, of the Code of Civil Procedure, 1908 a
summons in duplicate is herewith forwarded for service on the defendant
who is a prisoner in Jail. You are requested to
cause a copy of the said summons to be served upon the said defendant and to return the
original to this Court signed by the said defendant, with a statement of service endorsed
thereon by you

Judge

No 9

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PUBLIC
SERVANT OR SOLDIER (O 5, Rr 27, 28)

(Title)

To

Under the provisions of O 5, R 27 (or 28 as the case may be), of the Code of Civil
Procedure 1908 a summons in duplicate is herewith forwarded for service on the defendant
who is stated to be serving under you. You are requested

to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant with a statement of service endorsed thereon by you

Judge

No 10

TO ACCOMPANY RETURN OF SUMMONS OF ANOTHER COURT (O 5 R 23)

(Title)

Read proceeding from the _____ forwarding _____ for
service on _____ in Suit No _____
of 19 _____ of that Court

Read Serving Officer's endorsement stating that the _____ and proof of
the above having been duly taken by me on the oath of _____ and

it is ordered that the _____
be returned to the _____ with a copy of this
proceeding _____

Judge

NOTE.—This form will be applicable to process other than summons the service of which may have to be effected in the same manner

Local Amendments

Allahabad

Form No 10 — A form to accompany return of summons of another Court (O 5 R 23) is cancelled

Bengal

Insert the word _____ (or proof of the above having been duly made by the declaration of _____) after the words proof of the above having been duly taken by me on the oath of _____

Bombay

Form No 10 shall be amended to read as follows. —

No 10

TO ACCOMPANY RETURN OF SUMMONS OF ANOTHER COURT (O 5 R 23)

(Title)

Read proceeding from the _____ forwarding _____ for service on
_____ in suit No _____ of 19 _____ of that Court

Read Serving Officer's endorsement stating that the _____ and proof of the above
having been duly taken by me on the oath of _____ and

it is ordered that the _____ be returned
to the _____ with this proceeding _____

I hereby declare that the said summons on _____ has been duly
served _____

Judge

NOTE.—This form will be applicable to process other than summons the service of which may have to be effected in the same manner

No 11

AFFIDAVIT OF PROCESS SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE. (O 5 R 18)

(Title)

The affidavit of _____, son of _____

make oath
_____ affirm

ix and say as follows —

(1) I am a process server of this Court

(2) On the _____ day of _____

19 , I received a

summons

_____ issued by the Court of
notice

dated the _____ in suit No _____ day of _____

of 19 _____, in the said Court,
19 _____ for service on _____.

(3) The said _____

was at the

time personally known to me, and I served the said

summons _____ him
notice _____ her on the _____

about _____ day of _____
o'clock in the _____

19 _____ at _____
noon at _____

by tendering a copy thereof to _____ and
her

requiring _____ his
her signature to the original _____
_____ summons
(a) notice
(b)

(a) Here state whether the person served, signed or refused to sign the process, and in whose presence

(b) Signature of process server

(3) The said _____

or,

not being personally known to me
accompanied me to

and pointed out to me a person whom he stated to be the said _____
, and I served the said

summons _____ him
_____ on _____ on the _____
notice _____ her

day of _____

19 , at about _____

o'clock in the _____

noon at _____

by

tendering a copy thereof to _____ and requiring _____ his
her signature to the original _____
_____ summons
(a) notice
(b)

(a) Here state whether the person served, signed or refused to sign the process and in whose presence

(b) Signature of process server.

or

(3) The said _____ and the house in which he ordinarily resides being
personally known to me I went to the said house, in _____ and there
on the _____ day of _____ 19 , at about _____

o'clock in the _____

noon, I did not find the said

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to O 5, Rr 15 and 17

(b) Signature of process server

Or

(3) One _____ accompanied me to _____ and there
pointed out to me _____ which he said was the house in which
ordinarily resides I did not find the said _____ there
(a)
(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to O 5, Rr 15 and 17.

(b) Signature of process server.

Or,

If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service.

Sworn

by the said

affirmed

day of

19 .

before me this

Empowered under section 139 of the Code of Civil Procedure, 1908, to administer the oath to deponents

Local Amendments.

Bengal

Substitute the following for the existing form No. 11 —

No 11

DECLARATION OF PROCESS SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE (O 5, R. 18)

(Title)

I, _____, a process server of this Court, declare —(1) On the _____ day of _____ 19____, I received a summons _____ issued by the Court of _____ in Suit No _____ of 19____, in the _____ notice said Court, dated _____ day of _____ 19____, for service on _____ (2) The said _____ was at the time personally known to me and I served the said summons _____ on _____ on the _____ day of _____ 19____, at about _____ o'clock _____ notice _____ her _____ in the _____ noon at _____ by tendering a copy thereof to _____ him _____ her

and requiring _____ his _____ summons _____ signature to the original _____ her _____ notice

(a)

(b)

(a) Here state whether the persons served, signed or refused to sign the process and in whose presence

(b) Signature of process server

Or

(2) The said _____ not being personally known to me pointed out to me a person whom he stated to be the said _____, and I served the summons _____ him _____ said _____ on _____ on the _____ day of _____ 19____ at about _____ o'clock in the _____ noon at _____ by tendering a copy thereof to _____ him _____ his _____ summons _____ and requiring _____ signature to the original _____ her _____ notice

(a)

(b)

(a) Here state whether the person served, signed or refused to sign the process and in whose presence

(b) Signature of process server

Or,

(2) The said _____ and the house in which he ordinarily resides being personally known to me, I went to the said house, in _____ and there on the _____ day of _____ 19____, at about _____ o'clock in the _____ noon, I did not find the said _____.

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to O 5, Rr 15 and 17

(b) Signature of process server

Or,

(2) One _____ at _____ pointed out to me _____ which he said was the house in which _____ ordinarily resides I did not find the said _____ there

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served with special reference to O 5, Rr 15 and 17

(b) Signature of process server

Or,

(3) If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service "

Lahore

AFFIDAVIT OF PROCESS SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE (O 5 R 18)

(Title)

The affidavit of _____, son of _____ I
make oath _____

_____ and say as follows --

affirm

(1) I am a process server of this Court

(2) On the _____ day of _____ 19____ I received a
summons _____
_____ issued by the Court of _____ in suit No _____
notice _____

_____ of 19____ in the said Court, dated the _____ day of _____
19____ for service on _____

(3) The said _____ was at the time personally known to me, and I served the
summons _____ him _____
said _____ on _____ on the _____ day of _____ at about _____
notice _____ her _____ o'clock on the _____ noon at _____ by tendering a
copy thereof to _____ his _____ summons _____
_____ and requiring _____ signature to the original _____
her _____ her _____ notice _____

(a) Here state whether the persons served, signed or refused to sign the process, and in whose presence.

(b) Signature of process server

Or,

(3) The said _____ not being personally known to me
accompanied to _____

and pointed out to me a person whom he stated to be the said _____, and
 I served the said summons on him _____ on the _____ day of
 19, at about _____ o'clock in the _____ noon at
 by tendering a copy thereof to him and requiring his signature to the original summons
her her notice

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process and in
 whose presence

(b) Signature of process server

Or

(3) The said
personally known to me

and his house in which he ordinarily resides being

pointed out to me by
 house in

I went to the said

and there on the

day of

19 at

o'clock in the fore
after

noon I did not find the said

I enquired

{ (a)

{ (b)

} neighbours

I was told that

had gone to

and would not be back till

Signature of process server

Or,

*If substituted service has been ordered state fully and exactly the manner in which the
 summons was served with special reference to the terms of the order for substituted service*

Sworn

by the said

before me this

day of

affirmed

19 .

Empowered under section 139 of the Code
 of Civil Procedure to administer the oath
 to deponents

N W F P

Substitute the following for the third and fourth parts of (3) in Form No. 11 —

(3) The said
being personally known to me

and his house in which he ordinarily resides

I went to the said house in

and there on the day of

pointed out to me

19

at

o'clock in the fore
after noon I did not find the

said

I enquired from

neighbours

I was told that
 be back till

had gone to

and would not

Signature of process server

No 12

NOTICE TO DEFENDANT (O 9, R 6)

(Title)

To

[Name, description and place of residence]

Whereas this day was fixed for the hearing of the above suit and a summons was issued to you and the plaintiff has appeared in this Court and you did not so appear, but from the return of the Nazir it has been proved to the satisfaction of the Court that the said summons was served on you but not in sufficient time to enable you to appear and answer on the day fixed in the said summons,

Notice is hereby given to you that the hearing of the suit is adjourned this day and that the _____ day of _____ 19 _____ is now fixed for the hearing of the same, in default of your appearance on the day last mentioned the suit will be heard and determined in your absence

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____ Judge.

Local Amendment.

Madras

Insert the following as Form No 12 A.—

"No 12 A

NOTICE TO THE PROPOSED GUARDIAN OF A MINOR DEFENDANT (O 32, Rr 3 and 4)
RESPONDENT

(Title)

To

[Name, description and place of residence of proposed guardian]

Take notice that X plaintiff in _____ has presented a petition to the Court praying
appellant _____

that you be appointed guardian *ad litem* to the minor defendant (s) _____, and that
the same will be heard on the _____ day of _____ 19 _____ respondent (s)

2 The affidavit of X has been filed in support of this application.

3 If you are willing to act as guardian for the said _____ you are required to
defendant (s) _____ respondent (s)

sign (or affix your mark to) the declaration on the back of this notice

4 In the event of your failure to signify your express consent in manner indicated above, take further notice that the Court may proceed under O 32, R 4, Code of Civil Procedure, to appoint some other suitable person or one of its officers as guardian *ad litem* of the
defendant (s) _____

minor _____ aforesaid.

respondent (s) _____

Dated the _____ day of _____ 19 _____

(Signed)

(To be printed on the reverse)

I hereby acknowledge receipt of a duplicate of this notice and consent to act as guardian

of the minor defendant (s) _____ therein mentioned.
respondent (s) _____

(Signed) Y Z.

Witnesses

1

2

No 13
SUMMONS TO WITNESS
(O 16 Rr 1, 5)
(Title)

To
WHEREAS your attendance is required to _____ on behalf of the _____
in the above suit, you are hereby required [personally] to
appear before this Court on the _____ day of _____ 19____, at
_____ o'clock in the forenoon and to bring with you [or to send to this
Court]

A sum of Rs _____, being your travelling and other expenses and subsistence
allowance for one day is herewith sent. If you fail to comply with this order without lawful
excuse, you will be subject to the consequences of non attendance laid down in R 12 of O 16 of
the Code of Civil Procedure 1903

GIVEN under my hand and the seal of the Court this _____ day of _____ 19____.

Judge

NOTICE —(1) If you are summoned only to produce a document and not to give evidence, you
shall be deemed to have complied with the summons if you cause such docu-
ment to be produced in this Court on the day and hour aforesaid
(2) If you are detained beyond the day aforesaid a sum of Rs _____
will be tendered to you for each day's attendance beyond the day
specified

Local Amendment

Madras

Insert the following as Form No 13 A —

No 13 A

CERTIFICATE OF ATTENDANCE TO AN OFFICER OF GOVERNMENT SUMMONED
AS A WITNESS IN A SUIT TO WHICH THE GOVERNMENT IS A PARTY.

(O 16 R 4 A)

(Cause title)

This is to certify that _____ (name) _____ (designation) being a
Government servant was summoned to give evidence in his official capacity on behalf of the
plaintiff _____ suit _____ and was in attendance in this Court from the _____ day of
defendant _____ matter _____ to the _____ day of
19____ (inclusive) and that a sum of Rupees _____ has been paid into Court by the
plaintiff _____ towards his travelling and subsistence allowance for _____ days according to
defendant _____

Article 1133 of the Civil Service Regulations and that the said amount _____ has been
_____ will be
the Government treasury at _____ to be credited to Government under the head 'XVI-1—
Miscellaneous Fees and Fines '

Dated the _____ day of _____ 19____.

Presiding Judge or Chief Ministerial Officer '

No 14

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS

(O 16 R 10)

(Title)

To

Whereas it appears from the examination on oath of the serving officer that the summons could not be served upon the witness in the manner prescribed by law and whereas it appears that the evidence of the witness is material and he absconds and keeps out of the way for the purpose of evading the service of the summons This proclamation is, therefore, under R 10 of O 16 of the Code of Civil Procedure 1908, issued, requiring the attendance of the witness in this Court on the _____ day of _____ 19____ at _____ o'clock in the forenoon and from day to day until he shall have leave to depart, and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law

Given under my hand and the seal of the Court this _____ day of _____ 19____ .

day of

Judge

No 15

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS

(O 16 R 10)

(Title)

To

is therefore under R 10 of O 16 of the Code of Civil Procedure 1908 issued, requiring the attendance of the witness in this Court on the _____ day of _____ 19____ at _____ o'clock in the forenoon, and from day today until he shall have leave to depart, and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law

Given under my hand and the seal of the Court this _____ day of _____ 19____ .

day of

Judge

No 16

WARRANT OF ATTACHMENT OF PROPERTY OF WITNESS

(O 16, R 10)

(Title)

To

The Bailiff of the Court
Whereas the witness

_____ cited by _____ has not, after the expiration of the period limited in the proclamation issued for his attendance, appeared in Court, you are hereby directed to hold under attachment _____ property belonging to the said witness to the value of _____ and to submit a return accompanied with an inventory thereof, within _____ days

Given under my hand and the seal of the Court, this _____ day of _____ 19____ .

day of

Judge

No. 17

WARRANT OF ARREST OF WITNESS (O 16 R 10)

(Title)

To

The Bailiff of the Court

Whereas _____ has been duly served with a summons but has failed to attend [absconds and keeps out of the way for the purpose of avoiding service of a summons], You are hereby ordered to arrest and bring the said _____ before the Court

You are further ordered to return this warrant on or before the _____ day of _____ 19 _____ with an endorsement certifying the day and the manner in which it has been executed or the reason why it has not been executed

Given under my hand and the seal of the Court this _____ day of _____ 19 _____

Judge

No 18

WARRANT OF COMMITTAL (O 16 R 18)

(Title)

To

The Officer in charge of the Jail at

Whereas the plaintiff (or defendant) in the above named suit has made application to this Court that security be taken for the appearance of _____ to give evidence (or to produce a document) on the _____ day of _____ 19 _____

and whereas the Court has called upon the said _____ to furnish such security which he has failed to do This is to require you to receive the said _____ into your custody in the civil prison and to produce him before this Court at _____ on the said day and on such other day or days as may be hereafter ordered

Given under my hand and the seal of the Court this _____ day of _____ 19 _____

Judge

No 19

WARRANT OF COMMITTAL (O 16 R 18)

(Title)

To

The Officer in charge of the Jail at

Whereas _____ whose attendance is required before this Court in the above named case to give evidence (or to produce a document) has been arrested and brought before the Court in custody and whereas owing to the absence of the plaintiff (or defendant) the said _____ cannot give such evidence (or produce such document) and whereas the Court has called upon the said _____ to give security for his appearance on the _____ day of _____ 19 _____

at _____ which he has failed to do This is to require you to receive the said _____ into your custody in the civil prison and to produce him before this Court at _____ on the _____ day of _____ 19 _____

Given under my hand and the seal of the Court this _____ day of _____ 19 _____

Judge

x

Local Amendment.

No 20

Allahabad

APPLICATION FOR ISSUE OF SUMMONS TO A PARTY OR WITNESS.

No of Suit

Names of parties
In the Court of the
Date fixed for hearing

1	2	3	4		5		6
Number of witnesses to be summoned	Name and full address of each person to be summoned	Rank or occupation	Distance of residence from Court		Cash paid for		Name and address of person to whom unexpended travelling expenses and diet money should be returned
			Rail	Road	Travelling expenses	Diet expenses	

ix

APPENDIX C

DISCOVERY, INSPECTION AND ADMISSION.

No 1.

ORDER FOR DELIVERY OF INTERROGATORIES (O 11, R 1)

In the Court of

Civil Suit No

of

19 .

A B

..

..

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..

Plaintiff

against

C D, E F and G H

..

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..

..

..

..

..

..

Defendants

Upon hearing

filed the day of

liberty to deliver to the

do answer the interrogatories as prescribed by O 11, R 2, and that the costs of this application be

and upon reading the affidavit of

19 ; It is ordered that the

Interrogatories in writing and that the said

do answer the interrogatories as prescribed by O 11, R 2, and that

the costs of this application be

be at

No 2

INTERROGATORIES (O 11, R 4)

(Title as in No 1 *supra*)

Interrogatories on behalf of the above named [plaintiff or defendant C D] for the examination of the above named [defendants F F and G H or plaintiff]

1 Did not etc

2 Has not etc

etc

etc

etc

[The defendant E I is required to answer the interrogatories numbered

}

[The defendant G H is required to answer interrogatories numbered

}

No 3

ANSWER TO INTERROGATORIES (O 11 R 9)

(Title as in No 1 *supra*)

The answer of the above named defendant F F to the interrogatories for his examination by the above named plaintiff

In answer to the said interrogatories I the above named F F make oath and say as follows —

1

2

} Enter answers to interrogatories in paragraphs numbered consecutively

3 I object to answer the interrogatories numbered on the ground that [state grounds of objection]

No 4

ORDER FOR AFFIDAVIT AS TO DOCUMENTS (O 11 R 12)

(Title as in No 1 *supra*)

Upon hearing the do within days from the date of this order answer on affidavit stating which documents are or have been in his possession or power relating to the matter in question in this suit and that the costs of this application be

It is ordered that

No 5

AFFIDAVIT AS TO DOCUMENTS (O 11 R 13)

(Title as in No 1 *supra*)

I the above named defendant C D make oath and say as follows —

1 I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto

2 I object to produce the said documents set forth in the second part of the first schedule hereto [state grounds of objection]

3 I have had but have not now in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto

4 The last mentioned documents were last in my possession or power on [State when and at what has become of them and in whose possession they now are],

IX

5. According to the best of my knowledge, information and belief I have not now, and never had, in my possession, custody or power, or in the possession, custody or power of my pleader or agent, or in the possession, custody or power of any other person on my behalf, any account book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them other than and except the documents set forth in the said first and second schedules hereto

No 6

ORDER TO PRODUCE DOCUMENTS FOR INSPECTION (O 11, R 14)

(Title as in No 1 *supra*)

Upon hearing _____ and upon reading the affidavit of _____
 filed the _____ day of _____ 19 ____ It is ordered that the _____ do at
 all reasonable times, on reasonable notice produce at _____ situate at _____
 the following documents, namely, _____, and that the _____
 be at liberty to inspect and peruse the documents so produced, and to make notes of the
 contents. In the mean time it is ordered that all further proceedings be stayed and that the
 costs of this application be _____

No 7

NOTICE TO PRODUCE DOCUMENTS (O 11, R 16)

(Title as in No 1 *supra*)

Take notice that the [plaintiff or defendant] requires you to produce for his inspection
 the following documents referred to in your [plaint or written statement or affidavit dated the
 day of _____ 19 ____]

[Describe documents required]

A Y, Pleader for the

To Z, Pleader for the

No 8.

NOTICE TO INSPECT DOCUMENTS (O 11, R 17)

(Title as in No 1 *supra*)

Take notice that you can inspect the documents mentioned in your notice of the
 day of _____ 19 ____ [except the documents numbered
 in that notice] at [insert place of inspection] on Thursday next, the
 instant, between the hours of 12 and 4 o'clock

Or, that the [plaintiff or defendant] objects to giving you inspection of documents
 mentioned in your notice of the _____ day of _____ 19 ____, on the ground
 that [state the ground] —

No 9.

NOTICE TO ADMIT DOCUMENTS. (O. 12, R. 3)

(Title as in No 1, *supra*)

Take notice that the plaintiff [or defendant] in this suit proposes to adduce in evidence
 the several documents hereunder specified, and that the same may be inspected by the

defendant [or plaintiff], his pleader or agent, at _____ between the hours of _____, and the _____ on _____
 defendant [or plaintiff], is hereby required, within forty-eight hours from the last mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been, that such as are specified as copies are true copies; and such documents as are stated to have been served, sent or delivered were so served sent or delivered, respectively, saving all just exceptions to the admissibility of all such documents as evidence in this suit

G H, pleader [or agent] for plaintiff
 [or defendant]

To E F, pleader [or agent] for defendant [or plaintiff]

[Here describe the documents and specially as to each document whether it is original or a copy]

No 10

NOTICE TO ADMIT FACTS (O 12, R 5)

(Title as in No 1 *supra*)

Take notice that the plaintiff [or defendant] in this suit requires the defendant [or plaintiff] to admit, for the purpose of this suit only the several facts respectively hereunder specified, and the defendant [or plaintiff] is hereby required, within six days from the service of this notice to admit the said several facts saving all just exceptions to the admissibility of such facts as evidence in this suit

G H, pleader [or agent] for plaintiff [or defendant]

To E F, pleader [or agent] for defendant [or plaintiff]

The facts the admission of which is required, are—

- 1 That M died on the 1st January 1890
- 2 That he died intestate
- 3 That N was his only lawful son
- 4 That O died on the 1st April 1896
- 5 That O was never married

No 11

ADMISSION OF FACTS PURSUANT TO NOTICE (O 12 R 5)

(Title as in No 1 *supra*)

The defendant [or plaintiff] in this suit, for the purposes of this suit only hereby admits the several facts respectively hereunder specified subject to the qualifications of limitations if any hereunder specified, saving all just exceptions to the admissibility or any such facts or any of them, as evidence in this suit

Provided that this admission is made for the purposes of this suit only and is not an admission to be used against the defendant [or plaintiff] on any other occasion or by any one other than the plaintiff [or defendant, or party requiring the admission]

E F, pleader [or agent] for defendant [or plaintiff]

To G H, pleader [or agent] for plaintiff [or defendant]

Facts admitted

Qualifications or limitations if any subject to which they are admitted

- | | |
|--|---|
| 1 That M died on the 1st January, 1890 | 1 |
| 2 That he died intestate | 2 |
| 3 That N was his lawful son | 3 But not that he was his only lawful son |
| 4 That O died | 4 But not that he died on the 1st April, 1896 |
| 5 That O was never married | 5. |

No 12.

NOTICE TO PRODUCE (GENERAL FORM) (O 12, R 8.)

(Title as in No 1, *supra*)

Take notice that you are hereby required to produce and show to the Court at the next hearing of this suit all books papers letters copies of letters and other writings and documents in your custody, possession or power containing any entry, memorandum or minute relating to the matters in question in this suit, and particularly.

G H *Pleader* [or *agent*] for *plaintiff* [or *defendant*]To E F *pleader* [or *agent*] for *defendant* [or *plaintiff*]

APPENDIX D

DECREES

No 1

DECREE IN ORIGINAL SUIT (O 20, Rr 6, 7)

(Title)

Claim for

This suit coming on this day for final disposal before
in the presence of _____ for the plaintiff and of
_____ for the defendant It is ordered and decreed that
and that the sum of Rs _____
be paid by the _____ to the _____
account of the costs of this suit with interest thereon at the rate of _____
per cent per annum from this date to date of realization

Given under my hand and the seal of the Court this _____ day of _____

19 _____

Judge

Costs of Suit

PLAINTIFF				DEFENDANT			
	Rs.	A	P		Rs.	A	P
1 Stamp for plaint				Stamp for power			
2 Do for power				Do. for petition			
3 Do for exhibits				Pleader's fee			
4 Pleader's fee on Rs.				Subsistence for witnesses			
5 Subsistence for witnesses				Service of process			
6 Commissioner's fee				Commissioner's fee			
7 Service of process							
Total				Total			

Local Amendments

A

Bengal.

Call the table under the head Costs of suit ' in Form No 1 and substitute therefor the following —

PLAINTIFF				DEFENDANT			
	Rs	A	P		Rs	A	P
1 Stamp for plaint				1 Stamp for power			
2 Stamp for power				2 Stamp for petitions and affidavits			
3 Stamp for petitions and affidavits				3 Cost of exhibits including copies made under the Bankers Books Evidence Act 1891			
4 Cost of exhibits including copies made under the Bankers Books Evidence Act 1891				4 Pleadings fee			
5 Pleadings fee on Rs				5 Subsistence and travelling allowances of witnesses (including those of party if allowed by Judge)			
6 Subsistence and travelling allowances of witnesses (including those of party if allowed by Judge)				6 Process fees			
7 Process fees				7 Commissioners fees			
8 Commissioners fees				8 Demi paper			
9 Demi paper				9 Cost of transmission of records			
10 Cost of transmission of records				10 Other costs allowed under the Code and General Rules and Orders			
11 Other costs allowed under the Code and General Rules and Orders				11 Adjournment costs not paid in cash (to be deducted or added as the case may be)			
12 Adjournment costs not paid in cash (to be added or deducted as the case may be)							
Total				Total			

Patna

Substitute the following for the schedule of Costs of Suits in the form —

PLAINTIFF				DEFENDANT			
	Rs	A	P		Rs	A	P
1 Stamp for plaint				1 Stamp for power			
2 Stamp for power				2 Stamp for petition or affidavit			
3 Stamp for petition or affidavit				3 Costs for exhibits			
4 Costs for exhibits				4 Pleadings fee			
5 Pleadings fee on Rs				5 Subsistence			
6 Subsistence				(a) for defendant or his agent			
(a) for plaintiff or his agent				(b) for witnesses			
(b) for witnesses				6 Commissioners fee			
7 Commissioners fee				7 Service of process			
8 Service for process				8 Copying or typing charge			
9 Copying or typing charge							
Total				Total			

No 2.

SIMPLE MONEY DECREE (Section 34)

(Title)

Claim for

THIS suit coming on this day for final disposal before

in the presence of

of

for the plaintiff and
for the defendant it is ordered that the
do pay to the the sum of

dix

Rs with interest thereon at the rate of per cent per annum
 from to the date of realization of the said sum and do also pay
 Rs the costs of this suit with interest thereon at the rate of
 per cent per annum from this date to the date of realization

GIVEN under my hand and the seal of the Court this day of 19
 Judge

Costs of Suit

PLAINTIFF				DEFENDANT			
	Rs	A	P		Rs	A	P
1 Stamp for plaint				1 Stamp for power			
2 Stamp for power				2 Stamp for petition			
3 Stamp for exhibit				3 Pleader's fee			
4 Pleader's fee on Rs				4 Subsistence for witnesses			
5 Subsistence for witnesses				5 Service of process			
6 Commissioner's fee				6 Commissioner's fee			
7 Service of process							
Total				Total			

Local Amendment

Bengal

Cancel the table under the head Costs of Suit in Form No 2 and substitute therefor the following —

PLAINTIFF				DEFENDANT			
	Rs	A	P		Rs	A	P
1 Stamp for plaint				1 Stamp for power			
2 Stamp for power				2 Stamp for petitions and affidavits			
3 Stamp for petitions and affidavits				3 Costs of exhibits including copies made under the Bankers Books Evidence Act 1891			
4 Cost of exhibits including copies made under the Bankers Books Evidence Act 1891				4 Pleader's fee			
5 Pleader's fee on Rs				5 Subsistence and travelling allowances of witnesses (including those of party if allowed by Judge)			
6 Subsistence and travelling allowances of witnesses (including those of party if allowed by Judge)				6 Process fees			
7 Process fees				7 Commissioner's fees			
8 Commissioner's fees				8 Demi paper			
9 Demi paper				9 Cost of transmission of records			
10 Cost of transmission of records				10 Other costs allowed under the Code and General Rules and Orders			
11 Other costs allowed under the Code and General Rules and Orders				11 Adjournment costs not paid in cash (to be deducted or added as the case may be)			
12 Adjournment costs not paid in cash (to be added or deducted as the case may be)							
Total				Total			

No 3

PRELIMINARY DECREE FOR FORECLOSURE

(O 31, R 2 —Where accounts are directed to be taken)

(Title)

This suit coming on this _____ day etc., it is hereby ordered and decreed that it be referred to _____ as the Commissioner to take the accounts following —

- (i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal, or where no such rate is fixed at six per cent per annum or at such rate as the Court deems reasonable),
- (ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received,
- (iii) an account of all sum of money properly incurred by the plaintiff up to this date for cost charges and expenses (other than the costs of the suit) in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed between the parties or, failing such rate at the same rate as is payable on the principal, or failing both such rates at nine per cent per annum)
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage deed

2 And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall first be adjusted against any sums paid by the plaintiff under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal

3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the _____ day of _____ and that upon such report of the Commissioner being received it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make

4 And it is hereby further ordered and decreed—

- (i) that the defendant do pay into Court on or before the _____ day of _____ or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs _____ for the costs of the suit awarded to the plaintiff,
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R 10 together with such subsequent interest as may be payable under R 11 of O 31 of the First Schedule to the Code of Civil Procedure, 1909 the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints and the plaintiff

1. Forms 3 to 11 were substituted by S 8 and Schedule, of the Transfer of Property (Amendment Supplementary) Act, 1929 (XXI of 1929)

C P. C. 363 & 364

shall if so required re convey or re transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall if so required deliver up to the defendant quiet and peaceable possession of the said property

5 And it is hereby further ordered and decreed that in default of payment as aforesaid the plaintiff shall be at liberty to apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall if so required deliver up to the plaintiff quiet and peaceable possession of the said property and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

Local Amendments

Rangoon

Substitute the following —

Form No 3

PRELIMINARY DECREE FOR FORECLOSURE

(Title)

This suit coming on this day of _____ It is hereby ordered and declared that the sum of Rs _____ being costs of this suit shall be paid by the defendant No _____ to the _____^a, and it is declared that the amount due by the defendant No _____ to the plaintiff is the sum of Rs _____ being the balance of account as shown in the Schedule hereto and it is further declared that the plaintiff shall be entitled to apply for and obtain a final decree for foreclosure of the mortgage in suit provided that the defendant or b _____ may apply for and obtain a decree for redemption of the mortgage on payment into Court of the amount so declared to be due on or before the _____ day of _____ and on compliance with all further orders of the Court and on payment of such further sums as the Court may determine to be payable on finally adjusting the account up to the date of payment

SCHEDULE

1 Due to the plaintiff for redemption	Rs
2 Due to the plaintiff for costs of suit	Rs
3 Due to the plaintiff for costs etc in respect of the mortgage	Rs
Less costs etc in respect of the mortgage due to the defendant No _____	Rs
Less costs of suit due to the defendant No _____	Rs.
Due to the plaintiff	Rs

No 3 A

PRELIMINARY DECREE FOR FORECLOSURE

(O 31 R 2 —Where the Court declares the amount due.)

(Title)

Declared that the
up to the

1st mortgage

for principal, the sum of Rs. _____ for interest on the said principal the sum of Rs. _____ for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage security, together with interest thereon, and the sum of Rs. _____ for the costs of this suit awarded to the plaintiff, making in all the sum of Rs. _____.

2. And it is hereby ordered and decreed as follows —

(i) that the defendant do pay into Court on or before the _____ day of _____ or any later date up to which time for payment may be extended by the Court of the said sum of Rs. _____.

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such cost of the suit and such costs charges and expenses as may be payable under R 10 together with such subsequent interest as may be payable under R 11 of O 34 of the First Schedule to the Code of Civil Procedure 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the defendant or to such person as he appoints and the plaintiff shall if so required re convey or re transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall if so required deliver up to the defendant quiet and peaceable possession of the said property

3 And it is hereby further ordered and decreed that in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall if so required deliver up to the plaintiff quiet and peaceable possession of the said property, and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE.

Description of the mortgaged property

No 4

FINAL DECREE FOR FORECLOSURE

(O 34 R 9)

(Title)

Upon reading the preliminary decree passed in this suit on the _____ day of _____ and further orders (if any) dated the _____ day of _____ and the application of the plaintiff dated the _____ day of _____ for a final decree

and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the said mortgage

It is hereby ordered and decreed that the defendant and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned * [and (if the defendant be in possession of the said mortgaged property) that the defendant shall deliver to the plaintiff quiet and peaceable possession of the said mortgaged property]

2 And it is hereby further declared that the whole of the liability whatsoever of the defendant up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished

* Words not required to be deleted

Local Amendment

Form No 4

FINAL DECREE FOR FORCLOSURE

(Title)

Upon reading the preliminary decree passed in this suit on the _____ day of _____ and further orders dated the _____ day of _____ application of the plaintiff dated the _____ day of _____ for a final decree and after hearing the parties, and on it appearing that payment of the sum found due by the preliminary decree and compliance with the further orders of the Court has not been made within the time specified by any party entitling him to apply for a decree for redemption,

It is hereby ordered and decreed that the defendants Nos _____ and all persons claiming through or under them or any of them are hereby absolutely debarrd from all right of redemption of the property described in the Schedule hereto and that the defendants Nos _____ are freed from all liabilities in respect of the mortgage mentioned in the Schedule hereto and on account of this suit

And it is ordered that the defendant No _____ shall deliver to the plaintiff possession of the said property

SCHEDULE

*The mortgaged property**The mortgage*

No 5

PRELIMINARY DECREE FOR SALE

(O 31 R 4—Where accounts are directed to be taken)

(Title)

This suit coming on this _____ day etc., It is hereby ordered and decreed that it be referred to _____ as the Commissioner to take the accounts following —

- (i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable),
- (ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received;
- (iii) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate at the same rate as is payable on the principal, or failing both such rates at nine per cent. per annum),
- (iv) an account of any loss or damages caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of or permanently injurious to the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage deed

2 And it is hereby further ordered and decreed that any amount received under clause (iv) or adjudged due under clause (ii) above together with interest thereon, shall first be adjusted against any sums paid by the plaintiff under clause (iii) together with interest

thereon and the balance, if any, shall be added to the mortgage money or as the case may be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal

3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the _____ day of _____ and that upon such report of the Commissioner being received it shall be confirmed and countersigned subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make

4 And it is hereby further ordered and decreed

(i) that the defendant do pay into Court on or before the _____ day of _____ or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs. _____ for the costs of the suit awarded to the plaintiff

(ii) that on such payment and on payment thereafter before such date as the Court may fix or such amount as the Court may adjudge due in respect of such costs, of the suit and such costs charges and expenses as may be payable under R 10 together with such subsequent interest as may be payable under R 11 of O 31 of the First Schedule to the Code of Civil Procedure 1908 the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the defendant or to such person as he appoints and the plaintiff shall if so required reconvey and transfer the said property free from the mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall if so required deliver up to the defendant quiet and peaceable possession of the said property

5 And it is hereby further ordered and decreed that in default of payment as aforesaid the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property, and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold, and for the purposes of such sale the plaintiff shall produce before the Court, or such officer as it appoints all documents in his possession or power relating to the mortgaged property

6 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such cost of the suit and such costs charges and expenses as may be payable under R 10 together with such subsequent interest as may be payable under R 11 of O 31 of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be paid to the defendant or other persons entitled to receive the same

7 And it is hereby further ordered and decreed that if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance and that the parties are at liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

Local Amendment

Rangoon

Form No 5

PRELIMINARY DECREE FOR SALE

(File)

This suit coming on this

day of

It is hereby

ordered and decreed that the sum of Rs being costs of this
 suit shall be paid by the defendant No to the ^a,
 and it is declared that the amount due to the plaintiff by the defendant No
 is the sum of Rs being the balance of account as shown
 in the Schedule A hereto, and it is further declared that the plaintiff shall be entitled to
 apply for and obtain a final decree for sale of the property in suit^b

Provided that any of the defendants Nos may apply for and obtain
 a decree for redemption of the mortgage on payment into Court of the amount so declared to
 be due on or before the day of and on compliance with all
 further orders of the Court and on payment of such further sums as the Court may determine
 to be payable on finally adjusting the account up to the date of payment

And it is further declared that the amount due to the parties to the suit whose claims
 have been proved and the priorities of such parties to payment out of the sale proceeds are
 as shown in Schedule B hereto

SCHEDULE A

1 Due to the plaintiff for principal and interest on the mortgage	Rs
2 Due to the plaintiff for costs of suit	Rs
3 Due to the plaintiff for costs etc, in respect of the mortgage	Rs
Less costs, etc, due to the defendant No	Rs.
Less costs of suit due to the defendant No	Rs
Due to the plaintiff from defendant No	Rs

SCHEDULE B

Order of Priority	Party	Amount due
1		
2.		
3.		

No 5 A

PRELIMINARY DECREE FOR SALE

(O 34, R. 4—When the Court declares the amount due)

(Title)

This suit coming on this day, etc, It is hereby declared that the
 amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this
 day of is the sum of Rs for
 principal the sum of Rs for interest on the said principal, the sum
 of Rs for costs, charges and expenses (other than the costs of
 the suit) properly incurred by the plaintiff in respect of the mortgage security together
 with interest thereon, and the sum of Rs for the costs of the suit awarded
 to the plaintiff, making in all the sum of Rs

2 And it is hereby ordered and decreed as follows —

- (a) that the defendant do pay into Court on or before the
 day of or any later date up to which
 time for payment may be extended by the Court the said sum of Rs
- (ii) that on such payment and on payment thereafter before such date as the Court
 may fix of such amount as the Court may adjudge due in respect of such costs
 of the suit and such costs, charges and expenses as may be payable under
 R. 10 together with such subsequent interest as may be payable under R. 11,
 of O 34 of the First Schedule to the Code of Civil Procedure, 1908, the

(a) (Or as otherwise apportioned)

(b) (Or a specified part thereof)

plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4 And it is hereby further ordered and decreed that the money realized by such sale

Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under R 10, together with such subsequent interest as may be payable under R 11 of O 34 of the First Schedule to the Code of Civil Procedure, 1903, and that the balance if any shall be paid to the defendant or other persons entitled to receive the same.

5 And it is hereby further ordered and decreed that if the money realized by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the

SCHEDULE

Description of the mortgaged property

No 6

FINAL DECREE FOR SALE

(O 34 R 5)

(Title)

Upon reading the preliminary decree passed in this suit on the
day of _____ and further orders (if any) dated the
day of _____ and the application of the plaintiff dated the
day of _____ for a final decree and after hearing the parties and
it appearing that the payment directed by the said decree and orders has not been made by
the defendant or any person on his behalf or any other person entitled to redeem the
mortgage

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold, and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property

2 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into the Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the plaintiff for such costs of the suit including the costs of this application and such costs, charges and expenses as may be payable under R 10, together with such subsequent interest as may be

ix payable under R 11 of O 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same

Local Amendment

Rangoon

Form No 6

FINAL DECREE FOR SALE (Title)

Upon reading the preliminary decree passed in this suit on the _____ day of _____ and further orders dated the _____ and the application of the plaintiff dated the _____ day of _____ for a final decree, and after hearing the parties, and on it appearing that payment of the sum found due by the preliminary decree and compliance with the further orders of the Court has not been made within the time specified by any party entitling him to apply for a decree for redemption

It is hereby ordered and decreed that the mortgaged property mentioned in the schedule A hereto be sold and that for the purposes of such sale the parties shall produce before the Court or such officer as it appoints all documents of title in their possession or power relating to the said property,

And it is further ordered and decreed that the proceeds of the sale (after deduction therefrom of the expenses of the sale) shall, subject to any orders as to setting off the amount due against the purchase money be paid into Court and applied in payment of the amounts found due to the parties under the preliminary decree and further orders of the Court in the order of priority as shown in the Schedule B hereto

It is further declared that the mortgages in respect of which the amounts are shown as due in Schedule B and the right to redeem the same, shall be extinguished, except as to the right of any party entitled thereto to obtain a personal decree against the mortgagor for any balance unpaid

SCHEDULE A.

The Property

SCHEDULE B.

Order of Priority	Party	Amount due.
(1)
(2)
(3)

No 7.

PRELIMINARY DECREE FOR REDEMPTION WHEREON DEFAULT OF PAYMENT BY MORTGAGOR AND DECREE FOR FORECLOSURE IS PASSED.

(O 34, R 7—Where accounts are directed to be taken)

(Title)

This suit coming on this _____ day, etc., It is hereby ordered and decreed that it be referred to _____ as the Commissioner to take the accounts following—

- (i) an account of what is due on this date to the defendants for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent per annum or at such rate as the Court deems reasonable),
- (ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by order or for the use of the defendant or which, without the wilful default of the defendant or such person might

(a) (O) have been so received

(a) (or a specified part)

(iii) an account of all sums of money properly incurred by the defendant up to this date for costs charges and expenses (other than the costs of the suit) in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed between the parties, or failing such rate at the same rate as is payable on the principal or failing both such rates, at nine per cent per annum)

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage deed

2 It is hereby further ordered and decreed that any amount received under clause (i) or adjudged due under clause (ii) above together with interest thereon, shall be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon, and the balance if any shall be added to the mortgage money or, as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of _____, and that upon such report of the Commissioner being received it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make

4 And it is hereby further ordered and decreed —

(i) that the plaintiff do pay into Court on or before the day of _____, or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs _____ for the costs of the suit awarded to the defendant,

(ii) that, on such payment, and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable under R 10, together with such subsequent interest as may be payable under R 11 of O 24 of the First Schedule to the Code of Civil Procedure, 1908 the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the plaintiff, or to such person as he appoints and the defendant shall if so required, re convey or re transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

5 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant shall be at liberty to apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required deliver up to the defendant quiet and peaceable possession of the said property, and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE.

Description of the mortgaged property

ix

payable under R 11 of O 34 of the First Schedule to the Code of Civil Procedure, 1903 and that the balance if any, shall be paid to the defendant or other persons entitled to receive the same

Local Amendment

Rangoon

Form No. 6

FINAL DECREE FOR SALE

(Title)

Upon reading the preliminary decrees passed in this suit on the _____ day of _____ and further orders dated the _____ and the application of the plaintiff dated the _____ day of _____ for a final decree and after hearing the parties and on it appearing that payment of the sum found due by the preliminary decree and compliance with the further orders of the Court has not been made within the time specified by any party entitling him to apply for a decree for redemption

It is hereby ordered and decreed that the mortgaged property mentioned in the schedule A hereto be sold and that for the purposes of such sale the parties shall produce before the Court or such officer as it appoints all documents of title in their possession or power relating to the said property,

And it is further ordered and decreed that the proceeds of the sale (after deduction therefrom of the expenses of the sale) shall, subject to any orders as to setting off the amount due against the purchase money, be paid into Court and applied in payment of the amounts found due to the parties under the preliminary decrees and further orders of the Court in the order of priority as shown in the Schedule B hereto

It is further declared that the mortgages in respect of which the amounts are shown as due in Schedule B and the right to redeem the same shall be extinguished, except as to the right of any party entitled thereto to obtain a personal decree against the mortgagor for any balance unpaid

SCHEDULE A.

The Property

SCHEDULE B.

Order of Priority	Party	Amount due.
(1)
(2)	.	.
(3)		..

No 7.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR FORECLOSURE IS PASSED.

(O 34, R 7—Where accounts are directed to be taken)

(Title)

This suit coming on this _____ day, etc., It is hereby ordered and decreed that it be referred to _____ as the Commissioner to take the accounts following —

- (i) an account of what is due on this date to the defendants for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent per annum or at such rate as the Court deems reasonable),
- (ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by order or for the use of the defendant or which without the wilful default of the defendant or such person, might have been so received

(a) (O

(a)

(a) (or a specified part)

dant or which without the wilful default of the defendant or such person might have been so received ;

(iii) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate, as is payable on the principal, or, failing both such rates at nine per cent per annum),

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage deed

2 And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (ii) above together with interest thereon, shall first be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon, and the balance if any shall be added to the mortgage money, or as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal

3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of and that upon such report of the Commissioner being received it shall be confirmed and countersigned subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make

4 And it is hereby further ordered and decreed—

(i) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs for the costs of the suit awarded to the defendant,

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable under R 10 together with such subsequent interest as may be payable under R. 11 of O 34 of the First Schedule to the Code of Civil Procedure 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall if so required, re convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall if so required deliver up to the plaintiff quiet and peaceable possession of the said property

5 And it is hereby further ordered and decreed that, in default of payment as aforesaid the defendant may apply to the Court for a final decree for the sale of the mortgaged property, and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold, and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property

6 And it is hereby further ordered and decreed that the money realized by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs, charges and expenses as may be payable under R 10, together with such subsequent interest as may be payable under R 11 of O 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same

Rangoon

DECREE AGAINST MORTGAGOR Plaintiff
THE MORTGAGEE

Upon reading the application of the
decree passed in the suit on the day of
satisfied that the net proceeds of the sale
and the
shown in the Schedule hereto, and that
legally recoverable from the

a personally
It is hereby ordered and decreed that
b the sum of 1
of six per cent per annum from the
date of realization of the said sum and the

Party	
1	
2	
3	

PRELIMINARY DECREE FOR
PAYMENT BY MORTGAGOR
(O 34, R 7 — When)

This suit coming on this
decreed that it be referred to
following —

- (1) an account of what is due on the mortgage mentioned on the mortgage mentioned rate payable on the principal annum or at such rate as the
- (2) an account of the income of the defendant or by any other

- (a) Mortgagor.
- (b) Mortgagee
- (c) (being the date of payment of 100

dant or which without the wilful default of the defendant or such person might have been so received,

- (iii) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or failing both such rates at nine per cent per annum),
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage deed

2 And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above together with interest thereon, shall first be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon, and the balance if any shall be added to the mortgage money or as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal

3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of and that upon such report of the Commissioner being received it shall be confirmed and countersigned subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make

4 And it is hereby further ordered and decreed—

- (i) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs for the costs of the suit awarded to the defendant,
- (ii) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R 10, together with such subsequent interest as may be payable under R 11 of O 34 of the First Schedule to the Code of Civil Procedure 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property

5 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property, and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold, and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property

6 And it is hereby further ordered and decreed that the money realized by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs, charges and expenses as may be payable under R 10, together with such subsequent interest as may be payable under R 11 of O 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same

Rangoon

Local Amendment

Form No 7.

DECREE AGAINST MORTGAGOR PERSONALLY FOR BALANCE AFTER THE SALE OF
THE MORTGAGED PROPERTY

(Title)

Upon reading the application of the and reading the final
 decree passed in the suit on the day of , and the Court being
 satisfied that the net proceeds of the sale held under the aforesaid decree amounted to Rs
and have been paid to the parties, leaving balance (a) due as
 shown in the Schedule hereto and that the balances due to and
 legally recoverable from the are

^a personally,
 It is hereby ordered and decreed that the ^a do pay to
^b the sum of Rs with further interest at the rate
 of six per cent per annum from the day of c up to the
 date of realization of the said sum and the costs of this application.

SCHEDULE

Party	Amount due	Balance unpaid
1		
2		
3		

No 7 A

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF
PAYMENT BY MORTGAGOR A DECREE FOR SALE IS PASSED

(O 34 R 7 --Where accounts are directed to be taken)

(Title)

This suit coming on this day, etc , It is hereby ordered and
 decreed that it be referred to as the Commissioner to take the accounts
 following —

- (i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent per annum or at such rate as the Court deems reasonable),
- (ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by the order or for the use of the defendant

(a) Mortgagor.

(b) Mortgagee

(c) (being the date of payment of proceeds of sale as aforesaid)

dant or which without the wilful default of the defendant or such person might have been so received

- (iii) an account of all sums of money properly incurred by the defendant up to this date for costs charges and expenses (other than the costs of the suit) in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed between the parties or failing such rate at the same rate as is payable on the principal or failing both such rates at nine per cent per annum)
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of or permanently injurious to the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage deed

2 And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (ii) above together with interest thereon shall first be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon and the balance if any shall be added to the mortgage money or as the case may be be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal

3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of and that upon such report of the Commissioner being received it shall be confirmed and countersigned subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make

4 And it is hereby further ordered and decreed—

- (i) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs for the costs of the suit awarded to the defendant,
- (ii) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable under R 10 together with such subsequent interest as may be payable under R 11 of O 34 of the First Schedule to the Code of Civil Procedure 1908 the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaintiff mentioned and all such documents shall be delivered over to the plaintiff or to such person as he appoints and the defendant shall if so required reconvey or retransfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall if so required deliver up to the plaintiff quiet and peaceable possession of the said property

5 And it is hereby further ordered and decreed that in default of payment as aforesaid the defendant may apply to the Court for a final decree for the sale of the mortgaged property and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property

6 And it is hereby further ordered and decreed that the money realized by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs charges and expenses as may be payable under R 10 together with such subsequent interest as may be payable under R 11 of O 34 of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be paid to the plaintiff or other persons entitled receive the same

7 And it is hereby further ordered and decreed that, if the money realized by such sale shall not be sufficient for payment in full of the amount payable to the defendant as aforesaid the defendant shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance, and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

No 7 B

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR FORECLOSURE IS PASSED

(O 34 R 7—Where the Court declares the amount due)

(Title)

This suit coming on this _____ day, etc., It is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this _____ day of _____ is the sum of Rs _____ for principal, the sum of Rs _____ for interest on the said principal the sum of Rs _____ for costs charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage security together with interest thereon and the sum of Rs _____ for the costs of the suit awarded to the defendant making in all the sum of Rs _____

2 And it is hereby ordered and decreed as follows. —

- (i) that the plaintiff do pay into Court on or before the _____ day of _____ or any later date up to which time for payment may be extended by the Court the said sum of Rs _____
- (ii) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R 10 together with such subsequent interest as may be payable under R 11 of O 34 of the First Schedule to the Code of Civil Procedure, 1908 the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the plaintiff, or to such person as he appoints and the defendant shall if so required re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall if so required deliver up to the plaintiff quiet and peaceable possession of the said property

3 And it is hereby further ordered and decreed that in default of payment as aforesaid the defendant may apply to the Court for a final decree that the plaintiff shall thenceforth be absolutely debarréd and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required deliver up to the defendant quiet and peaceable possession of the said property, and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

No 7 C

PRELIMINARY DECREE FOR REDEMPTION WHEREON DEFAULT OF PAYMENT
BY MORTGAGOR A DECREE FOR SALE IS PASSED
(O 34 R 7—Where the Court declares the amount due)

(Title)

This suit coming on this _____ day etc It is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this _____ day of _____ is the sum of Rs _____ for principal the sum of Rs _____ for interest on the said principal the sum of Rs _____ for costs charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage security together with interest thereon and the sum of Rs _____ for the cost of this suit awarded to the defendant making in all the sum of Rs _____

2 And it is hereby ordered and decreed as follows —

- (i) that the plaintiff do pay into Court on or before the _____ day of _____ or any later date up to which time the payment may be extended by the Court the said sum of Rs _____
- (ii) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charge and expenses as may be payable under R 10 together with such subsequent interest as may be payable under R 11 of O 34 of the First Schedule to the Code of Civil Procedure 1908 the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the plaintiff or such person as he appoints and the defendant shall if so required convey or re transfer the said property to the plaintiff free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall if so required deliver up to the plaintiff quiet and peaceable possession of the said property

3 And it is hereby further ordered and decreed that in default of payment as aforesaid the defendant may apply to the Court for a final decree for the sale of the mortgaged property and on such application being made the mortgaged property or sufficient part thereof shall be directed to be sold and for the purposes of sale the defendant shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property

4 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs charges and expenses as may be payable under R 10 together with such subsequent interest as may be payable under R 11 of O 34 of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be paid to the plaintiff or other persons entitled to the same

5 And it is hereby further ordered and decreed that if the money realised by such sale shall not be sufficient for the payment in full of the amount payable to the defendant as aforesaid the defendant shall be at liberty (where such remedy is open to him under the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance and that the parties are at liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

No 7 D

**FINAL DECREE FOR FORECLOSURE IN A REDEMPTION SUIT ON
DEFAULT OF PAYMENT BY MORTGAGOR**

(O 34, R. 8)

(Title)

Upon reading the preliminary decree in this suit on the
day of _____ and further orders (if any) dated the _____
day of _____, and the application of the defendant
dated the _____ day of _____ for a final decree and after
hearing the parties, and it appearing that the payment as directed by the said decree and
orders has not been made by the plaintiff or any person on his behalf or any other person
entitled to redeem the mortgage

It is hereby ordered and decreed that the plaintiff and all persons claiming through
or under him be and they are hereby absolutely debarred and foreclosed of and from
all right of redemption of and in the property in the aforesaid preliminary decree
mentioned* [and (if the plaintiff be in possession of the said mortgaged property) that
the plaintiff shall deliver to the defendant quiet and peaceable possession of the said
mortgaged property]

2 And it is hereby further declared that the whole of the liability whatsoever of the
plaintiff up to this day arising from the said mortgage mentioned in the plaint or from
this suit is hereby discharged and extinguished

No 7 E

**FINAL DECREE FOR SALE IN A REDEMPTION SUIT ON DEFAULT
OF PAYMENT BY MORTGAGOR**

(O 34 R 8)

(Title)

Upon reading the preliminary decree passed in this suit on the
day of _____ and further orders (if any) dated the _____
day of _____ and the application of the defendant dated the _____
day of _____ for a final decree and after hearing the parties and it ap-
pearing that _____
plaintiff or at _____

It is hereby decreed that _____
the defendant shall produce before the Court, or such officer as it appoints all documents in
his possession or power relating to the mortgaged property

_____ and under any further orders that may have been passed in this suit and in pay-
ment of any amount which the Court may have adjudged due to the defendant for such costs
of this suit including the costs of this application and such costs, charges and expenses as may
be payable under R 10, together with the subsequent interest as may be payable under R 11,
of O 34 of the First Schedule to the Code of Civil Procedure, 1903, and that the balance if
any, shall be paid to the plaintiff or other persons entitled to receive the same

No 7 F

**FINAL DECREE IN A SUIT FOR FORECLOSURE, SALE OR REDEMPTION
WHERE THE MORTGAGOR PAYS THE AMOUNT OF THE DECREE**

(O 34, Rr 3, 5 and 8)

(Title)

This suit coming on this _____ day for further consideration and it appearing

* Words not required to be deleted

that on the _____ day of _____ the mortgagee or
 _____, the same being a person entitled to redeem, has paid into Court all amounts
 due to the mortgagee under the preliminary decree dated the _____
 day of _____. It is hereby ordered and decreed that —

- (i) the mortgagee do execute a deed of re-conveyance of the property in the afore-
 said preliminary decree mentioned in favour of the mortgagor * [or, as the case
 may be, _____ who has redeemed the property] or an acknowledgment
 of the amount due in his favour,
- (ii) the mortgagee do bring into Court all documents in his possession and
 power relating to the mortgaged property in the suit.

And it is hereby further ordered and decreed that, upon the mortgagee executing the
 deed of re-conveyance or acknowledgment in the manner aforesaid,—

- (i) the said sum of Rs _____ be paid out of Court to the
 mortgagee,
- (ii) the said deeds and documents brought into the Court be delivered out of Court
 to the mortgagor * [or the person making the payment] and the mortgagee do
 when so required concur in registering, at the cost of the mortgagor * [or other
 person making the payment] the said deed of re-conveyance or the acknowledg-
 ment in the office of the Sub Registrar of _____, and
- (iii) * [if the mortgagee plaintiff or defendant as the case may be, is in possession of
 the mortgaged property] that the mortgagee do forthwith deliver possession of
 the mortgaged property in the aforesaid preliminary decree mentioned to the
 mortgagor * [or such person as aforesaid who has made the payment]

— No 5 —

DECREE AGAINST MORTGAGOR PERSONALLY FOR BALANCE AFTER THE SALE OF THE MORTGAGED PROPERTY

(O 34 Rr 6 and 8 A)

(Title)

Upon reading the application of the mortgagee (the plaintiff or defendant as
 the case may be) and reading the final decree passed in the suit on the
 day of _____ and the Court being satisfied that the net proceeds of the
 sale held under the aforesaid final decree amounted to Rs _____ and have
 been paid to the applicant out of the Court on the _____ day of _____
 and that the balance now due to him under the aforesaid decree is Rs _____.

And whereas it appears to the Court that the said sum is legally recoverable from the
 mortgagor (plaintiff or defendant as the case may be) personally

It is hereby ordered and decreed as follows —

That the mortgagor (plaintiff or defendant as the case may be) do pay to the
 mortgagee (defendant or plaintiff as the case may be) the said sum of Rs _____
 with further interest at the rate of six per cent per annum from the
 day of _____ (the date of payment out of Court referred to above)
 up to the date of realization of the said sum and the costs of this application

Local Amendment

Rangeon

Form No 8

PRELIMINARY DECREE FOR REDEMPTION

(Title)

This suit coming on this _____
 and decreed that the sum of Rs _____

day of _____ It is hereby ordered
 being costs of this suit shall be paid by the _____

* Words not required to be deleted.

IX defendant No to the a, and it is hereby declared that the amount due to the defendant No by the plaintiff is the sum of Rs being the balance of account as shown in the schedule hereto, and it is further declared that on payment into Court of the said amount on or before the day of and on compliance with all further orders of the Court and on payment of such further sums as the Court may determine to be payable on finally adjusting the account up to the date of payment the plaintiff shall be entitled to apply for and obtain a final decree for redemption and that if the plaintiff fails to make full payment as aforesaid the defendant No shall be entitled to apply for and obtain a decree b

SCHEDULE

1 Due to the defendant No	on the mortgage	Rs
2 Due to the defendant No	for costs of suit	Rs
3 Due to the defendant No	for costs etc in	Rs
respect of the mortgage		Rs
Less costs etc in respect of the mortgage due to the plaintiff		Rs
		Rs
		Rs
Less costs of suit due to the plaintiff		Rs
		Rs
Due to the defendant No		Rs

No 3

PRELIMINARY DECREE FOR FORECLOSURE OR SALE

Plaintiff		1st Mortgagee
Defendant No 1	1st	Mortgagor
Defendant No 2	2nd	Mortgagee]

(O 31 Rr 2 and 4)

(Title)

The suit coming on this day etc, It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs for principal the sum of Rs for interest on the said principal the sum of Rs for costs charges and incurred by the plaintiff in respect of the mortgage sum of Rs for the costs of the suit all the sum of Rs

(Similar declarations to be introduced with regard to the amount due to defendant No 2 in respect of his mortgage if the mortgage money due thereunder has become payable at the date of the suit)

2 It is further declared that the plaintiff is entitled to payment of the amount due to him in priority to defendant No 2* [or (if there are several subsequent mortgages) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively —]

3 And it is hereby ordered and decreed as follows —

(a) (a) that defendants or one of them do pay into Court on or before the day of or any later date up

(a) or as otherwise apportioned

(b) for sale or foreclosure

* Words not required to be deleted

to which time for payment has been extended by the Court the said sum of Rs. due to the plaintiff, and
(b) that defendant No 1 do pay into Court on or before the

day of or any later date up to which time for payment has been extended by the Court the said sum of Rs. due to defendant No 2, and

- (ii) that, on payment of the sum declared to be due to the plaintiff by defendants or either of them in the manner prescribed in clause (i) (a) and on payment there after before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable under R 10 together with such subsequent interest as may be payable under R 11 of O 34 of the First Schedule to the Code of Civil Procedure 1908 the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the defendant No

(who has made the payment), or to such person as he appoints and the plaintiff shall if so required, re convey or re transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and also free from all liability whatsoever arising from the mortgage or this suit and shall if so required deliver up to the defendant No

(who has made the payment) quiet and peaceable possession of the said property

(Similar declarations to be introduced if defendant No 1 pays the amount found or declared to be due to defendant No 2 with such variations as may be necessary having regard to the nature of his mortgage)

4 And it is hereby further ordered and decreed that in default of payment as aforesaid of the amount due to the plaintiff the plaintiff shall be at liberty to apply to the Court for a final decree—

- (i) **[in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage deed is foreclosure and not sale] that the defendants jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall if so required deliver to the plaintiff quiet and peaceable possession of the said property or*
- (ii) **[in the case of any other mortgage] that the mortgaged property or a sufficient part thereof shall be sold, and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property and*
- (iii) **[in the case where a sale is ordered under clause 4 (ii) above] that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may have been passed in this suit and in payment of the amount which the Court may adjudge due to the plaintiff in respect of such costs of this suit and such costs charges and expenses as may be payable under R 10 together with such subsequent interest as may be payable under R 11 of O 34 of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be applied in payment of the amount due to defendant No 2 and that if any balance be left it shall be paid to the defendant No 1 or other persons entitled to receive the same and*
- (iv) *that if the money realised by such sale shall not be sufficient for payment in full of the amounts due to the plaintiff and defendant No 2 the plaintiff or defendant No 2 or both of them as the case may be shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No 1 for the amounts remaining due to them respectively*

* Words not required to be deleted,

(X) defendant No. _____ to the _____, and it is hereby declared that the amount due to the defendant No. _____ by the plaintiff is the sum of Rs. _____ being the balance of account as shown in the schedule hereto and it is further declared that on payment into Court of the said amount on or before the _____ day of _____ and on compliance with all further orders of the Court and on payment of such further sums as the Court may determine to be payable on finally adjusting the account up to the date of payment the plaintiff shall be entitled to apply for and obtain a final decree of redemption and that if the plaintiff fails to make full payment as aforesaid the defendant No. _____ shall be entitled to apply for and obtain a decree ^b

SCHEDULE

1	Due to the defendant No. _____	on the mortgage	Rs. _____
2	Due to the defendant No. _____	for costs of suit	Rs. _____
3	Due to the defendant No. _____	for costs etc in respect of the mortgage	Rs. _____
	Less costs etc in respect of the mortgage due to the plaintiff		Rs. _____
			<hr/> Rs. _____
	Less costs of suit due to the plaintiff		Rs. _____
	Due to the defendant No. _____		<hr/> Rs. _____

No. _____

PRELIMINARY DECREE FOR FORECLOSURE OR SALE

Plaintiff _____

Defendant No. 1 _____

Defendant No. 2 _____

(O 34 Rr 7 and 4)

(Title)

1st Mortgage

Mortgage

Mortgage

The suit coming on this _____ day etc, It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to the _____ day of _____ is the sum of Rs. _____ for principal the sum of Rs. _____ for interest on the said principal the sum of Rs. _____ for costs charges and expenses (other than the costs of the suit) incurred by the plaintiff in respect of the mortgage and with interest thereon and the sum of Rs. _____ for the costs of this suit awarded to the plaintiff make up all the sum of Rs. _____

(Similar declarations to be introduced with regard to the amount due to defendant No. 2 in respect of his mortgage if the mortgage money due thereon has been paid at the date of the suit)

2. It is further declared that the plaintiff is entitled to payment of the amount due to him in priority to defendant No. 2* [or if there are several subsequent mortgages the several parties hereto are entitled in the following order to the payment of the amount due to them respectively —]

3. And it is hereby ordered and decreed as follows —

(i) (a) that defendants or one of them do pay into Court on or before the _____ day of _____ or any later date up to _____

(a) or as otherwise apportioned

(i) for sale or foreclosure

* Words not required to be deleted

- to which time for payment has been extended by the Court the said sum of Rs _____ due to the plaintiff; and
 (b) that defendant No. 1 do pay into Court on or before the _____ day of _____ or any later date up to

which time for payment has been extended by the Court the said sum of Rs _____ due to defendant No. 2, and

- (ii) that on payment of the sum declared to be due to the plaintiff by defendants or either of them in the manner prescribed in clause (i) (a) and on payment there after before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R 10 together with such subsequent interest as may be payable under R 11 of O 34 of the First Schedule to the Code of Civil Procedure 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the defendant No _____

(who has made the payment), or to such person as he appoints and the plaintiff shall if so required, re convey or re transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and also free from all liability whatsoever arising from the mortgage or this suit and shall if so required deliver up to the defendant No _____

(who has made the payment) quiet and peaceable

possession of the said property

(Similar declarations to be introduced if defendant No 1 pays the amount found or declared to be due to defendant No 2 with such variations as may be necessary having regard to the nature of his mortgage)

4 And it is hereby further ordered and decreed that in default of payment as aforesaid of the amount due to the plaintiff the plaintiff shall be at liberty to apply to the Court for a final decree—

- (i) "[in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage deed is foreclosure and not sale] that the defendants jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required deliver to the plaintiff quiet and peaceable possession of the said property or
 (ii) "[in the case of any other mortgage] that the mortgaged property or a sufficient part thereof shall be sold and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property and
 (iii) "

passed in this suit and in payment of the amount which the Court may adjudge due to the plaintiff in respect of such costs of this suit and such costs charges and expenses as may be payable under R 10 together with such subsequent interest as may be payable under R 11 of O 34 of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be applied in payment of the amount due to defendant No 2 and that if any balance be left it shall be paid to the defendant No 1 or other persons entitled to receive the same and

- (iv) that if the money realised by such sale shall not be sufficient for payment in full of the amounts due to the plaintiff and defendant No 2, the plaintiff or defendant No 2 or both of them as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No 1 for the amounts remaining due to them respectively

* Words not required to be deleted,

5 And it is hereby further ordered and decreed—

(a) that if defendant No 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No 1 makes default in the payment of the said amount defendant No 2 shall be at liberty to apply to the Court to keep the plaintiff's mortgage alive for his benefit and to apply for a final decree (in the same manner as the plaintiff might have done under clause 4 above) —

* [(i) that defendant No 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the schedule annexed hereto and shall if so required, deliver up to defendant No 2 quiet and peaceable possession of the said property] or

* [(ii) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale defendant No 2 shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property]

and (b) (if on the application of defendant No 2 such a final decree for foreclosure is

6 And it is hereby further ordered and decreed * [in the case where a sale is ordered under clause 5 above] —

(i) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by defendant No 2 in respect of the plaintiff's mortgage and the costs of the suit in connection therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount, and that the balance if any shall then be applied in payment of the amount adjudged due to defendant No 2 in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of this suit and such costs charges and expenses as may be payable to defendant No 2 under R 10 together with such subsequent interest as may be payable under R 11 of O 34 of the first Schedule to the Code of Civil Procedure 1903 and that the balance if any shall be paid to defendant No 1 or other persons entitled to receive the same and

(ii) that if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of the plaintiff's mortgage or defendant No 2's mortgage defendant No 2 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No 1 for the amount of the balance

7 And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

Form No 9

FINAL DECREE FOR REDEMPTION

(Title)

Upon reading the preliminary decree passed in this suit on the _____ day of _____ and further orders dated the _____ 19____, and the decree and after hearing the parties and on it appearing that payment of the sum found due by the preliminary decree and subse-

quent orders has been made and all further orders of the Court have been complied with by the plaintiff

It is hereby ordered and decreed that the defendant No shall deliver to the plaintiff or to such person as the plaintiff appoints in this behalf the mortgaged property specified in the Schedule hereto and all documents in the possession or power of the defendant No relating to the said property, and shall execute and have registered (as required by the plaintiff and at the cost of the plaintiff) either (i) an acknowledgment in writing that all rights created by the mortgage in suit have been extinguished, (ii) a retransfer to the plaintiff or to such third person as he may direct of the said property freed from the mortgage and from all encumbrances created by the defendant or by any person deriving title from him, or (iii) a transfer of the mortgage to such third person as the plaintiff may direct

SCHEDULE

(The property)

Note—This form is applicable, with substitution of the proper party for the 'plaintiff' where the decree is in favour of a party other than the plaintiff

Rangoon

Re number Forms 12 to 23 as 10 to 21 respectively

No 10

PRELIMINARY DECREE FOR REDEMPTION OF PRIOR MORTGAGE AND FORECLOSURE OR SALE ON SUBSEQUENT MORTGAGE

[Plaintiff	us	2nd Mortgagee,
Defendant No 1		Mortgagor,
Defendant No 2		1st Mortgagee]

(O 31 Rr 2 4 and 7)

(Title)

The suit coming on this day etc It is hereby declared that the amount due to defendant No 2 on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs for principal the sum of Rs for interest on the said principal the sum of Rs for costs charges and expenses (other than the costs of the suit) properly incurred by defendant No 2 in respect of the mortgage security with interest thereon and the sum of Rs for the costs of this suit awarded to defendant No 2, making in all the sum of Rs

(Similar declarations to be introduced with regard to the amount due from defendant No 1 to the plaintiff in respect of his mortgage if the mortgage money due there under has become payable at the date of the suit)

2 It is further declared that defendant No 2 is entitled to payment of the amount due to him in priority to the plaintiff [or if (there are several subsequent mortgagees) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively —]

3 And it is hereby ordered and decreed as follows —

(i) (a) that the plaintiff or defendant No 1 or one of them do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs due to defendant No 2, and

(b) that defendant No 1 do pay into Court on or before the day of or any later date up to

(a) or where the defendant claims by derived title by those under whom he claims
*Words not required to be deleted

which time for payment has been extended by the Court the said sum of Rs _____ due to the plaintiff, and

- (ii) that on payment of the sum declared due to defendant No. 2 by the plaintiff and defendant No 1 or either of them in the manner prescribed in Clause (i) (a) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable under R 10 together with such subsequent interest as may be payable under R 11 of O 31 of the First Schedule to the Code of Civil Procedure, 1908, defendant No 2 shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the plaintiff or defendant No 1 (whoever has made the payment) or to such person as he appoints and defendant No 2 shall if so required re convey or re transfer the said property free from the said mortgage and clear of and from all encumbrances created by defendant No 2 or any person claiming under him or any person under whom he claims and

(Similar declarations to be introduced if defendant No 1 pays the amount for and or declared due to the plaintiff with such variations as may be necessary having regard to the nature of his mortgage)

4 And it is hereby further ordered and decreed that, in default of payment as aforesaid of the amount due to defendant No 2, defendant No 2 shall be at liberty to apply to the Court that the suit be dismissed or for a final decree—

- (i) *“in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the that the plaintiff and and defend forth stand absolutely debarred the mortgaged property described in the Schedule annexed hereto and shall if so required deliver to the defendant No 2 quiet and peaceable possession of the said property or*
- (ii) *“in the case of any other mortgage] that the mortgaged property or a sufficient part thereof shall be sold and that for the purposes of such sale defendant No 2 shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property, and*
- (iii) *“in the case where a sale is ordered under clause 1 (ii) above] that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to defendant No 2 under the decree and any further orders that may be passed in this suit and in payment of the amount which the Court may adjudge due to defendant No 2 in respect of such costs of the suit and such costs charges and expenses as may be payable to the plaintiff under R 10 together with such subsequent interest as may be payable under R 11 of O 31 of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be applied in payment of the amount due to the plaintiff and that, if any balance be left it shall be paid to defendant No 1 or other persons entitled to receive the same and*
- (iv) that if the money realised by such sale of the amounts due to defendant No plaintiff or both of them, as the remedy is open under the terms of their respective by any law for the time being in force to apply for a personal decree against defendant No 1 for the amount remaining due to them respectively

5 And it is hereby further ordered and decreed —

- (a) that if the plaintiff pays into Court to the credit of this suit the amount adjudged

due to defendant No. 2 but defendant No. 1 makes default in the payment of the said amount the plaintiff shall be at liberty to apply to the Court to keep defendant No. 2's mortgage alive for his benefit and to apply for a final decree (in the same manner as the defendant No. 2 might have done under clause 1 above)—

"[(i) that defendant No. 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall if so required, deliver up to the plaintiff quiet and peaceable possession of the said property] or

"[(ii) that the mortgaged property or a sufficient part thereof be sold and that for the purpose of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property]

and (b) (if on the application of defendant No. 2 such a final decree for foreclosure is passed) that the whole of the liability of defendant No. 1 arising from the plaintiff's mortgage or from the mortgage of the defendant No. 2 or from this suit shall be deemed to have been discharged and extinguished

6 And it is hereby further ordered and decreed (in the case where a sale is ordered under clause 5 above) —

(i) that the money realized by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by the plaintiff in respect of defendant No. 2's mortgage and the costs of the suit in connexion therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount and that the balance if any shall then be applied in payment of the amount adjudged due to the plaintiff in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable to the plaintiff under R 10 together with such subsequent interest as may be payable under P 11 of O 31 of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be paid to defendant No. 1 or other persons entitled to receive the same and

(ii) that if the money realized by such sale shall not be sufficient for payment in full of the amount due in respect of defendant No. 2's mortgage or the plaintiff's mortgage defendant No. 1 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amount of the balance

7 And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

No 11

PRELIMINARY DECREE FOR SALE

[Plaintiff—Sub or derivative mortgagees

vs

Defendant No. 1—Mortgagor

Defendant No. 2—Original mortgagees]

(O 31 R 4)

(Title)

This suit coming on this

day, etc., It is hereby declared that the

amount due to defendant No. 2 on his mortgage calculated up to this day of
 is the sum of Rs. for principal the sum of Rs.
 for interest on the said principal the sum of Rs. for costs charges
 and expenses (other than the costs of the suit) in respect of the mortgage security together
 with interest thereon and the sum of Rs. for the costs of the suit and
 to defendant No. 2 making in all the sum of Rs.

(Similar declarations to be introduced with regard to the amount due from defendant No. 2 to the plaintiff in respect of his mortgage)

2 And it is hereby ordered and decreed as follows —

(i) that defendant No. 1 do pay into Court on or before the said day of or any later date up to which time for payment may be extended by the Court the said sum of Rs. due to defendant No. 2

(Similar declarations to be introduced with regard to the amount due to the plaintiff from defendant No. 2 being at liberty to pay such amount)

(ii) that on payment of the sum declared due to defendant No. 2 by defendant No. 1 in the manner prescribed in clause 2 (i) and on payment thereafter by any date as the Court may fix of such amount as the Court may adjudge in respect of such costs of the suit and such costs charges and expenses as may be payable under R. 10 together with such subsequent interest as may be payable under R. 11, of O 34 of the First Schedule to the Code of Civil Procedure 1908 the plaintiff and defendant No. 2 shall bring into Court all documents in their possession or power relating to the mortgaged property in the plaintiff's hands and all such documents (except such as relate only to the sub-mortgage) shall be delivered over to defendant No. 1 or to such person as he appoints, and defendant No. 2 shall if so required convey or retransfer the property to defendant No. 1 free from the said mortgage clear of and from all incumbrances created by defendant No. 2 or any person claiming under him or any person under whom he claims and free from all liability arising from the mortgage or this suit and shall if so required deliver up to defendant No. 1 quiet and peaceable possession of the said property and

(iii) that upon payment into the Court by defendant No. 1 of the amount due to defendant No. 2 the plaintiff shall be at liberty to apply for payment to him of the sum declared due to him together with any subsequent costs of the suit and other costs charges and expenses as may be payable under R. 10 together with such subsequent interest as may be payable under R. 11 of O 34 of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall then be paid to defendant No. 2 and that if the amount paid into the Court is not sufficient to pay in full the sum due to the plaintiff the plaintiff shall be at liberty (if such remedy is open to him by the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 for the amount of the balance.

3 And it is further ordered and decreed that if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff the plaintiff shall bring into the Court all documents etc. (as in sub clause (ii) of clause 2)

4 And it is hereby further ordered and decreed that in default of payment by defendant Nos. 1 and 2 as aforesaid the plaintiff may apply to the Court for a final decree and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold and that for the purposes of such sale the plaintiff and defendant No. 2 shall produce before the Court or such officer as it appoints all documents in their possession or power relating to the mortgaged property

5 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount due to the plaintiff as specified in clause 1 above with the costs of the suit and other costs charges and expenses as may be payable under R. 10 together with such subsequent interest as may be payable under R. 11 of O 34 of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be applied in payment of

the amount due to defendant No 2; and that, if any balance be left it shall be paid to defendant No 1 or other persons entitled to receive the same

6 And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amounts payable to the plaintiff and defendant No 2 the plaintiff or defendant No 2 or both of them, as the case may be shall be at liberty (if such remedy is open under their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No 2 or defendant No 1 (as the case may be) for the amount of the balance

7 And it is hereby further ordered and decreed that, if defendant No 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No 1 makes default in payment of the amount due to the defendant No 2, defendant No 2 shall be at liberty to apply to the Court for a final decree for foreclosure or sale (as the case may be)—*(declarations in the ordinary form to be introduced according to the nature of defendant No 2's mortgage and the remedies open to him thereunder)*

8 And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE.

Description of the mortgaged property

— — —
No 12

DECREE FOR RECTIFICATION OF INSTRUMENT

(Title)

19 It is hereby declared that the _____, dated the _____ day of _____
does not truly express the intention of the parties to such _____
And it is decreed that the said _____ be rectified by _____

— — —
No 13

DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CREDITORS

(Title)

It is hereby declared that the _____, dated the _____ day of _____
19 _____, and made between _____ and _____
is void as against the plaintiff and all other the creditors, if any, of the defendant.

— — —
No 14.

INJUNCTION AGAINST PRIVATE NUISANCE.

(Title)

Let the defendant _____, his agents, servants and workmen, be perpetually restrained from burning or causing to be burnt, any bricks on the defendant's plot of land marked B in the annexed plan, so as to occasion a nuisance to the plaintiff as the owner or occupier of the dwelling house and garden mentioned in the plaint as belonging to and being occupied by the plaintiff

— — —
No 15

INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL.

(Title)

Let the defendant _____, his contractors, agents and workmen, be per-

perpetually restrained from continuing to erect upon his premises in any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down so or in such manner as to darken injure or obstruct such of the plaintiff's windows in his said premises as are ancient lights.

No 16

INJUNCTION RESTRAINING USE OF PRIVATE ROAD

(Title)

Let the defendant his agents servants and workmen be perpetually restrained from using or permitting to be used any part of the lane at the soil of which belongs to the plaintiff as a carriage way for the passage of carts carriages or other vehicles either going to or from the land marked B in the annexed plan or for any purpose whatsoever

No 17.

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT

(Title)

It is ordered that the following accounts and inquiries be taken and made that is to say —

In creditor's suit—

1 That an account be taken of what is due to the plaintiff and all the other creditors of the deceased

In suit by legatees—

2 That an account be taken of the legacies given by the testator's will

In suits by next of kin—

3 That an inquiry be made and account taken of what or of what share if any the plaintiff is entitled to as next of kin [or one of the next of kin] of the intestate

[After the first paragraph the decree will where necessary order in a creditor's suit inquiry and accounts for legatees heirs at law and next of kin In suits by claimants other than creditors after the first paragraph in all cases an order to inquire and take an account of creditors will follow the first paragraph and such of the others as may be necessary will follow omitting the first formal words The form is continued as in a creditor's suit]

4 An account of the funeral and testamentary expenses

5 An account of the moveable property of the deceased come to the hands of the defendant or to the hands of any other person by his order or for his use

6 An inquiry what part (if any) of the moveable property of the deceased is outstanding and undisposed of

7 And it is further ordered that the defendant do on or before the day of next pay into Court all sums of money which shall be found to have come to his hands or to the hands of any person by his order or for his use

8 And that if the *shall find it necessary for carrying out the objects of the suit to sell any part of the moveable property of the deceased that the same be sold accordingly and the proceeds paid into Court

9 And that Mr L. F. be receiver in the suit (or proceeding) and receive and get in all outstanding debts and outstanding moveable property of the deceased and pay the same into the hands of the * (and shall give security by bond for the due performance of his duties to the amount of rupees)

10 And it is further ordered that if the moveable property of the deceased be found insufficient for carrying out the objects of the suit then the following further inquiries be made and accounts taken that is to say—

(a) An inquiry what immoveable property the deceased was seized of or entitled to at the time of his death

* Here insert name of proper officer

(f) An inquiry what are the incumbrances (if any) affecting the immoveable property of the deceased or any part thereof,

(c) An account so far as possible of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed

11 And that the immoveable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit, be sold with the approbation of the Judge free from incumbrances (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent

12 And it is ordered that G. H. shall have the conduct of the sale of the immoveable property and shall prepare the conditions and contracts of sale subject to the approval of the * and that in case any doubt or difficulty shall arise the papers shall be submitted to the Judge to settle

13 And it is further ordered that for the purpose of the inquiries hereinbefore directed, the *shall advertise in the newspapers according to the practice of the Court or shall make such inquiries in any other way which appear to the *to give the most useful publicity to such inquiries

14 And it is ordered that the above inquiries and accounts be made and taken, and that all other acts ordered to be done be completed, before the day of , and that the *do certify the result of the inquiries and the accounts and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

15 And lastly, it is ordered that this suit [or proceeding] stand adjourned for making final decree to the day of

[Such part only of this decree is to be used as is applicable to the particular case]

No 13.

FINAL DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE

(Title)

1. It is ordered that the defendant do, on or before the day of , pay into Court the sum of Rs , the balance by the said certificate found to be due from the said defendant on account of the estate of , the testator, and also the sum of Rs for interest, at the rate of Rs. per cent per annum, from the day of to the day of , amounting together to the sum of Rs .

2 Let the *of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said costs, when so taxed, be paid out of the said sum of Rs. ordered to be paid into Court as aforesaid as follows —

(a) The costs of the plaintiff to Mr his attorney [or pleader] or and the costs of the defendant to Mr his attorney [or pleader]

(b) And (if any debts are due) with the residue of the said sum of Rs after payment of the plaintiff's and defendant's costs as aforesaid let the sums, found to be owing to the several creditors mentioned in the schedule to the certificate, of the *, together with subsequent interest on such of the debts as bear interest, be paid, and, after making such payments, let the amount coming to the several legatees mentioned in the schedule, together with subsequent interest (to be verified as aforesaid), be paid to them

3 And if there should then be any residue, let the same be paid to the residuary legatee

perpetually restrained from continuing to erect upon his premises in any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down so or in such manner as to darken injure or obstruct such of the plaintiff's windows in his said premises as are ancient lights.

No 16

INJUNCTION RESTRAINING USE OF PRIVATE ROAD

(Title)

Let the defendant his agents servants and workmen be perpetually restrained from using or permitting to be used any part of the lane at the soil of which belongs to the plaintiff as a carriage way for the passage of carts carriages or other vehicles either going to or from the land marked B in the annexed plan or for any purpose whatsoever

No 17.

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT

(Title)

It is ordered that the following accounts and inquiries be taken and made that is to say —

In creditor's suit—

1 That an account be taken of what is due to the plaintiff and all the other creditors of the deceased

In suit by legatees—

2 That an account be taken of the legacies given by the testator's will.

In suits by next of kin—

3 That an inquiry be made and account taken of what or of what share if any the plaintiff is entitled to as next of kin (or one of the next of kin) of the intestate

4 An account of the funeral and testamentary expenses

5 An account of the moveable property of the deceased come to the hands of the defendant or to the hands of any other person by his order or for his use

6 An inquiry what part (if any) of the moveable property of the deceased is outstanding and undisposed of

8 And that if the *shall find it necessary for carrying out the objects of the suit to sell any part of the moveable property of the deceased that the same be sold accordingly and the proceeds paid into Court

9 And that Mr D F be receiver in the suit (or proceeding) and receive and get in all outstanding debts and outstanding moveable property of the deceased and pay the same into the hands of the *(and shall give security by bond for the due performance of his duties to the amount of rupees)

10 And it is further ordered that if the moveable property of the deceased be found insufficient for carrying out the objects of the suit then the following further inquiries be made and accounts taken that is to say—

(a) An inquiry what immovable property the deceased was seized of or entitled to at the time of his death

* Here insert name of proper officer

(b) An inquiry what are the incumbrances (if any) affecting the immovable property of the deceased or any part thereof,

(c) An account so far as possible of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed

11 And that the immovable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit, be sold with the approbation of the Judge free from incumbrances (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent

12 And it is ordered that G. H. shall have the conduct of the sale of the immovable property, and shall prepare the conditions and contracts of sale subject to the approval of the Judge, and that in case any doubt or difficulty shall arise the papers shall be submitted to the Judge to settle

13 And it is further ordered that for the purpose of the inquiries hereinbefore directed, the Judge shall advertise in the newspapers according to the practice of the Court or shall make such inquiries in any other way which appear to the Judge to give the most useful publicity to such inquiries

14 And it is ordered that the above inquiries and accounts be made and taken, and that all other acts ordered to be done be completed, before the day of the month of 190 . . . and that the Judge do certify the result of the inquiries and the accounts, and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of the month of 190 . . .

15 And lastly, it is ordered that this suit [or proceeding] stand adjourned for making final decree to the day of the month of 190 . . .

(Such part only of this decree is to be used as is applicable to the particular case)

No 18.

FINAL DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE

(Title)

1. It is ordered that the defendant do, on or before the day of the month of 190 . . ., pay into Court the sum of Rs . . ., the balance by the said certificate found to be due from the said defendant on account of the estate of the said . . ., the testator and also the sum of Rs . . . for interest, at the rate of Rs . . . per cent per annum, from the day of the month of 190 . . ., amounting together to the sum of Rs . . .

2 Let the Judge of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said costs, when so taxed, be paid out of the said sum of Rs . . . ordered to be paid into Court as aforesaid, as follows —

(a) The costs of the plaintiff to Mr . . . his attorney [or pleader] or and the costs of the defendant to Mr . . . his attorney [or pleader]

(b) And (if any debts are due) with the residue of the said sum of Rs . . . after payment of the plaintiff's and defendant's costs as aforesaid, let the sums, found to be owing to the several creditors mentioned in the schedule to the certificate, of the . . ., together with subsequent interest on such of the debts as bear interest, be paid, and, after making such payments, let the amount coming to the several legatees mentioned in the schedule, together with subsequent interest (to be verified as aforesaid), be paid to them

3 And if there should then be any residue, let the same be paid to the residuary legatee

Here insert name of proper officer

No 19

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE, WHERE
AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE PAYMENT
OF LEGACIES

(Title)

- 1 It is declared that the defendant is personally liable to pay the legacy of Rs. _____ bequeathed to the plaintiff,
- 2 And it is ordered that an account be taken of what is due for principal and interest on the said legacy
- 3 And it is also ordered that the defendant do, within _____ weeks after the date of the certificate of the _____, pay to the plaintiff the amount of what the _____ shall certify to be due for principal and interest
- 4 And it is ordered that the defendant do pay the plaintiff his costs of suit the same to be taxed in case the parties differ

No 20

FINAL DECREE IN AN ADMINISTRATION SUIT BY NEXT OF KIN

(Title)

- 1 Let the _____ of the said Court tax the costs of the plaintiff and defendant in this suit and let the amount of the said plaintiff's costs, when so taxed be paid by the defendant to the plaintiff out of the sum of Rs _____, the balance by the said certificate found to be due from the said defendant on account of the personal estate of E F the intestate within one week after the taxation of the said costs by the said _____, and let the defendant retain for her own use out of such sum her costs when taxed
- 2 And it is ordered that the residue of the said sum of Rs _____ after payment of the plaintiff's and defendant's costs as aforesaid, be paid and applied by defendant as follows —
 - (a) Let the defendant within one week after the taxation of the said costs by the _____ as aforesaid pay one third share of the said residue to the plaintiffs A B and C D his wife in her right as the sister and one of the next of kin of the said E F, the intestate.
 - (b) Let the defendant retain for her own use one other third share of the said residue as the mother and one of the next of kin of the said E F the intestate
 - (c) And let the defendant within one week after the taxation of the said costs by the _____ as aforesaid pay the remaining one third share of the said residue to G H as the brother and the other next of kin of the said E F the intestate

No 21

PRELIMINARY DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP
AND THE TAKING OF PARTNERSHIP ACCOUNTS

(Title)

It is declared that the proportionate shares of the parties in the partnership are as follows —

It is declared that this partnership shall stand dissolved [or shall be deemed to have been dissolved] as from the _____ day of _____, and it is ordered that the dissolution thereof as from that day be advertised in the Gazette etc

And it is ordered that _____ be the receiver of partnership-estate and effects in this suit and do get in all the outstanding book debts and claims of the partnership

And it is ordered that the following accounts be taken —

- 1 An account of the credits properly and effects now belonging to the said partner-ship,
- 2 An account of the debts and liabilities of the said partnership,
- 3 An account of all dealings and transactions between the plaintiff and defendant, from the foot of the settled account exhibited in this suit and marked (A) and not disturbing any subsequent settled accounts

And it is ordered that the goodwill of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned and the stock in trade, be sold on the premises, and that the _____ may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed before the _____ day of _____ and that the _____ do certify the result of the accounts, and that all other acts are completed and have his certificate in that behalf ready for the inspection of the parties on the _____ day of _____

And lastly it is ordered that this suit stand adjourned for making a final decree to the _____ day of _____

— — — — —
No 22

FINAL DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS

(Title)

It is ordered that the fund now in Court, amounting to the sum of Rs _____
be applied as follows

- 1 In payment of the debts due by the partnership set forth in the certificate of the _____
amounting in the whole to Rs _____

- 2 In payment of the costs of all parties in this suit, amounting to Rs _____

[These costs must be ascertained before the decree is drawn up]

- 3 In payment of the sum of Rs _____ to the plaintiff as his share of the
partnership assets of the sum of Rs _____, being the residue of the
said sum of Rs _____ now in Court, to the defendant as his share of the
partnership assets.

[Or And that the remainder of the said sum of Rs _____ be paid
to the said plaintiff (or defendant) in part payment of the sum of Rs _____
certified to be due to him in respect of the partnership accounts]

- 4 And that the defendant [or plaintiff] do on or before the _____ day of _____
pay to the plaintiff [or defendant]
being the balance of the said sum of
the sum of Rs _____
Rs _____ due to him, which will then remain due

— — — — —
No 23.

DECREE FOR RECOVERY OF LAND AND MESNE PROFITS

(Title)

It is hereby decreed as follows —

- 1 That the defendant do put the plaintiff in possession of the property specified in the schedule hereunto annexed

- 2 That the defendant do pay to the plaintiff the sum of Rs _____
with interest thereon at the rate of _____ per cent per annum to the

* Here insert name of proper officer

ix date of realization on account of mesne profits which have accrued due prior to the institution of the suit

Or

2 That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit

3 That an inquiry be made as to the amount of mesne profits from the institution of the suit until [the delivery of possession to the decree holder] [the relinquishment of possession by the judgment debtor with notice to the decree holder through the Court] [the expiration of three years from the date of the decree]

Schedule

Local Amendment

Madras

Add the following form as Form No 24, viz

"No 24.

DECREE SANCTIONING A COMPROMISE OF A SUIT ON BEHALF OF A MINOR OR A LUNATIC.

(Title)

sence of etc., and O D, the
but this suit may be compromised of

the said guardian *ad litem* of the other part, (or, on the terms hereafter set forth) and, it appearing to this Court that the said compromise is fit and proper and for the benefit of the said minor this Court doth sanction the said compromise on behalf of the said minor and with the consent of all parties hereto It is ordered as follows —
(Set out the terms of the compromise)'

APPENDIX E.

EXECUTION.

No 1

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT SHOULD NOT BE RECORDED AS CERTIFIED.

(O. 21, R 2)

(Title)

To

Whereas in execution of the decree in the above named suit applied to this Court that the sum of Rs

has
recoverable under the

decree has been ^{paid} ———— and should be recorded as certified, this is to give you notice that
^{adjusted}
you are to appear before this Court on the _____ day of

19, to show cause why the ^{payment} ———— aforesaid should not be recorded as
^{adjustment}
certified

Given under my hand and the seal of the Court, this
19 _____ day of

Judge

No 2

PRECEPT

(Section 46).

(Title)

Court

of
Proce
hold
of the decree

Dated the

day of

19 Judge

Schedule

g that the judgment
the said Court and
ider O 21 R 6 of the

19
Judge

19 .
Judge

1	2	3	4	5	6	7	8	9
Number of suit and the Court by which the decree was passed	Names of parties	Date of application for execution	Number of the execution case	Processes issued and dates of service thereof	Costs of execution	Amount realized	How the case is disposed of	Remarks
					<i>R a p</i>	<i>R a p</i>		

(1) If partial, strike out "no" and state to what extent

date of realization on account of mesne profits which have accrued due prior to the institution of the suit

Or

2. That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit

the institution of
ishment of posses
Court] [the expira

Schedule.

Local Amendment

Madras

Add the following form as Form No 24, viz

"No 24.

DECREE SANCTIONING A COMPROMISE OF A SUIT ON BEHALF OF A MINOR
OR A LUNATIC.

(Title)

This suit coming on this day for final disposal in the presence of etc, and O D, the defendant, a minor by E F, his guardian *ad litem*, applying that this suit may be compromised in the terms of an agreement in writing, dated the

part, and the said O D by
s hereafter set forth) and, it
or and for the benefit of the
behalf of the said minor, and

APPENDIX E.

EXECUTION.

No. 1.

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT SHOULD
NOT BE RECORDED AS CERTIFIED.

(O. 21, R 2)

(Title)

To

Whereas in execution of the decrees in the above named suit applied to this Court that the sum of Rs

has
recoverable under the

decrees has been ^{paid} and should be recorded as certified, this is to give you notice that
adjusted
you are to appear before this Court on the day of

19, to show cause why the ^{payment} aforesaid should not be recorded as
adjustment

certified

Given under my hand and the seal of the Court, this
19

day of

Judge

No 2.

PRECEPT.

(Section 46).

(Title)

in Court

of the decrees.

Dated the

day of

19 Judge

Schedule

No. 3.
ORDER SENDING DECREE FOR EXECUTION TO ANOTHER COURT
(O 21, R 6.)
(Title)

Whereas the decree holder in the above suit has applied to this Court for a certificate of execution to be sent to the Court of _____ at _____

. nent
an
f th

Ordered

That a copy of this order be sent to _____ with a copy of the decree and of any order which may have been made for execution of the same and a certificate of non satisfaction _____

Dated the _____ day of _____ 19____
Judge

No. 4
CERTIFICATE OF NON SATISFACTION OF DECREE
(O 21, R 6.)
(Title)

Certified that non satisfaction of the decree of this Court in Suit No _____ of 19____ a copy which is herunto attached has been obtained by execution within the jurisdiction of this Court,

Dated the _____ day of _____ 19____
Judge

No 5
CERTIFICATE OF EXECUTION OF DECREE TRANSFERRED TO
ANOTHER COURT
(O 21, R 6)
(Title)

Number of suit and the Court by which the decree was passed	Names of parties	Date of application for execution	Number of the execution case	Processes issued and dates of service thereof	Costs of execution	Amount realized	How the case is disposed of	Remarks
1	2	3	4	5	6	7	8	9
					R a p	R a p		

Signature of Muharrir in charge

Local Amendment.

Signature of Judge

Rangoon

In the heading of Form No 5 for the words and figures 'O 21, R 6,' the word and figures 'Section 41' shall be substituted

(1) If partial, strike out "no" and state to what extent

No 6

APPLICATION FOR EXECUTION OF DECREE.

(O 21, R 11)

In the Court of

I,
 below set forth — , decree holder, hereby apply for execution of the decree hereon

No of suit	Names of parties	Date of decree	Whether any appeal preferred from decree	Payment or adjustment made, if any	Previous application, if any, with date and result	Amount with interest due upon the decree or other relief granted thereby together with particulars of any cross decree	Amount of costs, if any, awarded	Against whom to be executed	Mode in which the assistance of the Court is required
1	2	3	4	5	6	7	8	9	10
789 of 1897	A B—Plaintiff C D—Defendant	October 11 1897	No	None	Rs 72 4 recorded on application, dated the 4th March, 1899	Rs 314 8 2 principal [interest at 6 per cent per annum, from date of decree till payment]	<div>Rs A P</div> <div>As awarded in the decree . . . 47 10 4</div> <div>Subsequently incurred . . . 8 2 0</div> <div>Total 55 12 4</div>	Against the defendant C D	<p>[When attachment and sale of moveable property is sought]</p> <p>I pray that the total amount of Rs [together with interest on the principal sum up to date of payment] and the costs of taking out this execution be realized by attachment and sale of defendant's moveable property as per annexed list and paid to me</p> <p>[When attachment and sale of immovable property is sought]</p> <p>I pray that the total amount of Rs [together with interest on the principal sum up to date of payment] and the costs of taking out this execution be realized by the attachment and sale of defendant's immovable property specified at the foot of this application and paid to me</p>

I
knowledge and belief

declare that what is stated herein is true to the best of my

Dated the

Signed
day of, decree holder.
19

[When attachment and sale of immoveable property is sought]

Description and Specification of Property

The undivided one third share of the judgment debtor in a house situated in the village of value Rs 40 and bounded as follows —

East by G's house west by H's house, south by public road, north by private lane and J's house

I declare that what is stated in the above description is true to the best of my knowledge and belief and so far as I have been able to ascertain the interest of the defendant in the property therein specified

Signed , decree holder

No 7

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE

[(O 21, R 16)]

(Title)

To

Whereas

has made application to this Court for execution of decrees in Suit No of 19 on the allegation that the said decree has been transferred to him by assignment this is to give you notice that you are to appear before this Court on the day of 19 to

show cause why execution should not be granted

Given under my hand and the seal of the Court, this day of 19

No. 8

WARRANT OF ATTACHMENT OF MOVEABLE PROPERTY IN EXECUTION OF A DECREE FOR MONEY

(O 21, R 30)

(Title)

To

The Bailiff of the Court

Whereas

day of

was ordered by decrees of this Court passed on the 19 in Suit No of 19, to

Decree			
Principal			
Interest			
Costs			
Costs of execution			
Further Interest			
Total			

pay to the plaintiff the sum of Rs as noted in the margin, and whereas the said sum of Rs has not been paid, These are to command you to attach the moveable property of the said

as set forth in the schedule hereunto annexed, or which shall be pointed out to you by the said

unless the said and shall pay to you the said sum of Rs.

together with Rs the costs of this attachment, to hold the same until further orders from this Court

You are further commanded to return this warrant on or before the day of 19, with an endorsement certifying the day on which and manner in which it has been executed, or why it has not been executed

Given under my hand and the seal of the Court, this day of 19

Judge

Schedule

1 This reference was substituted for the reference ' (O 21, R 22) ' by S 2 and Sch I of the Repealing and Amending Act, 1914 (V of 1914)

No 6

APPLICATION FOR EXECUTION OF DECREE

(O 21, R 11)

In the Court of

I
below set forth —

, decree holder, hereby apply for execution of the decree herein

No of suit	Names of parties	Date of decree	Whether any appeal preferred from decree	Payment or adjustment made if any	Previous application, if any, with date and result	Amount with interest due upon the decree or other relief granted thereby together with particulars of any cross decree	Amount of costs, if any, awarded	Against whom to be executed	Mode in which the assistance of the Court is required
1	2	3	4	5	6	7	8	9	10
780 of 1897	A B—Plaintiff C D—Defendant	October 11, 1897	No	None	Rs 72 4 recorded on application dated the 4th March, 1899	Rs 314 8 2 principal [interest at 6 per cent per annum from date of decree till payment]	<div>Rs A P</div> <div>As awarded in the decree . . . 47 10 4</div> <div>Subsequently incurred . . . 8 2 0</div> <div>Total 55 12 4</div>	Against the defendant C D	<div>[When attachment and sale of moveable property is sought]</div> <div>I pray that the total amount of Rs (together with interest on the principal sum up to date of payment) and the costs of taking out this execution be realized by attachment and sale of defendant's moveable property as per annexed list and paid to me</div> <div>[When attachment and sale of immovable property is sought]</div> <div>I pray that the total amount of Rs (together with interest on the principal sum up to date of payment) and the costs of taking out this execution be realized by the attachment and sale of defendant's immovable property specified at the foot of this application and paid to me</div>

I
knowledge and belief

Dated the

declare that what is stated herein is true to the best of my

Signed
day of, decree holder.
19

of against A B of . A

C D of
 know all men by these presents that we, I J of etc,
 and K L of etc, and M N of
 etc, are jointly and severally bound to the Judge of the Court of
 in Rs. to be paid to the said Judge, for which payment to
 be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors
 and administrators, jointly and severally by these presents
 Dated this day of 19
 And whereas the moveable property specified in the Schedule hereunto annexed has been
 attached under a warrant from the said Court dated the day of
 19, in execution of a decree in favour of
 in suit No of 19 on
 the file of and the said property has been left in the charge
 of the said I J

Now the condition of this obligation is that, if the above bounden I J shall duly account
 for and produce when required before the said Court all and every the property aforesaid
 and shall obey any further order of the Court in respect thereof, then this obligation shall
 be void otherwise it shall remain in full force

I J
 K L
 M N

Signed and delivered by the above bounden in the presence of

Form No 15 B.

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF ANY PERSON AND SURETIES

[O 21, R. 43 (1) (c)]

In the Court of at Civil Suit No
 of A B. of
 against

C D of
 Know all men by these presents that we, I J of etc, and K L of
 etc, are jointly and severally bound to the Judge of the Court of
 in Rupees to be paid to the said Judge for which
 payment to be made we bind ourselves, and each of us, in the whole our and each of our heirs,
 executors and administrators, jointly and severally, by these presents
 Dated this day of 19
 And whereas the moveable property specified in the schedule hereunto annexed has been
 attached under a warrant from the said Court, dated the day of
 19, in execution of a decree in favour of in suit No of
 19 on the file of

for and
 shall o
 otherw
 cordan

I J were a surety for the restoration of property taken in execution of a decree

I J
 K L
 M N

Signed and delivered by the above bounden in the presence of ."

Madras

For the word "dated" substitute the words "Given under my hand and the seal of the
 Court, this day of"

Add the following Form —

"Form No 15-A

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF PERSON INTERESTED AND SURETIES.

(O 21, R. 43)

In the Court of at Civil Suit No

dix

entitled to be released according to the terms and provisions of section 58 of the Code of Civil Procedure 1908, and the Court does hereby fix
annas per diem as the

day of

19

Judge

No 15

**ORDER FOR THE RELEASE OF A PERSON IMPRISONED IN
EXECUTION OF A DECREE**

(Sections 58 59)

(Title)

To

The Officer in charge of the Jail at
Under orders passed this day, you are hereby directed to set free
judgment debtor now in your custody

Dated

Judge

Local Amendments

Calcutta

Form No 15 A

**BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT
IN CHARGE OF ANY PERSON AND SURETIES
(Order XXI A Rules 3 (a) and (5))**

In the Court of _____ at _____
Civil Suit No _____ of _____
A B of _____ against _____

C D of

Know all men by these presents that we I J of _____
at _____

etc and h L of
etc are jointly
in Rupees

t to be made we bind ourselves and
rs and administrators jointly and

severally by these presents

Dated this _____ day of _____ 19 _____

And whereas the moveable property/livestock specified in the Schedule hereunto annexed
has been attached under a warrant from the said Court dated the _____ day of _____

in suit No _____ of _____ 19 _____ in execution of a decree in favour of _____
and the said property has been left in the charge of the said I J _____ on the file of _____

bounden I J shall duly
every the property/live
livestock aforesaid) and
obligation shall be void
bove bounden I J in the

execution proceedings

I J
K L
M N

Signed and delivered by the above
bounden in the presence of

Labore

Add the following —

'Form No 15-A

**BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT
IN CHARGE OF PERSON INTERESTED AND SURETIES**

(O 21 R 43)

In the Court of

at

Civil Suit No

of A B of against A

C D of
 know all men by these presents that we I J of etc, etc,
 and K L of etc and M N of etc,
 etc are jointly and severally bound to the Judge of the Court of
 in Rs to be paid to the said Judge, for which payment to
 be made we bind ourselves and each of us in the whole, our and each of our heirs, executors
 and administrators jointly and severally by these presents
 Dated this day of 19
 And whereas the moveable property specified in the Schedule hereunto annexed has been
 attached under a warrant from the said Court dated the day of
 19, in execution of a decree in favour of
 in suit No of 19 on
 the file of and the said property has been left in the charge
 of the said I J

Now the condition of this obligation is that, if the above bounden I J shall duly account
 for and produce when required before the said Court all and every the property aforesaid
 and shall obey any further order of the Court in respect thereof then this obligation shall
 be void otherwise it shall remain in full force

I J
 K L
 M N

Signed and delivered by the above bounden in the presence of

Form No 15 B

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF ANY PERSON AND SURETIES

[O 21 R 43 (1) (c)]

In the Court of at Civil Suit No
 of A B of
 against

C D of
 know all men by these presents that we, I J of etc, and K L of
 etc, are jointly and severally bound to the Judge of the Court of
 in Rupees to be paid to the said Judge for which
 payment to be made we bind ourselves and each of us, in the whole, our and each of our heirs,
 executors and administrators, jointly and severally, by these presents
 Dated this day of 19
 And whereas the moveable property specified in the schedule hereunto annexed has been
 attached under a warrant from the said Court, dated the day of
 19 in execution of a decree in favour of in suit No of
 19 on the file of

I J were a surety for the restoration of property taken in execution of a decree

I J
 K L
 M N

Signed and delivered by the above bounden in the presence of "

Madras

For the word "dated" substitute the words 'Given under my hand and the seal of the
 Court this day of "

Add the following Form —

"Form No 15 A

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF PERSON INTERESTED AND SURETIES

(O 21, R 43)

In the Court of at Civil Suit No

ix

of

A B of

C D of

against

Know all men by these presents that we I J of etc and K L of
 etc and M N of etc are jointly and severally bound to the Judge of
 the Court of in Rupees to be paid to the said
 Judge for which payment to be made we bind ourselves and each of us in the whole our and
 each of our heirs executors and administrators jointly and severally by these presents

Dated this day of 19

And whereas the moveable property specified in the schedule hereunto annexed has been
 attached under a warrant from the said Court dated the day of 19
 in execution of a decree in favour of in suit No of 19
 on the file of and the said property has been left in the charge of the said
 I J

t if the above bounden I J shall duly ac
 Courts all and every the property afore
 respect thereof then this obligation shall

I J
 K L
 M N

Signed and delivered by the above bounden

in the presence of

Rangoon

The following shall be inserted as From No 15 A —

Form No 15 A

FORM OF RECEIPT FOR MONEY DEPOSITED IN CONNECTION WITH THE ATTACHMENT OF PROPERTY TOGETHER WITH NOTICE TO DECREE HOLDER

In the Court of
 Execution Case No of 19

tensus

Received the sum of Rs on account of the following expenditure to
 be incurred in connection with attachment of property as per list appended —

Process Fees Rules—

1 15 (i) (b) (ii) 2 17 (1) (c) (ii) (2)

- 1 Custody Fees
- 2 Feeding charges
- 3 Conveyance charges
- 4 Other expenses (to be specified)

Rs	a	p

Total

N B — The decree holder is hereby warned that the sum deposited by him for re
 ccurring charges will be exhausted on the day of 19 and that unless a further
 deposit is made before that date the attachment will cease
 Date this day of 19

Bailiff

List of property to be attached

No 16

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF
 MOVEABLE PROPERTY TO WHICH THE DEFENDANT IS ENTITLED SUB-
 JECT TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE
 IMMEDIATE POSSESSION THEREOF (O 21 R 46)

(Title)

To

Whereas

has failed to

cature at Rangoon and

2 Strike out if used in the High Court of Judicature at Rangoon and the Small Cause
 Court Rangoon

day of 19 , in Suit No of 19 ,
 in favour of for Rs , It is ordered that the
 defendant be, and is hereby, prohibited and restrained until the further order of this Court,
 from receiving from the following property in the possession
 of the said , that is to say,
 to which the defendant is entitled, subject to any claim of the said
 and the said is hereby prohibited and restrained, until the further
 order of this Court, from delivering the said property to any person or persons whomsoever.
 Given under my hand and the seal of the Court, this
 day of 19 .

Judge.

No 17.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF DEBTS NOT SECURED BY NEGOTIABLE INSTRUMENTS

(O 21, R 46)

(Title)

To WHEREAS has failed to
 satisfy a decree passed against on the
 day of 19 , in Suit No.
 of 19 , in favour of for Rs ; It is
 ordered that the defendant be, and is hereby, prohibited and restrained, until the further
 order of this Court, from receiving from you a certain debt alleged now to be due from
 you to the said defendant, namely,
 and that you, the said , be,
 and you are hereby, prohibited and restrained, until the further order of this Court, from
 making payment of the said debt, or any part thereof, to any person whomsoever or otherwise
 than into this Court

GIVEN under my hand and the seal of the Court, this
 day of 19 .

Judge.

No 18

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES IN THE CAPITAL OF A CORPORATION.

(O 21, R 46)

(Title)

To , Secretary of Defendant and to
 Corporation
 WHEREAS has failed to satisfy a decree passed
 against on the
 day of 19 , in Suit No
 of 19 , in favour of , for Rs ;
 It is ordered that you, the defendant, be, and you are hereby, prohibited and restrained,
 until the further order of this Court, from making any transfer of
 shares in the aforesaid Corporation, namely, , or from receiving
 payment of any dividends thereon; and you, the Secretary of the
 said Corporation, are hereby prohibited and restrained from permitting any such transfer or
 making any such payment

Given under my hand and the seal of the Court, this
 day of 19 .

Judge.

No 19

ORDER TO ATTACH SALARY OF PUBLIC OFFICER OR SERVANT OF
RAILWAY COMPANY OR LOCAL AUTHORITY (O 21, R 48)

(Title)

To

WHEREAS

the above named case, is a *(describe office of judgment debtor)* receiving his salary (or allowances) at your hands, and whereas the said case, has applied in this Court for the attachment of the salary (or allowances) of the said *to the extent of* judgment debtor in decree holder in (or allowances) of due to him under the decree, You are hereby required to withhold the said sum of *in monthly* from the salary of the said *and to remit the said sum (or monthly instal* instalments of *ments) to this Court*

Given under my hand and the seal of the Court, this

19 .

day of

Judge

No 20

ORDER OF ATTACHMENT OF NEGOTIABLE INSTRUMENT

(O 21, R 51)

(Title)

To

The Bailiff of the Court

Whereas an order has been passed by this Court on the *19*, for the attachment of *day of* , You are hereby directed to seize the said *and bring the same into Court*

Given under my hand and the seal of the Court, this

19 .

day of

Judge

No 21

ATTACHMENT

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY
OR OF ANY SECURITY IN THE CUSTODY OF A COURT OF JUSTICE
OR OFFICER OF GOVERNMENT (O 21, R 52)

(Title)

To
Sir

The plaintiff having applied, under R 52 of O 21 of the Code of Civil Procedure, 1908, for an attachment of certain money now in your hands *(here state how the money is supposed to be in the hands of the person addressed on what account, etc)*, I request that you will hold the said money subject to the further order of this Court,

I have the honour to be

Sir,

Your most obedient Servant,
Judge

Dated 'the

day of

19 .

No 22

NOTICE OF ATTACHMENT OF A DECREE TO THE COURT WHICH PASSED IT
(O 21, R 53)

(Title)

To

Sir,

The Judge of the Court of

I have the honour to inform you that the decree obtained in your Court on the

day of _____ 19 , by _____
 in Suit No _____ of 19 , in which he was _____ : and
 _____ was
 application of _____ has been attached by this Court on the
 suit specified above You at _____ the _____
 Court until you receive an _____
 called or until execution of the _____
 to be executed or by his judgment gentler _____

I have the honour, etc ;
 Judge

Dated the _____ day of _____ 19 .

No. 23.

NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF THE DECREE.

(O. 21, R 53)

(Title)

To _____
 Whereas an application has been made in this Court by the decree-holder in the above
 suit for the attachment of a decree obtained by you on the _____ day
 of _____ 19 in the Court of _____
 in Suit No _____ of 19 , in
 which _____ was _____ and
 _____ , It is ordered that you, the said
 _____ , be, and you are hereby,
 prohibited and restrained, until the further order of this Court, from transferring or charging
 the same in any way

Given under my hand and the seal of the Court, this _____ day of
 19 .

Judge

No 24.

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER WHERE THE PROPERTY CONSISTS OF IMMOVABLE PROPERTY.

(O 21, R 54)

(Title)

To _____ Defendant.

Whereas you have failed to satisfy a decree passed against you on the
 day of _____ 19 , in Suit No _____
 of 19 , in favour of _____

for Rs _____ ; It is
 ordered that you, the said _____ , be, and
 you are hereby, prohibited and restrained, until the further order of this Court, from trans-
 ferring or charging the property specified in the schedule herunto annexed, by sale, gift or
 otherwise and that all persons be, and that they are hereby, prohibited from receiving the same
 by purchase, gift or otherwise

Given under my hand and the seal of the Court, this _____ day of
 19 .

Schedule

Judge.

No 25

ORDER FOR PAYMENT TO THE PLAINTIFF, ETC, OF MONEY, ETC, IN THE
HANDS OF A THIRD PARTY (O 21, R. 56)

(Title)

To

Whereas the following property has been attached in execution of a decree in Suit No of 19, passed on the day of 19, in favour of ; It is ordered that the property so attached, consisting of Rs in money and Rs in currency-notes, or a sufficient part thereof to satisfy the said decree, shall be paid over by you, the said to

Given under my hand and the seal of the Court, this day of 19 .

Judge

No 26

NOTICE TO ATTACHING CREDITOR (O. 21, R. 53)

(Title)

To

Whereas has made application to this Court for the removal of attachment on placed at your instance in execution of the decree in Suit No of 19, this is to give you notice to appear before this Court on the day of 19, either in person or by a pleader of the Court duly instructed to support your claim, as attaching creditor

Given under my hand and the seal of the Court, this day of 19 .

Judge

No 27

WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE FOR MONEY

(O 21, R 66)

(Title)

To

The Bailiff of the Court

These are to command you to sell by auction, after giving day's previous notice, by affixing the same in this Court house, and after making due proclamation, the

property attached under a warrant from this Court, dated the day of 19, in execution of a decree in favour of in Suit No of 19, or so much of the said property as shall realize the sum of Rs - , being the

You are further commanded to return this warrant on or before the day of 19, of the said decree and costs still remaining unsatisfied

with an endorsement certifying the manner in which it has been executed, or the reason why it has not been executed

Given under my hand and the seal of the Court, this day of 19 .

Judge.

No 29

NOTICE OF THE DAY FIXED FOR SETTLING A SALE PROCLAMATION

(O 21 R 66)

(Title)

To

Whereas in the above named suit
for the sale of

Judgment debtor
, the decree holder, has applied
, You are hereby informed
day of

that the
19 , has been fixed for settling the terms of the proclamation
of sale

Given under my hand and the seal of the Court, this
19 ,

day of

Judge

No 29

PROCLAMATION OF SALE (O 21, R 66)

(Title)

Notice is hereby given that under R 64 of O 21 of the Code of Civil Procedure, 1908, an
(1) Suit No of 19 order has been passed by this Court for the sale of the attached
decided by the property mentioned in the annexed Schedule in satisfaction of the
of in which claim of the decree holder in the suit (1) mentioned in the
was plaintiff and margin amounting with costs and interest upto date of sale to the
was defendant sum of

The sale will be by public auction, and the property will be put up for sale in the lots
specified in the Schedule. The sale will be of the property of the judgment debtors above named
as mentioned in the Schedule below, and the liabilities and claims attaching to the said
property, so far as they have been ascertained, are those specified in the Schedule against each lot.

In the absence of any order of postponement the sale will be held by
at the monthly sale commencing
at O Clock on the at
In the event, however, of the debt above specified and of the
costs of the sale being tendered or paid before the knocking down of any lot, the sale will be
stopped

At the sale the public generally are invited to bid, either personally or by duly autho-
rised agent. No bid by or on behalf of, the judgment creditors above mentioned, however, will
be accepted nor will any sale to them be valid without the express permission of the Court pre-
viously given. The following are the further

Conditions of sale

1 The particulars specified in the Schedule below have been stated to the best of the in-
formation of the Court, but the Court will not be answerable for any error, misstatement or
omission in this proclamation

2 The amount by which the biddings are to be increased shall be determined by the offi-
cer conducting the sale. In the event of any dispute arising as to the amount bid, or as to the
bidder, the lot shall at once be again put up to auction

3 The highest bidder shall be declared to be the purchaser of any lot, provided always
that he is legally qualified to bid, and provided that it shall be in the discretion of the Court or
officer holding the sale to decline acceptance of the highest bid when the price offered appears
so clearly inadequate as to make it advisable to do so

dix

4 For reasons recorded it shall be in the discretion of the officer conducting the sale to adjourn it subject always to the provisions of R 69 of O 21

5 In the case of moveable property the price of each lot shall be paid at the time of sale or as soon after as the officer holding the sale directs and in default of payment the property shall forthwith be again put up and re sold

6 In the case of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of 25 per cent on the amount of his purchase money to the officer conducting the sale and in default of such deposit the property shall forthwith be put up again and re sold

7 The full amount of the purchase money shall be paid by the purchaser before the Court closes on the fifteenth day after the sale of the property exclusive of such day or if the fifteenth day be a Sunday or other holiday then on the first office day after the fifteenth day

8 In default of payment of the balance of purchase money within the period allowed the property shall be re sold after the issue of a fresh notification of sale The deposit after defraying the expenses of the sale may if the Court thinks fit be forfeited to Government and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold

Given under my hand and the seal of the Court this
day of 19

Judge

Schedule of Property

Number of lot	Description of property to be sold with the name of each owner where there are more judgment debtors than one	The revenue assessed upon the estate or part of the estate if the property to be sold is an interest in an estate or a part of an estate paying revenue to Government	Detail of any encumbrances to which the property is liable	Claims if any which have been put forward to the property and any other known particulars bearing on its nature and value

Local Amendments

Allahabad

In Form No 29 (Proclamation of Sale) delete the sentence No bid by previously given in the paragraph above conditions of sale

Madras

Add the following as a Note to Form No 29 (proclamation of sale)—

and the
title

No 30

ORDER ON THE NAZIR FOR CAUSING SERVICE OF PROCLAMATION OF SALE

(O 21 R 66)

(Title)

To

The Nazir of the Court

Whereas an order has been made for the sale of the property of the judgment debtor specified in the Schedule hereunder annexed and whereas the

day of 19 has been fixed for the sale of the said

property copies of the proclamation of sale are by this warrant made over to you and you are hereby ordered to have the proclamation published by beat of drum within each of the properties specified in the said Schedule to a true copy of the said proclamation on a conspicuous part of each of the said properties and afterward on the Court house and then to submit to this Court a report showing the dates on which and the manner in which the proclamations have been published

Dated the day of 19

Schedule

Judge

No 31

CERTIFICATE BY OFFICER HOLDING A SALE OF THE DEFICIENCY OF PRICE ON
A RE SALE OF PROPERTY BY REASON OF THE PURCHASER'S DEFAULT.

(O 21, R 71)

(Title)

Certified that at the re-sale of the property in execution of the decree in the above-named suit in consequence of default on the part of , purchaser there was a deficiency in the price of the said property amounting to Rs , and that the expenses attending such re-sale amounted to Rs , making a total of Rs which sum is recoverable from the defaulter

Dated the day of 19

Officer holding the sale

No 32

NOTICE TO PERSON IN POSSESSION OF MOVEABLE PROPERTY SOLD
IN EXECUTION

(O 21, R 72)

(Title)

To

Whereas

has become the purchaser at a public sale in execution of the decree in the above suit of now in your possession, you are hereby prohibited from delivering possession of the said person except the said to any

Given under my hand and the seal of the Court this day of 19 .

Judge.

dix

No 33

PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN EXECUTION TO ANY
OTHER THAN THE PURCHASER, (O 21, R 79)

To

(Title)

and to

Whereas _____ has become the
purchaser at a public sale in execution of the decree in the above suit of _____
you _____ being debts due from
_____ to you

_____ ; it is ordered that you
are hereby, prohibited from receiving, and you _____ be, and you

_____ from making payment of, the said
debt to any person or persons except the said

Given under my hand and the seal of the Court, this
day of _____ 19 .

Judge

No 34

PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD IN EXECUTION.
(O. 21, R. 79)

To

(Title)

and

, Secretary of
Corporation

Whereas _____ has become the purchaser at a
public sale in execution of the decree, in the above suit, of certain shares in the above
Corporation that is to say, of _____ standing in the name of you

_____ ; it is ordered that
you
be, and you are hereby, prohibited from making any transfer of the said shares to any person
except the said _____, the purchaser aforesaid, or from
receiving any dividends thereon, and you

_____, Secretary of the said Corporation, from permitting any such transfer or
making any such payment to any person except the said
the purchaser aforesaid

Given under my hand and the seal of the Court, this
day of _____ 19 .

Judge.

. No. 35

CERTIFICATE TO JUDGMENT-DEBTOR AUTHORIZING HIM TO MORTGAGE, LEASE
OR SELL PROPERTY. (O 21, R 83)

(Title)

Whereas in execution of the decree passed in the above suit an order was made on
the _____ day of _____ 19 , for the sale
of the under-mentioned property of the judgment debtor

_____, and whereas the Court has, on the application of the said
judgment debtor, postponed the said sale to enable him to raise the amount of the decree by
mortgage, lease or private sale of the said property or of some part thereof :

This is to certify that the Court doth hereby authorize the said judgment debtor to make the proposed mortgage lease or sale within a period of _____ from the date of this certificate, provided that all monies payable under such mortgage, lease or sale shall be paid into this Court and not to the said judgment debtor

Description of property

Given under my hand and the seal of the Court, this
day of _____ 19 _____

Judge

No 36

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE

(O 21 Rr 90, 92)

(Title)

To

Whereas the under mentioned property was sold on the _____ day of _____ 19 _____ in execution of the decree passed in the above named suit and whereas _____, the decree holder [or judgment-debtor] has applied to this Court to set aside the sale of the said property on the ground of a material irregularity [or fraud] in publishing [or conducting] the sale namely that

Take notice that if you have any cause to show why the said application should not be granted you should appear with your proofs in this Court on the _____ day of _____ 19 _____, when the said application will be heard and determined

Given under my hand and the seal of the Court, this
day of _____ 19 _____

Description of property

Judge

No 37

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE

(O 21 Rr 91, 92)

(Title)

To

Whereas _____, the purchaser of the under mentioned property sold on the _____ day of _____ 19 _____, in execution of the decree passed in the above named suit, has applied to this Court to set aside the sale of the said property on the ground that

the judgment debtor had no saleable interest therein

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the _____ day of _____ 19 _____, when the said application will be heard and determined

Given under my hand and the seal of the Court, this
day of _____ 19 _____

Description of property

Judge

lix

No 38

CERTIFICATE OF SALE OF LAND (O 21, R 94)

(Title)

This is to certify that _____ has been declared purchaser at a sale by public auction on the _____ day of _____ 19____, of _____ in execution of decree in this suit and that the said sale has been duly confirmed by this Court

Given under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge

Local Amendments

Nagpur

In Form No 38 *insert* the words _____ for Rs _____ between the words, The purchaser and At a sale

Patna

Substitute the following for form No 38

Form No 38'

Certificate of sale of land (O 21, R 94)

District

In the Court of

Execution case No

at

of 19____.

Decree holder,

versus

Judgment debtor by

This is to certify that

caste

, Than

, by occupation District

son of

resident of

at a sale by public auction on the _____ day of _____, has been declared the purchaser specified below in execution of the decrees in suit No _____ of this Court and that the said sale has been duly confirmed by this Court

Given under my hand and the seal of the Court _____ day² _____ of _____ 19____.

this

Judge

Specification and price of properties³

No 39

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND
AT A SALE IN EXECUTION (O 21, R 95)

(Title)

To

The Bailiff of the Court

Whereas

fied purchaser of

decrees in suit No

ordered to put the said

as aforesaid in possession of the same

of

has become the certified purchaser at a sale in execution of _____ 19____, you are hereby _____, the certified purchaser,

- 1 If the decree has been received by transfer from other Court enter name of that Court
- 2 The date when the sale became absolute
- 3 Particulars sufficient to identify the property including the name of each registration sub district in which any part of the property is situated should be fully stated

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge

Local Amendment.

Madras

Substitute the following for the old one —

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE IN EXECUTION (O. 21, R. 95)

(Title)

To

The Bailiff of the Court

Whereas has become the certified purchaser of
at a sale in execution of decree in suit No of 19 , you are hereby
ordered to put the said , the certified purchaser, as aforesaid, in posses-
sion of the same and you are hereby further required to state in your return whether there are
crop on the land and whether you have delivered them to , the certified purchaser
Given under my hand and the seal of the Court this day of 19 .

Judge

No 40

SUMMONS TO APPEAR AND ANSWER CHARGE OF OBSTRUCTING EXECUTION OF DECREE (O 21, R 97)

(Title)

To

Whereas , the decree holder
in the above suit has complained to this Court that you have resisted (or obstructed)
the officer charged with the execution of the warrant for possession

You are hereby summoned to appear in this Court on the
day of 19 , at a.m. to answer the said
complaint

Given under my hand and the seal of the Court this
day of 19

Judge.

No 41

WARRANT OF COMMITTAL (O 21, R 98)

(Title)

To

The Officer in Charge of the Jail at

Whereas the under mentioned property has been decreed to , the
plaintiff in this suit, and whereas the Court is satisfied that without any
just cause resisted [or obstructed] and is still resisting [or obstructing] the said
in obtaining possession of the property, and whereas the said
has made application to this Court that the said be
committed to the civil prison ,

You are hereby commanded and required to take and receive the said
 into the civil prison and to keep him imprisoned therein for the period
 of _____ days
 Given under my hand and the seal of the Court, this
 day of _____ 19 .

Judge

No 42

AUTHORITY OF THE COLLECTOR TO STAY PUBLIC SALE OF LAND.

(Section 72)

(Title)

To

, Collector of

SIR

In answer to your communication No _____, dated _____,
 _____, representing that the sale in execution of the decree
 in this suit of _____ land situate within your district is objectionable I have
 the honour to inform you that you are authorized to make provision for the satisfaction of the
 said decree in the manner recommended by you

I have the honour to be,

SIR

Your obedient Servant,

Judge

Local Amendments

Allahabad

Add the following as form No 43 —

Form No 43

The security to be furnished under Section 50 (4) shall be, as nearly as may be, by a bond
 in the following form —
 In the Court of _____ at _____

Suit No _____

of 19 _____

A.B. of _____

against _____

Plaintiff
Defendant

O.D. of _____

Whereas in execution of the decree in the suit aforesaid, the said C.D. has been arrested
 under a warrant and brought before the Court of _____, and whereas the said
 C.D. has applied for his discharge on the ground that he undertakes within one month to
 apply under section 5 of Act No III c _____
 ordered that the said C.D. shall
 sufficient security in the sum of Rs _____
 upon, and that he will within one month from this date apply under section 5 of Act No III
 of 1907, to be declared an insolvent,

Therefore I, E.F., inhabitant of _____, have voluntarily become
 security and do hereby bind myself my heirs, and executors to _____ as Judge of
 the said Court and his successors in office that the said C.D. will appear at any time when
 called upon by the said Court, and will apply in the manner and within the time hereinafter
 set forth, and in default of such appearance or of such application, I bind myself, my heirs and
 executors, to pay to the said Court on its order, the sum of Rs _____

Witness my hand at _____

this _____

day of _____

19 .

(Signed) E.F.,

Surety

Witnesses.

APPENDIX F.

SUPPLEMENTAL PROCEEDINGS.

No. 1.

WARRANT OF ARREST BEFORE JUDGMENT. (O. 38, R. 1.)

(Title)

To

The Bailiff of the Court
Whereas

Principal					
Interest	.				
Costs	
Total					

, the plaintiff in the above suit, claims the

sum of Rs _____ as noted in the margin
and has proved to the satisfaction of the Court
that there is probable cause for believing that the
defendant
is about to _____

These are to command you to demand and re-
ceive from the said _____ the
sum of Rs _____ as sufficient to
satisfy the plaintiff's claim, and unless the said

he may show cause why he should not furnish security to the amount of Rs. _____
for his personal appearance before the Court, until such time as the said suit shall be fully and
finally disposed of, and until satisfaction of any decree that may be passed against him in the
suit.

Given under my hand and the seal of the Court, this
day of _____ 19 ____

Judge

No. 2.

SECURITY FOR APPEARANCE OF A DEFENDANT ARRESTED BEFORE JUDGMENT.

(O. 38, R. 2.)

(Title)

Whereas at the instance of _____, the plaintiff in the above suit,
the defendant has been arrested and brought before the Court.

And whereas on the failure of the said defendant to show cause why he should not
furnish security for his appearance, the Court has ordered him to furnish such security.

Therefore, I _____ have voluntarily become surety and do hereby bind myself,
my heirs and executors, to the said Court, that the said defendant shall appear at any time
when called upon while the suit is pending and until satisfaction of any decree that may be
passed against him in the said suit; and in default of such appearance I bind myself, my heirs
and executors, to pay to the said Court, at its order, any sum of money that may be adjudged
against the said defendant in the said suit.

Witness my hand at
19

this

day o

(Signed)

Witnesses

1

2

No 3

SUMMONS TO DEFENDANT TO APPEAR ON SURETY'S APPLICATION FOR
DISCHARGE (O 38 R 3)

(Title)

To
Whereas 19 who became surety on the day of
for your appearance in the above suit has applied to the
Court to be discharged from his obligation
You are hereby summoned to appear in this Court in person on the
day of 19 at A.M. when the said
application will be heard and determined
Given under my hand and the seal of the Court this
day of 19 Judge

No 4

ORDER FOR COMMITTAL (O 38 R 4)

(Title)

To
Whereas plaintiff in this suit has made application to the
Court that security be taken for the appearance of the defendant
to answer any judgment that may be passed against him in the suit and whereas the
Court has called upon the defendant to furnish such security or to offer a sufficient
deposit in lieu of security which he has failed to do it is ordered that the said defen-
dant be committed to the civil prison until the decision of the
suit or if judgment be pronounced against him until satisfaction of the decree
Given under my hand and the seal of the Court this
day of 19 Judge

No 5

ATTACHMENT BEFORE JUDGMENT WITH ORDER TO CALL FOR SECURITY FOR
FULFILMENT OF DECREE (O 38 R 5)

(Title)

To
The Bailiff of the Court
Whereas his proved to the satisfaction of the Court
that the defendant in the above suit
These are to command you to call upon the said defendant on
or before the day of 19 either to furnish
security for the sum of rupees to produce and place at the disposal
of this Court when required or the value thereof or
such portion of the value as may be sufficient to satisfy any decree that may be passed

against him or to appear and show cause why he should not furnish security and you are further ordered to attach the said and keep the same under safe and secure custody until the further order of the Court and you are further commanded to return this warrant on or before the day of 19 with an endorsement certifying the date on which and the manner in which it has been executed or the reason why it has not been executed

Given under my hand and the seal of the Court this day of 19

Jt lge

No 6

SECURITY FOR THE PRODUCTION OF PROPERTY (O 33 R 5)

(Title)

Whereas at the instance of the plaintiff in the above suit the defendant has been directed by the Court to furnish security in the sum of R to produce and place at the disposal of the Court the property specified in the Schedule hereunto annexed

Therefore I have voluntarily become surety and do hereby bind myself my heirs and executors to the said Court that the said defendant shall produce and place at the disposal of the Court when required the property specified in the said Schedule or the value of the same or such portion thereof as may be sufficient to satisfy the decree and in default of which so long I bind myself my heirs and executors to pay to the said Court the sum of Rs or such sum not exceeding the said sum as the said Court may adjudge

Selected

Witness my hand at 19

this

day of

(Signed)

Witnesses

1
2

No 7

ATTACHMENT BEFORE JUDGMENT ON PROOF OF FAILURE TO FURNISH SECURITY

(O 33 R 6)

(Title)

To

The Bailiff of the Court

Whereas the plaintiff in this suit has applied to the Court to call upon the defendant to furnish security to fulfil any decree that may be passed against him in the suit and where the Court has called upon the said to furnish such security which he has failed to do These are to command you to attach the property of the said and keep the same under safe and secure custody until the further order of the Court and you are further commanded to return this warrant on or before the day of 19 with an endorsement certifying the date on which and the manner in which it has been executed or the reason why it has not been executed

Given under my hand and the seal of the Court, this
day of _____ 19 .

Judge

No 8

TEMPORARY INJUNCTIONS (O 39, R 1)
(Title.)

Upon motion made unto this Court by _____, Pleader of [or Counsel for] the plaintiff A B, and upon reading the petition of the said plaintiff in this matter filed [this day] [or the plaint filed in this suit on the _____ day of _____, or the written statement of the said plaintiff filed on the _____ day of _____] and upon hearing the evidence of _____ and _____ in support thereof [if after notice and defendant not appearing add, and also the evidence of _____ as to service of notice of this motion upon the defendant C D] This Court doth order that an injunction be awarded to restrain the defendant C D, his servants, agents and workmen, from pulling down, or suffering to be pulled down, the house in the plaint in the said suit of the plaintiff mentioned [or in the written statement, or petition, of the plaintiff and evidence at the hearing of this motion mentioned], being No 9, Oilmongers Street, Hindupur, in the Taluk of _____ and from selling the materials whereof the said house is composed, until the hearing of this suit or until the further order of this Court

Dated this

day of

19 .

Judge

[Where the injunction is sought to restrain the negotiation of a note or bill, the ordering part of the order may run thus —]

to restrain the defendants

and

from parting with out of the custody of them or any of them or endorsing, assigning or negotiating the promissory note [or bill of exchange] in question, dated on or about the _____, etc., mentioned in the plaintiff's plaint [or petition] and the evidence heard at this motion until the hearing of this suit, or until the further order of this Court.

[In Copyright cases]

to restrain the defendant C D, his servants, agents or workmen, from printing, publishing or vending a book, called _____, or any part thereof, until the, etc

[Where part only of a book is to be restrained]

to restrain the defendant C D, his servants, agents or workmen from printing publishing selling or otherwise disposing of such parts of the book in the plaint [or petition and evidence, etc] mentioned to have been published by the defendant as herein after specified, namely, that part of the said book which is entitled _____

and also that part which is entitled _____

[or which is contained in page _____ both inclusive] until _____

to page _____, etc.

[In Patent cases]

to restrain the defendant C D, his agents, servants and workmen, from making or vending any perforated bricks [or as the case may be] upon the principle of the inventions in the plaintiff's plaint [or petition, etc, or written statement, etc] mentioned belonging to the plaintiffs, or either of them, during the remainder of the respective terms of the patents in the plaintiff's plaint [or as the case may be] mentioned, and from counterfeiting, imitating or resembling the same inventions, or either of them, or making any addition thereto, or subtraction therefrom, until the hearing, etc

[In cases of Trade marks]

to restrain the defendant C D, his servants, agents or workmen, from selling, or exposing for sale, or procuring to be sold, any composition or blacking [or as the case may be] described as or purporting to be blacking manufactured by the plaintiff A B, in bottles having affixed thereto such labels as in the plaintiff's plaint [or petition, etc] mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition

or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by the plaintiff A B and from using trade cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff A B, until the, etc

(To restrain a partner from in any way interfering in the business)

to restrain the defendant C D, his agents and servants from entering into any contract and from accepting drawing endorsing or negotiating any bill of exchange, note or written security in the name of the partnership firm of B and D, and from contracting any debt, buying and selling any goods and from making or entering into any verbal or written promise agreement or undertaking, and from doing, or causing to be done any act, in the name or on the credit of the said partnership firm of B and D, or whereby the said partnership firm can or may in any manner become or be made liable to or for the payment of any sum of money, or for the performance of any contract, promise or undertaking until the, etc

No 1 [9]

APPOINTMENT OF A RECEIVER (O 40, R 1)

(Title)

To

Whereas has been attached in execution of a decree passed in the above suit on the day of 19, in favour of

You are hereby (subject to your giving security to the satisfaction of the Court) appointed receiver of the said property under Order 40 of the Code of Civil Procedure, 1908 with full powers under the provisions of that Order

You are required to render a due and proper account of your receipts and disbursements in respect of the said property on . You will be entitled to remuneration at the rate of per cent upon your receipts under the authority of this appointment

Given under my hand and the seal of the Court this day of 19 .

Judge

Local Amendment

Madras

Substitute the following for Form No 9—

No 9

APPOINTMENT OF A RECEIVER

(O 40 R 1)

(Title)

Whereas it appears to the Court that in the above suit it is just and convenient to appoint a receiver of the properties specified below (or whereas the properties specified below have been attached in execution of a decree passed in the above suit on the day of 19, in favour of)

It is hereby ordered that A B be appointed (subject to his giving security to the satisfaction of the Court) the receiver of the said property and of the rents issues and profits thereof under Order 40 of the Code of Civil Procedure 1908 with all powers under the provisions of that order except that he shall not without leave of the Court, (1) grant leases for a term exceeding three years or (2) institute suits in any Court (except suits for rent), or (3) institute appeals in any Court (except from a decree in a rent suit) where the value of the appeal is over Rs 1 000, or (4) expend on the repairs of any property in any period of two years more than half of the net annual rental of the property to be repaired, such rental being calculated at the amount at which the property to be repaired would be let when in a fair state of repair, provided that such amount shall not exceed Rs 1 000

¹ Forms 6 and 7 were renumbered 9 and 10, respectively, by S 2 and Sch I of the Repealing and Amending Act, 1914 (N of 1914)

X

parties

And it is further ordered that the ————— to the above suit and all persons claiming under defendants

them do deliver up quiet possession of the properties, moveable and immovable, specified below together with all leases, agreements for lease, habereas, account books, papers, memoranda and writings relating thereto to the said receiver. And it is further ordered that the said receiver do take possession of the said property, moveable and immovable, and collect the rents, issues and profits of the said immovable property, and that the tenants and occupiers do attorn and pay their rents in arrear and growing rents to the said receiver. And it is further ordered that the said receiver shall have power to bring and defend suits in his own name and shall also have power to use the names of the plaintiffs and defendants where necessary. And it is further ordered that the receipt or receipts of the said receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid or delivered to him as such receiver.

And it is further ordered that the said receiver do, out of the first money to be received by him pay the debts due from the said ————— and shall be entitled to retain in his hands the sum of Rs ————— for current expenses, but subject thereto shall pay his receipts as soon as the same come to his hands, into Court to the credit of the suit. He shall once in every ————— months file his accounts and vouchers in Court, the first account to be filed on the day of ————— and to be passed on the ————— day of —————.

He shall be entitled to the commission at the rate of Rs ————— per cent on the net amounts collected by him or to the sum of Rs ————— per month (or as the case may be) as his remuneration (or he shall act without any remuneration).

And it is further ordered (where an additional office establishment is required) that the said receiver shall be allowed to charge to the estate in addition to his own office establishment the following further establishment —

(Here enter specification of property)

Given under my hand and the seal of the Court this ————— day of ————— 19 —

No 1 [10]

BOND TO BE GIVEN BY RECEIVER (O 40, R 3)

(Title)

Know all men by these presents that we, ————— and —————, are jointly and severally bound to ————— of the Court of ————— in Rs ————— to be paid to the

said ————— or his successor in office for the time being. For which payment to be made we bind ourselves and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this ————— day of ————— 19 — against

Whereas a plaint has been filed in this Court by ————— for the purpose of [here insert the object of suit]

And whereas the said ————— has been appointed, by order of the above mentioned Court to receive the rents and profits of the immovable property and to get in the outstanding moveable property of ————— in the said plaint named —————

Now the condition of this obligation is such that if the above bounden ————— shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the immovable property, and in respect of the moveable property, of the said ————— at such periods as the said Court shall appoint and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct, then this obligation shall be void, otherwise it shall remain in full force.

Signed and delivered by the above bounden in the presence of

Note—If deposit of money is made, the memorandum thereof should follow the terms of the condition of the bond

1 Forms 6 and 7 were renumbered 9 and 10, respectively, by S 2 and Sch I of the Repealing and Amending Act, 1914 (X of 1914)

Local Amendments.

Allahabad

No 11

Add the following as Form Nos 11 and 12 —

The security to be furnished under O 33 R 9 shall be, as nearly as may be, by a bond in the following form —

In the Court of _____ at _____ Suit No _____ of 19 _____
 Plaintiff
 Defendant

Amount of suit, Rupees

Whereas in the suit above specified the plaintiff _____ aforesaid has applied to the said Court that the said defendant _____, may be called on to furnish sufficient security to fulfil any decree that may be passed against him in the said suit or that on his failure to do certain property of the said defendant, _____, may be attached,

And whereas on the failure of the said defendant _____ to furnish such security, or, show cause why it should not be furnished the property aforesaid of the said defendant _____ has been attached by order of the said Court

Therefore I _____ inhabitant of _____ have voluntarily become security and hereby bind myself my heirs and executors to _____ as Judge of the said Court and his successors in office, that the said defendant _____, shall produce and place at the disposal of the said Court, when required, the property herein below specified namely (here give description of the property or refer to an annexed Schedule), or the value of the same or such portion thereof as may be sufficient to fulfil such decree and shall when required pay the costs of the attachment and in default of his so doing I bind myself, my heirs and executors to pay to _____ as Judge of the said Court and his successors in office on its order such sum to the extent of rupees (here enter a sufficient sum to cover the amount of suit with costs and the costs of attachment) as the said Court may adjudge against the said defendant

Witness my hand at _____ this _____ day of _____ 19 _____

(Signed)
 Surety

Witnesses

No 12

The security to be furnished under O 39, R 2 (2) shall be, as far as may be, by a bond in the following form —

In the Court of _____ at _____ of 19 _____
 Plaintiff,
 Defendant

Whereas in the suit above specified, instituted by the said plaintiff, _____, to restrain the said defendant _____, from (here state the breach of contract or other injury) the said Court has on the application of the said plaintiff, _____, granted an injunction to restrain the said defendant from the repetition (or the continuance) of the said breach of contract (or wrongful act complained of), and required security from the said defendant against such repetition (or continuance)

Therefore I _____, inhabitant of _____, have voluntarily become security and do hereby bind myself my heirs and executors, _____, to _____ as Judge of the said Court and his successors in office that the said defendant, _____, shall abstain from the repetition (or continuance) of the breach of contract aforesaid (or wrongful act, or from the commission of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right), and in default of his so abstaining I bind myself, my heirs and executors to pay into Court, on the order of the Court, such sum to the extent of rupees _____, as the Court shall adjudge against the said defendant

Witness my hand at _____ this _____ day of _____ 19 _____

(Signed)
 Surety

Witnesses

lix

APPENDIX G

APPEAL, REFERENCE AND REVIEW.

No 1

MEMORANDUM OF APPEAL (O 41, R 1)

(Title)

The

above named appeals to the
Court atfrom the decree of
19, dated the

in Suit No _____ of _____
day of _____ 19, and sets forth the following grounds
of objection to the decree appealed from, namely —

No 2

SECURITY BOND TO BE GIVEN ON ORDER BEING MADE TO STAY
EXECUTION OF DECREE

(O 41 R 5)

(Title)

To

This security bond on stay of execution of decrees executed by
witnesseth —

That _____, the plaintiff in Suit No _____ of 19,
having sued _____, the defendant, in this Court and a decree having been
passed on the _____ day of _____ 19, in favour of the plaintiff
_____ he said decree in the _____

to execute the decree, the defendant has
has been called upon to furnish security
he extent of Rs _____

mortgaging the properties specified in the Schedule hereunto annexed and covenant that if
the decree of the first Court be confirmed or varied by the Appellate Court the said defendant
shall duly act in accordance with the decree of the Appellate Court and shall pay whatever
may be payable by him thereunder and if he should fail therein then any amount so payable
shall be realized from the properties hereby mortgaged and if the proceeds of the sale of the
said properties are insufficient to pay the amount due I and my legal representatives will
be personally liable to pay the balance To this effect I execute this security bond this _____ day
of _____ 19

Schedule

(Signed)

Witnessed by

1
2

No 3

SECURITY BOND TO BE GIVEN DURING THE PENDENCY OF APPEAL (O 41, R 6)

(Title)

To

This security bond on stay of execution of decrees executed by
witnesseth —

That _____, the plaintiff in Suit No _____ of 19,
having sued _____, the defendant, in this Court and a decree having been
passed on the _____ day of _____ 19, in favour of the
plaintiff, and the defendant having preferred an appeal from the said decree in the
Court, the said appeal is still pending

Now the plaintiff decree holder has applied for execution of the said decree and
has been called upon to furnish security accordingly I of my own free will stand security
to the extent of Rs _____, mortgaging the properties specified in the
Schedule hereunto annexed, and covenant that if the decree of the first Court be reversed
or varied by the Appellate Court the plaintiff shall restore any property which may be or
has been taken in execution of the said decree and shall duly act in accordance with the
decree of the Appellate Court and shall pay whatever may be payable by him thereunder
and if he should fail therein then any amount so payable shall be realized from the pro-
perties hereby mortgaged and if the proceeds of the sale of the said properties are

insufficient to pay the amount due I and my legal representatives will be personally liable to pay the balance To this effect I execute this security bond this day of 19

Schedule

(Signed)

Witnessed by

1
2

No 4

SECURITY FOR COSTS OF APPEAL (O 41 R 10)

(Title)

To

This security bond for costs of appeal executed by

witnessed by —

The appellant has preferred an appeal from the decree in Suit No of 19 against the respondent and has been called upon to furnish security accordingly I of my own free will stand security for the costs of the appeal mortgaging the properties specified in the schedule hereunto annexed I shall not transfer the said properties or any part thereof and in the event of any default on the part of the appellant I shall duly carry out any order that may be made against me with regard to payment to the costs of appeal Any amount so payable shall be realized from the properties hereby mortgaged and if the proceeds of the sale of the said properties are insufficient to pay the amount due I and my legal representatives will be personally liable to pay the balance To this effect I execute this security bond this day of 19

Schedule

(Signed)

Witnessed by

1
2

No 5

INTIMATION TO LOWER COURT OF ADMISSION OF APPEAL (O 41 R 13)

(Title)

To

You are hereby directed to take notice that the decree passed by you therein on the day of 19 in the above suit has preferred an appeal to this Court from the

You are requested to send with all practicable despatch all material papers in the suit

Dated the day of 19

Judge

No 6

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL

(O 41 R 14)

(Title)

Appeal from the dated the day of of the Court of 19 To

Respondent,

The notice that an appeal from the decree of in this case has been presented by and registered in this Court and that the day of 19 has been fixed by this Court for the hearing of this appeal

If no appearance is made on your behalf by yourself, your pleader, or by some one by law authorized to act for you in this appeal it will be heard and decided in your absence

Given under my hand and the seal of the Court, this day of 19

Judge

ix

[Note—If a stay of execution has been ordered, intimation should be given of the fact on this notice]

Local Amendment

Madras

Insert the following 'Note' namely —

'Note — Also take notice that if an address for service is not filed before the aforesaid date this appeal is liable to be heard and decided as if you had not made an appearance'

Insert the following as Forms Nos 6 A and 6 B —

"No 6 A

NOTICE TO RESPONDENT

(O 41 A, R 2)

(Cause title)

Appeal from the

dated the

of the Court of
day of

To

Respondent

Madras

(If the appellant appears in person insert his address for service)

Given under my hand and the seal of the Court, this 19 day of

Interlocutory application No of 19 has been made by appellant,
and execution has been stayed (or order made) by order dated the 19 day of

"No 6 B

MEMORANDUM OF APPEARANCE

(O 41 A R 3)

(Cause Title)

Take notice that the respondent intends to appear and defend the above appeal, and that his address for services of all notices and process is (insert address)

The said respondent requires a list of the papers which the appellant proposes to translate and print

Dated the day of

19
Signed C D
Vakil for Respondent

To

The Registrar High Court of Judicature Madras

No 7

NOTICE TO A PARTY TO A SUIT NOT MADE A PARTY TO THE APPEAL BUT JOINED BY THE COURT AS A RESPONDENT

(O 41, R 20)

(Title)

To

Whereas you were a party in suit No

of 19, in the Court
ferred an appeal
to this Court

a respondent in
day of

19, at a m If no appearance is made on your behalf on the said day and at the said hour the appeal will be heard and decided in your absence

Given under my hand and the seal of the Court, this day of

19

Judge

No 8
MEMORANDUM OF CROSS OBJECTION. (O 41, R 22)
(Title)

Whereas the Court at _____ has preferred an appeal to the _____ from the decree of _____
in Suit No _____ of 19 _____, dated the _____
day of _____ 19 _____ and whereas notice of the day fixed for hearing the appeal
was served on the _____ day of _____ 19 _____, the _____
file- this memorandum of cross objection under R 22 of O 41 of the
Code of Civil Procedure 1908 and sets forth the following grounds of objection to the decree
appealed from namely —

No 9
DECREE IN APPEAL (O 41, R 35)
(Title)

Appeal No _____ of 19 _____ from the decree of the Court of _____
dated the _____ day of _____ 19 _____
Memorandum of Appeal

Plaintiff
Defendant

The above named appeals to the _____ Court at _____
the _____ from the decree of _____ in the above suit, dated _____
namely — _____ day of _____ 19 _____, for the following reasons,
This appeal coming on for hearing on the _____ day of _____
19 _____ before _____, in the presence of _____ for the respondent,
it is ordered—
The costs of this appeal, as detailed below amounting to Rs _____, are to
be paid by _____ The costs of the original suit are to be paid by _____, are to
GIVEN under my hand this _____ day of _____ 19 _____
Judge

Costs of Appeal

Appellant				Respondent			
Amount				Amount			
	Rs	1	P		Rs	1	P.
1 Stamp for memorandum of appeal .				Stamp for power . . .			
2 Do for power				Do for petition . . .			
3 Services of processes				Service of processes . . .			
4 Pleader's fee on Rs .				Pleader s fee on Rs			
TOTAL . .				TOTAL			

Local Amendments

- Calcutta**
Cancel the words from ' Memorandum of Appeal' to ' the following reasons, namely' —
Form No 9
- Madras**
Omit the entire portion beginning with the words "Memorandum of Appeal ' and ending
with the words ' the following reasons, namely —"
"Form No 9
- Patna**

In the schedule of costs in the form of Decree in Appeal, add ' Copying or typing charges '
below the item "pleader's fee on Rs _____" in the columns for Appellant and Respondent,
and number the new entry in the first column as "5".

No 10

APPLICATION TO APPEAL *in forma pauperis* (O 44 R. 1)

(Title)

I the above named present the accompanying memorandum of appeal from the decree in the above suit and apply to be allowed to appeal as a pauper

Annexed is a full and true schedule of all the moveable and immovable property belonging to me with the estimated value thereof

Dated the day of 19 .

(Signed)

Note—Where the application is by the plaintiff he should state whether he applied and was allowed to sue in the Court of first instance as a pauper

No 11.

NOTICE OF APPEAL *in forma pauperis* (O 44, R. 1)

(Title)

Whereas the above named has applied to be allowed to appeal as a pauper from the decree in the above suit dated the day of 19 and whereas the day of 19 has

you desire to show opportunity will be

day of 19

Judge

No 12.

NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO THE KING IN COUNCIL SHOULD NOT BE GRANTED

(O 15 P 3)

(Title)

To

Take notice that has applied to this Court for a certificate that as regards amount or value and nature the above case fulfils the requirements of section 110 of the Code of Civil Procedure 1903 or that it is otherwise a fit one for appeal to His Majesty in Council

The day of 19 is fixed for you to show cause why the Court should not grant the certificate asked for

Given under my hand and the seal of the Court this day of 19

Registrar

Local Amendment

Madras

Forms 12 A, 12 B and 12 C

Insert the following as new forms after the Form No 12 —

'No 12 A.

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL

(O 45 R 7)

is of sufficient value and the findings of

the Code of Civil Procedure, praying for the

al to His Majesty in Council against the

decree of this Court in suit No of 19 final order

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and the other papers material to the application and upon hearing the arguments of for the petitioner and of

respondent (if he appear) this Court doth certify that the amount of the subject matter of the suit in the Court of first instance is Rs. 10 000 and the value of the subject matter in dispute on appeal to His Majesty in Council is also of the value of Rs. 10 000 upwards of Rs. 10 000 or that the decree appealed from involves directly some claim or question to final order indirectly respecting property of the value of Rs. 10 000 and that the decree appealed from does not affirm the decision of the lower Court final order upwards of Rs. 10 000

No 12 B

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL

(O 45 R 7)

(In cases where the subject matter is of sufficient value and the findings of the Court are concurrent)

Read the petition presented under O 45 R 3 of the Code of Civil Procedure praying for a grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the decree of this Court in suit No of 19 final order

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of for the petitioner and of for the respondent (if he appears) this Court doth certify that the amount of the subject matter of the suit in the Court of value

first instance is Rs. 10 000 and the amount of the subject matter in dispute upwards of Rs. 10 000 value Rs. 10 000 or that the decree appealed against involves directly some claim or question to final order indirectly respecting property of the value of Rs. 10 000 and that the affirming decree appealed from involves the following substantial question (s) of law viz — final order upwards of Rs. 10 000

Form 12 C

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL

(O 45 R 7)

(In cases where the subject matter in dispute is either not of sufficient value or is incapable of money valuation)

Read petition presented under O 45 R 3 of the Code of Civil Procedure praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the decree of this Court in suit No of 19 final order

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of for the petitioner and of amount for the respondent (if he appears) this Court doth certify that the value of the subject matter of the suit both in the Court of the first instance and in this Court is below Rs. 10 000 in value incapable of money valuation

Court in the exercise of the discretion vested in it is satisfied that the case is a fit one for appeal to His Majesty in Council for the reasons set forth below, viz —

(1)
(2)

..

No 13

NOTICE TO RESPONDENT OF ADMISSION OF APPEAL TO THE KING IN
COUNCIL (O 45, R. 8)

(Title)

To

Whereas

in the above case, has furnished the security and made the deposit required by
O 45 R 7 of the Code of Civil Procedure, 1908

Take notice that the appeal of the said to His Majesty in
Council has been admitted on the day of 19
Given under my hand and the seal of the Court, this
day of 19

Registrar

No 14.

NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE GRANTED

(O 47, R 4)

(Title)

To

Take notice that
decree passed on the

The day of 19, is taken for you to show
the Court should not grant a review of its decree in this case
Given under my hand and the seal of the Court, this
day of 19

Judge

APPENDIX H
MISCELLANEOUS

No 1

AGREEMENT OF PARTIES AS TO ISSUES TO BE TRIED

(O 14, R 6)

(Title)

WHEREAS we, the parties in the above suit, are agreed as to the question of fact
[or of law] to be decided between us and the point at issue between us is whether a claim
founded on a bond, dated the day of 19 and
filed as Exhibit in the said suit, is or is not beyond the statute
of limitation (or state the point at issue whatever it may be)

We therefore severally bind ourselves that, upon the finding of the Court in the
negative [or affirmative] of such issue, will pay to the said
the sum of Rupees (or such sum as the Court shall
hold to be due thereon), and I, the said, will accept the said sum of
Rupees (or such sum as the Court shall hold to be due.) in
full satisfaction of my claim on the bond aforesaid [or that upon such finding I, the said
will do or abstain from doing, etc., etc.]

Plaintiff
Defendant

Witnesses —

1
2

Dated the

day of

19 .

No 2

NOTICE OF APPLICATION FOR THE TRANSFER OF A SUIT TO ANOTHER
COURT FOR TRIAL (Section 24)

No In the Court of the District Judge of
of 19
WHEREAS an application dated the day of 19
has been made to this Court by the in
Suit No of 19 now pending in the Court of the
at in which is plaintiff and
the at is defendant for the transfer of the suit for trial to the Court of
You are hereby informed that the day of 19 has been
fixed for the hearing of the application when you will be heard if you desire to offer any
objection to it

GIVEN under my hand and the seal of the Court this day of
19
Judge

No 3

NOTICE OF PAYMENT INTO COURT (O 24 R 2)
(Title)

TAKE notice that the defendant has paid into Court Rs
and says that that sum is sufficient to satisfy the plaintiff's claim in full
V 1 Pleader for the defendant
To Z Pleader for the plaintiff

No 4

NOTICE TO SHOW CAUSE (GENERAL FORM)
(Title)

To Whereas the above named has made
application to this Court that
You are hereby warned to appear in this Court in person or by a pleader duly
instructed on the day of
19 at O'clock in the forenoon to show cause against the
application, failing whereon the said application will be heard and determined *ex parte*
GIVEN under my hand and the seal of the Court this
day of 19
Judge

Local Amendment

Allahabad

Form No 4

Notice to show cause (General form)
In the Court of at district
Civil Suit No of 19
Miscellaneous No of 19
resident of
versus
resident of

To Wherea
instructed on
show cause ag
mined *ex parte* and it will be presumed that you consent to be the appointed Guardian for
the suit

Given under my hand and the seal of the Court, this day of
19 Judge

No 5

LIST OF DOCUMENTS PRODUCED BY ^{plaintiff} (O 13, R 1)
^{defendant}
(Title)

No	Description of document	Date if any which the document bears	Signature of party or pleader
1	2	3	4

Allahabad **Local Amendment.**

Form No 5

LIST OF DOCUMENTS PRODUCED BY ^{plaintiff} (O 13 R 1)
^{defendant}

In the Court of _____ at _____ District _____
 Suit No _____ of 19 .

*versus**Plaintiff**Defendant*

List of documents produced with the plaint (or at first hearing) on behalf of plaintiff (or defendant)

This list was filed by _____ this _____ day of _____ 19 .

1	2	3	4
Serial No	Description and date if any, of the document	What became of the document	Remarks
		If brought on the record the exhibit mark put on the document	

Signature of party or pleader producing the list

NO 6

NOTICE TO PARTIES OF THE DAY FIXED FOR EXAMINATION OF A WITNESS
 ABOUT TO LEAVE THE JURISDICTION (O 18 R 16)

(Title)

To _____ *Plaintiff (or Defendant)*

WHEREAS in the above suit application has been made to the Court by _____, a witness required
 that the examination of _____
 by the said _____, in the said suit may be taken immediately

and it has been shown to the Court's satisfaction that the said witness is about to leave the Court's jurisdiction (or any other good and sufficient cause to be stated)

TAKE notice that the examination of the said witness will be taken by the Court on the _____ day of _____ 19____.

Dated the _____ day of _____ 19____ Judge

NO 7

COMMISSION TO EXAMINE ABSENT WITNESS (O 26, Rr 4 18)

(Title)

To WHEREAS the evidence of _____ is required by the _____ in the above suit, and whereas _____, you are requested to take the evidence on interrogatories (or otherwise) of such witness, and you are hereby appointed Commissioner for that purpose. The evidence will be taken in the presence of the parties or their agents if in attendance who will be at liberty to question the witness on the points specified and you are further requested to make return of such evidence as soon as it may be taken.

Process to compel the attendance of the witness will be issued by any Court having jurisdiction on your application.

A sum of Rs _____ being your fee in the above is herewith forwarded.

GIVEN under my hand and the seal of the Court this _____ day of _____ 19____.

Judge

Local Amendment

Patna

Add the following 'Note' at the foot —

"NOTE —The Commissioner has power under Chapter X of the Indian Evidence Act to control the examination of witnesses."

No 8

LETTER OF REQUEST (O 26, R 5)

(Title)

(Heading —To the President and Judges of etc etc or as the case may be)

Whereas a suit is now pending in the _____ in which A B is plaintiff and C D is defendant, and in the said suit the plaintiff claims

(Abstract of Claim)

And whereas it has been represented to the said Court that it is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties, that the following persons should be examined as witnesses upon oath touching such matters, that is to say

F F of _____
G H of _____ and
I J of _____

And it appearing that such witnesses are resident within the jurisdiction of your honourable Court

Now I _____, as the _____ of the said Court, have the honour to request, and do hereby request that for the reasons aforesaid and for the assistance of the said Court, you, as the President and Judges of the said _____, or some one or more of you, will be pleased to summon the said witness (and such other witnesses as the agents of the said plaintiff and defendant _____ as you _____ he proceed _____ will cause _____ of request _____ question in the presence of the agents of the plaintiff _____ on due notice given, attend such examination

And I further have the honour to request that you will be pleased to cause the answers of the said witnesses to be reduced into writing, and all books, letters, papers and documents produced upon such examination to be duly marked for identification, and that you will be further pleased to authenticate such examination by the seal of your tribunal, or in such other way as is in accordance with your procedure, and to return the same, together with such request in writing, if any, for the examination of other witnesses to the said Court

(Note — If the request is directed to a Foreign Court, the words "through His Majesty's Secretary of State for Foreign Affairs for transmission" should be inserted after the words "other witnesses" in the last line of this form.)

COMMISSION FOR A LOCAL INVESTIGATION, OR TO EXAMINE ACCOUNTS

(O 26, Rr 9, 11)

To

Whereas it is deemed requisite, for the purposes of this suit, that a commission should be issued; You are hereby appointed Commissioner for the purpose of

Process to compel the attendance before you of any witnesses, or for the production of any documents whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application

A sum of Rs _____, being your fee in the above, is herewith forwarded

Given under my hand and the seal of the Court, this
day of 19

Jude

COMMISSION TO MAKE A PARTITION. (O 26, R 18)

(Title)

To

To Whereas it is deemed requisite for the purposes of this suit that a commission should be issued to make the partition or separation of the property specified in, and according to the rights as declared in the decree of this Court, dated the _____ day of _____

19. You are hereby appointed Commissioner for the said purpose and are directed to make such inquiry as may be necessary, to divide the said property according to the best of your skill and judgment, to allot such shares to the several parties paid to any party by any other party for the

Process to compel the attendance before you of any witness, or for the production of any documents whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application

having jurisdiction on your application
A sum of Rs . being your fee in the above, is herewith for-
warded

Given under my hand and the seal of the Court this
day of 19 .

Judge

NOTICE TO MINOR DEFENDANT AND GUARDIAN, (O 32, R. 3)

(Title)

To

Minor Defendant
Natural Guardian

Whereas an application has been presented on the part of the plaintiff in the above
 suit for the appointment of a guardian of the person of the said
 minor, and you are of the opinion that it is proper that such appointment
 be made, unless within the time specified in the order of the court, a
 petition is made to this Court for the appointment of your
 self as guardian of the person of the said minor, then and in that
 event, you are authorized to appoint the said guardian of the person
 of the said minor, and to do all such acts and things as may be
 necessary and proper to carry out the purposes of the said order of
 the court.

1 Here insert the name of the guardian

you the minor to act as guardian for the suit the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the said suit

Given under my hand and the seal of the Court this
19

day of

Judge

Local Amendment

Allahabad

In Appendix H for form No 11 under the heading Notice to Minor defendant and guardian substitute

No 11

NOTICE TO MINOR DEFENDANT AND GUARDIAN

In the Court of _____ at _____ District _____

resident of _____

Suit No _____ of 19 _____

Plaintiff

resident of _____
To

Defendant

(1)

Minor defendant

and _____

_____ natural

guardian

(2)

or

certificated

the person in whose care the minor is alleged to be Whereas an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to

_____ natural

minor defendant you said minor and you (2)

the _____

certificated

guardian or the person in whose care the minor is alleged to be are hereby required to take not less than _____ days from the service upon you of this notice and

and not be

the suit

as the

son of

resident of _____

Given under my hand and the seal of the Court this
19

day of

Judge

Madras

Substitute the following for form No 11 —

No 11

NOTICE TO GUARDIAN APPOINTED OR DECLARED OR TO FATHER OR OTHER NATURAL GUARDIAN OR TO THE PERSON IN CHARGE OF THE MINOR

[O 32 R 3 (5)]

(Title)

To

Guardian appointed or declared or if the or other natural guardian or person in charge of the minor

in the above
or you are hereby required
vice upon you of this notice
of some friend of the said

Minor to act as _____ his
her guardian for the purpose of the said suit the Court will proceed to appoint
some other person to act as guardian of the said minor for the purposes of the said

Given under my hand and the seal of the Court this
19

day of

Judge

ardian is named cut out the
natural and certificated
whom the minor lives

lix

"No 11 A

NOTICE TO PROPOSED GUARDIANS OF A MINOR DEFENDANT
RESPONDENT

To Order 32, R 3 (9)
(X Z)
(Name to description and place of residence of proposed guardian)
Take notice that X ^{plaintiff} in ^{has presented a petition to the Court praying}
^{appellant}

that you be appointed guardian *ad litem* to the minor ^{defendant (s)} and the same will be heard
on the ^{respondent (s)}

2 The affidavit of X has been filed in support of this application
^{defendant (s)}

3 If you are willing to act as guardian for the said ^{respondent (s)} you are requested to
sign (or affix your mark to) the declaration on the back of this notice

4 In the event of your failure to signify your express consent in the manner indicated
above take further notice that the Court may proceed under O 32, R 3, Code of Civil Proce-
dure to appoint some other suitable person or one of its officers as guardian *ad litem* of the
^{defendant (s)}

minor ^{respondent (s)} aforesaid

Dated this ^{day of} 10 . (Sd)

(To be printed on the reverse)

I hereby acknowledge receipt of a duplicate of this notice and consent to act as guardian
of the minor ^{defendant (s)} therein mentioned
^{respondent (s)}

Signature
X Z

Witnesses

1
2

Nagpur

For Form No 11 substitute the following —

No 11

NOTICE TO MINOR DEFENDANT AND GUARDIAN

(O 32 R 4 A)

To (Title)

Minor Defendant
Legally appointed Guardian

Actual Guardian

Proposed
on the part of the plaintiff

Whereas an application has been presented ^{on behalf of the minor defendant} for the
appointment of you ^{as the guardian of the suit of the minor}
defendant (you the said minor) you
his legally appointed ^{the proposed guardian for the}
actual guardian and you

appear before
the appointed
is made to
minor for the
other person
named in the

1 The portion in brackets should be scored out if no notice is to issue to the minor
defendant

Given under my hand and the seal of the Court this day of 19
Judon

Palma

For Form No 11 substitute the following —

Form No 11.

NOTICE TO THE MINOR DEFENDANT AND GUARDIAN OF APPLICATION FOR
APPOINTMENT OF THE GUARDIAN TO BE GUARDIAN FOR THE SUIT

(O 32 R 3)

(Title)

To *Minor defendant*

Guardian (appointed by authority or natural or the person in whose care the minor is as the case may be)

Whereas an application has been presented on the part of the plaintiff in the above suit for the appointment of you¹ as guardian for the suit to the minor defendant you the said minor and you¹ are hereby required to take notice that unless within 21 day from the service upon you of this notice you¹ give your consent to be appointed to act as guardian the Court will proceed subject to the decision of any objection that may be ruled to appoint an officer of the Court to act as guardian to you the minor for the said suit

Given under my hand and the seal of the Court this day of 19
Judge

All the following are Form No. 11 A and 11 B —

Form No 11 A

Notice to the minor defendant and guardian of application for
appointment of another person to be guardian for the suit
(O 32 R 3)

To *Minor defendant*

minor is)
he above suit

we hereby

13 Given under my hand and the seal of this Court this day of 19 *Judge*

Form No 11 B

(O 32 R 4)
(Title)

District
In the Court of
Smt No

of 19 _____ at _____
Plaintiff
Defendant

1075345

- 1 Here insert name of guardian
2 Here insert name and description of proposed guardian
3 Here insert name of guardian upon whom the notice is to be served

To

Proposed Guardian

Whereas an application for appointment of your suit to the minor defendant days from the service upon your consent to act as guardian to act as a guardian to the minor for the purposes of the said suit

Given under my hand and the seal of this Court this
day of 19

Judge

No 12

Notice to opposite Party of day fixed for hearing evidence of pauperism

(O 33 R 6)

(Title)

To

Whereas applied to this Court for permission to institute a suit against *forma pauperis* under O 33 of the Code of Civil Procedure 1903 and whereas the Court sees no reason to reject the application and whereas the adduce in proof of his pauperism and for hearing any evidence which may be adduced in disproof thereof

Notice is hereby given to you under R 6 of O 33 that in case you may wish to offer any evidence to disprove the pauperism of the applicant you may do so on appearing in this Court on the said day of 19

Given under my hand and the seal of the Court this
day of 19

Judge

No 13

Notice to Surety of his Liability under a Decree

(Section 145)

(Title)

To

Whereas you are liable as surety for the performance of any decree which might be passed against the said defendant in the above suit and whereas a decree was passed on the day of 19 against the said defendant for the payment of and whereas application has been made for execution of the said decree against you

Take notice that you are hereby required on or before the day of 19 to show cause why the said decree should not be executed against you and if no sufficient cause shall be shown to the satisfaction of the Court an order for its execution will be forthwith issued in the terms of the said application

Given under my hand and the seal of the Court this
day of 19

Judge

Note 1 —Where there are numerous plaintiffs or numerous defendants, the name of the first plaintiff only, or the first defendant only, as the case may be, need be entered in the register

Note 2 —Cases remanded by appellate Courts to lower Courts under O 41, R 23, Civil Procedure Code, will be re admitted and entered in the general register of suits under their original numbers. In each case the letter R will be affixed to the number to be entered in column 2

Note 3 —In column 14 should be indicated whether the decision was *ex parte* on compromise or on contest against all or any of the defendants

Note 4 —When the Court of execution is other than the Court which passed the decree, the name of the executing Court should be given in column 26 "

No 14
REGISTER OF CIVIL SUITS (O 4 R 2)

CALCUTTA

Cancel columns 20 27 and substitute the following —

Execution					Return of Executions																						
20	No of execution application as per the date of application	21	Relief sought If money amount claimed	22	Order and date thereof If portion of relief not granted what portion	23	Against whom order made	24	For what amount to be stated	25	Amount of costs	26	Adjustments and satisfaction reported if any	27	Amount paid into Court	28	Persons arrested	29	Whether judgment debtor committed to jail if not why not If committed to jail, the period of stay in it	30	Manner of other return other than arrest and payment	31	Amount or relief still due and when execution petition is closed	32	If petition infunctious why and to what extent	33	Appeal if any, against order in execution and if so the result

No 15

REGISTER OF APPEALS (O 41, R 9)

COURT (OR HIGH COURT) AT

REGISTER OF APPEALS FROM DECREES in the year 19

[illegible]

Local Amendment.

Form No 16,

Allahabad

Add the following Nos 16 to 18 —

The security to be furnished under O 25, R 1, shall be, as nearly as may be by bond in the following form —

In the Court of _____ at _____
 Suit No. _____ of 19 _____

Plaintiff
Defendant.

versus

Whereas a suit has been instituted in the said Court by the said plaintiff to recover from the said defendant the sum of rupees _____ and the said plaintiff is residing out of British India (or is a woman) and does not possess any sufficient immovable property within British India independent of the property in the suit

Therefore I inhabitant of _____ have voluntarily become security, and do hereby bind myself my heirs and executors to _____ as Judge of the said Court and to his successors in office that the said plaintiff, his heirs and executors, shall whenever called on by the said Court, pay all costs that may have been or may be incurred by the said defendant, in the said suit and in default of such payment I bind myself my heirs and executors to pay all such costs to the said Court on its order

Witness my hand at _____ this _____ day of 19 _____
 (signed)

Witnesses

Surety.

Form No 17

Address for service

Under O 7 Rr 19 26 O 8 Rr 11 and 12, O 41 R 39, O 46 R 8, O 47, R 10, O 52, R 1

In the Court of the _____ of _____
 Original _____ suit No _____ of 19 _____
 or case

versus

Plaintiff.
Defendant

This address shall be within the local limits of the District Court within which the suit is filed or of the District Court within which the party ordinarily resides if within the limits of the United Provinces of Agra and Oudh but not within the limits of any other province —

Name, parentage and caste	Residence	Pargana or Tahsil	Post Office	District

Dated

Local Amendment

Form No 16.

Allahabad

Add the following Nos 16 to 18 —

The security to be furnished under O 25, R 1 shall be as nearly as may be by bond in the following form —

In the Court of

at

Suit No.

of 19

Plaintiff

versus

Defendant

Whereas a suit has been instituted in the said Court by the said plaintiff

to recover from the said defendant

the sum

of rupees. and the said plaintiff is residing out of British India (or is a woman) and does not possess any sufficient immovable property within British India independent of the property in the suit

Therefore I, the undersigned, being a duly qualified and acting Judge of the said Court, do hereby bind myself, my heirs and executors to _____ as Judge of the said Court and to his successors in office that the said plaintiff _____ his heirs and executors shall whenever called on by the said Court pay all costs that may have been or may be incurred by the said defendant _____, in the said suit and in default of such payment I bind myself, my heirs and executors to pay all such costs to the said Court on its order.

Witness my hand at

thus

day of 19

(signed)

Witnesses

Secret

Form No 17

Address for service

Under O 7 Rr 19 26 O 8 Rr 11 and 12 O 41 R 39 O 46 R 8 O 47 R 10
O 57 R 1

In the Court of the

of

Original— suit — No
or case

of 19 .

versus

Plaintiff

Defendant

This address shall be within the local limits of the District Court within which the suit is filed or of the District Court within which the party ordinarily resides if within the limits of the United Provinces of Agra and Oudh but not within the limits of any other province —

Name parentage and caste	Residence	Pargana or Tahsil	Post Office	District

Dated

ix Any summons, notice, or process in the case may, henceforward, be issued to me at the above address until I file notice of change. If this address is changed I shall forthwith file a notice of change containing all the new particulars.

Signature of party { Plaintiff
Defendant
Appellant
Respondent

Or

I file the above address according to the instructions given by my client (name)
(and capacity)

Signature of Pleader

N B—This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter.

Form No 18

Notice of change of address for service

Under O 7, Rr 19 26, O 8 Rr 11 and 12, O 41, R 38, O 46 R 9, O 47 R 10,
O 52 R 1

In the Court of the
suit

at

Original—No
or case

of 19

versus

Plaintiff,

Defendant

This address shall be within the local limits of the District Court within which the suit is filed or of the District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh but not within the limits of any other province—

Name parentage and caste	Residence	Pargana or Tahsil	Post Office	District

Dated

Any summons, notice, or process in the case may, henceforward, be issued to me at the above address until I file notice of change. If this address is again changed I shall forthwith file a notice of change containing all the new particulars.

Signature of party { Plaintiff
Defendant
Appellant
Respondent

Or

I file the above address according to the instructions given by my client (name)
(and capacity)

Signature of Pleader

N B—This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter.

THE SECOND SCHEDULE

ARBITRATION

ARBITRATION IN SUITS

P. 1. [S 506] (1) Where in any suit all the parties interested agree⁷ that any matter in difference¹⁰ between them shall be referred to arbitration, they may, at any time before judgment is pronounced,¹³ apply to the Court¹⁶ for an order of reference

(2) Every such application shall be in writing¹² and shall state the matter sought to be referred

[1877—S 506, 1859—Ss 312, 313]

Synopsis

	Note No		Note No
Legislative changes	1	Reference in respect of matters outside	
Scope of the Schedule	2	suit	11
Applicability of the Schedule to insolvency proceedings	3	Application shall be in writing	See
Applicability of the Schedule to execution proceedings	4	Note 21 below	12
Applicability of the Schedule to probate proceedings	5	At any time before judgment is pronounced	13
Applicability of the Schedule to suits for restitution of conjugal rights	6	Revocation of submission	14
Arbitration in proceedings under other Acts	6a	Withdrawal of suit after reference to arbitration	15
All parties interested must agree to reference	7	Court — Appellate Court	16
All the parties if should apply	8	Death of party if operates as revocation of reference	17
Effect of omission to sign or verify the application	9	Authority of pleader to refer	18
Matter in difference	10	Authority of agent to refer	19
		Authority of guardian or manager of a joint Hindu family	20
		Form	21
		Agreement to abide by the decision of the Court	22

Other Topics

Authority of guardian of minor to refer See Note 20 Pts (1) and (2) Authority of partner to refer See Note 19 Pts (4) to (6)

1 Legislative changes

The word *agrees* has been submitted for the vague word *de iure* as being a more definite and legal expression¹

Para 1—Note 1

1 (1917) 1917 Mad 672 (674) 39 Mad 853 Dissenting from (1918) 21 Ind Cas 989 (All) (F B)

2 Scope of the Schedule

The law of arbitration in British India is to be found in this Code and in the Arbitration Act, 1899. The Code deals both with arbitrations pending litigation, and with arbitrations without recourse to litigation. The Arbitration Act, on the other hand, applies only to arbitrations by agreement *without the intervention* of the Court of justice, and only in cases where, if the subject matter submitted to arbitration were the subject of a suit, the suit could be instituted in a Presidency Town or other local area to which the Act is made applicable by the Local Government. Where the Act applies, Paragraphs 17 to 23 of the Second Schedule (dealing with references to arbitration without the intervention of the Court) do not apply.¹

The Act was passed to remedy two defects that were supposed to exist in the provisions as to arbitration enacted in the old Code, viz:—

- (1) That the Code did not apply to cases where the dispute which was the subject of reference did not arise at the date of the agreement to refer. In other words where an agreement was entered into to settle differences that may arise in future by arbitration, and a dispute subsequently arose between the parties, the agreement to refer could not be filed in Court under the provisions of the Code.
- (2) That the Code applied only to cases where the agreement to refer named the arbitrator or stated that he should be appointed by the Court.

The first of these defects was, however, removed by a Full Bench decision of the High Court of Bombay in *Fazulbhoy Mehrul Chinnoy v The Bombay and Persia Steam Navigation Company, Ltd.*,^{1a} in which it was held that on a correct interpretation of the Code, it applied also to agreements to refer future disputes to arbitration. The second defect also has now been removed by the omission from Paragraph 17 of this Schedule, of the provisions requiring the arbitrator to be named. At present, therefore, there is no material difference between the provisions of the Code and those of the Arbitration Act as regards references without the intervention of the Court, except that the latter applies to particular local areas, and the former applies to other parts of British India.

In *Ghulam Khan v Muhammad Hassan*,^{1b} their Lordships of the Privy Council had occasion to consider the true construction and effect of the provisions of the Code relating to arbitration and they observed that those provisions deal with arbitrations under three heads:—

- (1) Where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit. In that case all proceedings from first to last are under the supervision of the Court. (Paragraphs 1 to 16 deal with such matters)

Note 2

1 (1926) 1926 Cal 730 (732)
(See also (1912) 15 Ind Cas 402 (403)
1912 Pun Re No 37)
(1909) 4 Ind Cas 1150 (1151) 3 Sind L R

162
(1903) 35 Cal 199 (201)
1a (1895) 20 Bom 232 (235) (F B)
1b (1901) 29 Cal 167 (182 183) (1 C)

(2) Where the parties, *without recourse to litigation*, agree to refer their differences to arbitration and it is desired that the agreement of reference should have the sanction of the Court. In that case all further proceedings are under the supervision of the Court (Paragraphs 17 to 19 of the Schedule deal with such matters)

(3) Where the agreement of reference is made and the arbitration itself takes place *without the intervention of the Court*, and the assistance of the Court is only sought to give effect to the award (Paragraphs 20 To 23 of the schedule deal with these matters)

3 Applicability of the Schedule to insolvency proceedings

The provisions of this Schedule do not apply to proceedings under the Provincial Insolvency Act 1920 by virtue of S 5 of that Act. An Insolvency Court has therefore no power to refer the whole proceedings to arbitrators to decide whether the petitioner for insolvency or (in the case of a petition by a creditor) the debtor should or should not be declared an insolvent. The proceedings require the exercise of judicial discretion and it would be acting contrary to the whole spirit of the Act for a Court which has special jurisdiction thereunder to delegate its powers and duties to the arbitrator ¹

4 Applicability of the Schedule to execution proceedings

This Schedule does not apply to execution proceedings and a Court executing a decree cannot refer the matter in the execution proceedings to arbitration ¹

5 Applicability of the Schedule to probate proceedings

A dispute relating to the genuineness of a will in a probate proceeding pending before Court cannot be referred to arbitration ¹. So also an application for revocation of the grant of a probate cannot be referred to arbitration ². This is based on the view that a decision on such questions is not merely one *inter partes* but is a judgment *in rem* against the whole world and therefore cannot be allowed to be decided by arbitrators selected at the instance of merely the parties to the proceeding

6 Applicability of the Schedule to suits for restitution of conjugal rights

The *factum* or validity of a marriage may in a suit for the restitution of conjugal rights be referred to arbitration ¹ but the whole suit cannot be referred to arbitration inasmuch as the question whether a decree for restitution should be made or not is a matter entirely in the discretion of the Court and cannot be delegated to arbitrators ²

6a Arbitration in proceedings under other Acts

1 Section 52 of the Bengal Estates Partition Act (V of 1897) provides that when a partition has been referred to arbitration the proceedings shall be

Note 3

1 (1916) 1916 Lah 170 (171) 1916 Pun Re No 50

Note 4

1 (1925) 1925 Cal 812 (814) 32 Cal 559
(1935) 1935 All 125 (125) A reference made in execution is invalid

Note 5

1 (1930) 1930 All 510 (541)

2 (1834) 1894 Pun Re No 72 page 240

Note 6

1 (1929) 1929 Lah 394 (395)
(1918) 1918 Lah 357 (358)
(1929) 1929 Lah 177 (178)

2 (1918) 1918 Lah 357 (358) Following 1895
Pun Re No 37
(1933) 1933 Lah 532 (532)

conducted in accordance with the provisions of Paragraphs 1 to 16 of this Schedule so far as they are applicable

2 The provisions of this Code relating to arbitration have been made applicable, by S 265, Sub S (3) of the Chota-Nagpur Tenancy Act (VI of 1908) to all suits, appeals and proceedings under that Act before the Deputy Commissioner, so far as they may apply

3 Under S 43 of the Bengal Survey Act (V of 1875) and S 16 of the Burma Boundaries Act (V of 1880), the Collector or the Boundary Officer may, with the consent of the parties concerned, refer to arbitration any dispute as to a boundary

4 In cases of reference to arbitration under S 203 of the U P Land Revenue Act (III of 1901) the provisions of Paragraphs 2 to 16 of this Schedule shall apply, so far as they are not inconsistent with anything in that Act (See S 204 of the Act)

7 All parties interested must agree to reference

The agreement to refer the matter in dispute in a pending suit must have the concurrence of *all* the parties concerned¹ In other words the foundation of the jurisdiction of the Court to make an order of reference is an *agreement* between all the persons interested² An order of reference made by the Court where all the parties interested have not agreed, is thus without jurisdiction and invalid³ not only against the absent party, but against all parties, *i e*, even those who have joined in the reference^{3a} A subsequent consent by one of the parties who did not join in the reference at the time it was made cannot make the proceedings valid

Note 7

51

of reference on the ground of non
of the parties

(1911) 9 Ind Cas 195 (196) 1911 Pun Re No 17

(1920) 1920 Sind 107 (110) 14 Sind L R 156

Court cannot force a submission on a reluctant party—See the following cases—

(1863 Gb) 10 Moo Ind App 413 (425, 426) (PC)

(1868) 1868 Pun Re No 29 Consent should be voluntary

(1869) 1869 Pun Re No 52 A submission to arbitration may be recommended

(1927) 1927 Mad 1164 (1150)

(1873) 19 South W R 321 (321)

(1865) 10 South W R 171 (171) *Reference must be by all the parties who are*

3

—Application for reference to arbitration by decree holder and only one of them—Order of reference by Court is illegal

law
(1926) 36 Ind Cas 273 (273) (Mad). *Order of reference*

and an award made on such reference is void and need not be set aside⁴. An objection to the validity of the reference on the ground of the non-agreement of all the parties can be raised at any stage⁵. The decision cited below⁶ where it was held that a party may be estopped by his conduct from contesting a reference to which he was no party cannot be accepted on principle as correct.

It is however only the parties interested that should agree to the reference. Section 506 of the old Code provided that *all the parties to the suit* may apply for a reference to arbitration. But it was held by the High Court of Allahabad that the words "all the parties to a suit" would not necessarily include parties between whom and any of the parties to the submission there was, in fact, no matter in difference in the suit⁷. The word "interested" was added in the present Code to give effect to the above view⁸.

The expression "all parties interested" means parties interested in the *specific dispute* referred to arbitration and not in the subject matter of the whole suit⁹. Where parties have distinct and severable interests, a party interested only in one such portion need not join in a reference with respect to the other portions¹⁰.

The question whether a party is interested within the meaning of this Paragraph depends upon the facts of each case¹¹. One important test is to see whether he is a necessary party or a person who could be joined as a proper party under the provisions of O 1, R 10 of the Code¹². An unnecessary or *pro forma party*,¹³ or a party who had been exonerated at the time of the reference¹⁴ cannot be said to be a person interested within the meaning of the Paragraph. A person who is *ex parte* in the suit¹⁵ or even a person against whom no relief is claimed¹⁶ is not

can be taken by any party
[But see (1930) 1930 Sind 206 (209)
24 Sind L R 470. Person who is
party to reference cannot object to
award on the ground that another
person was a necessary party when
the latter himself does not object

(1893) 1883 Pun Re No 130

(1929) 115 Ind Cas 680 (682) (Pat)

1 (1929) 1929 Mad 621 (623)

5 (1916) 1919 Cal 336 (336)

7 (1902) 24 All 229 (230)

9 (1907) 1907 Cal 400 (400)

(1928) 1928 Bom 248 (249) 52 Bom 408

(1924) 1924 Pat 33 (34, 36) 2 Pat 777

10 (1931) 1931 All 453 (454) 53 All 669

(1931) 1931 All 659 (660). Suit on promissory
executed by A in favour of B and
assigned by B to C—No relief asked for
against B—Reference to arbitration
without B is not invalid

11 (1926) 1928 Bom 248 (249, 250) 53 Bom
408

(1933) 1933 All 799 (740). Suit on promissory

executed by A in favour of B and
assigned to C—Relief claimed
against A and in the alternative
against B—B is interested person

(1934) 1934 Pat 19 (21). The test is to see
the nature of the suit and not the
possibility of the omitted parties
having any interest in a future litigation
which may arise as result of
a decree in the suit

(1917) 1917 Pat 136 (137)

12 (1929) 1929 All 768 (768)

13 (1913) 18 Ind Cas 609 (610) 35 All 107

Unnecessary party

(1934) 1934 All 658 (660)

(1934) 1934 Pat 19 (21). *Pro forma* defendant

(1926) 1926 All 238 (239) 48 All 239. *Pro
forma* defendant

(1917) 1917 All 183 (186) 39 All 489
2 May 583

(1912) 14 Ind Cas 562 (562) (Mad)

(1917) 1917 Pat 136 (138)

PP

16 (1925) 1925 Mad 62. (622, 623)

necessarily a person not interested. Whether he is so interested or not depends upon the facts of the particular case¹⁷ including the conduct of the party up to the end of the proceedings¹⁸. But the mere fact that the award that was passed is not in fact against him cannot be taken to show that he was not interested at the time of the reference^{18a}. Where there is in fact no matter in difference between the *ex parte* defendant and the parties to the submission, his not joining the reference will not affect the validity of the reference¹⁹. If on the other hand he is interested and does not agree to the reference, the order of reference is *ultra vires* and is invalid²⁰.

A defendant who makes a complete admission of the plaintiff's claim entitling the latter to a judgment under O 12, R 6 of the Code is no longer interested and need not join in the reference by the plaintiff and the other defendants²¹.

8 All the parties if should apply

All the parties interested must not only agree to the reference, but must *apply* to the Court. If before the application is made to the Court one of the parties resiled from the agreement no order of reference can be passed on the ground that he previously agreed to a reference being made before the application was presented¹.

See also the undermentioned case².

9 Effect of omission to sign or verify the application—See Note 21 infra

10 Matter in difference

The matter in difference is the matter in dispute between the parties¹. A dispute implies an assertion of a right by one party and the repudiation thereof by another². It is not however necessary that the question should be one which the Court can *legally enquire into*. Thus a dispute as to an uncertified payment or adjustment which the Court cannot take notice of, can be a matter in difference between the parties which can be referred to arbitration³.

The matter in difference must be one which has *actually arisen at the time of the reference* though it need not have arisen at the time of the agreement to refer⁴. There can be no reference to arbitration under this Schedule of existing

17 See cases cited in foot note 11 above

18 (1930) 1930 Sind 256 (253) 24 Sind L R 470

18a (1927) 1927 Sind 239 (240)

(1911) 10 Ind Cis 539 (550) (All)

[See however (1910) 7 Ind Cis 63 (68) 32 All 657]

19 (1902) 24 All 229 (230)

20 (1920) 1920 Mad 852 (854) 42 Mad 632

(1925) 1925 Mad 621 (623)

(1925) 1925 Lah 477 (478)

(1917) 1917 Cal 481 (483)

[See also (1925) 1925 Oudh 201

No 17

(1933) 142 Ind Cis 673 (679) (Lah)

[See also (1909) 1 Ind Cis 140 (146) (All)]

2

[See also (1933) 1935 Bom 153 (155) 156] Agreement to refer made before suit—During pendency of suit one party alone applying for reference—Court will not make reference if there are difficult points of law or if the award is likely to be a nullity or if the agreed arbitrator is disqualified from acting]

Note 10

1 (1931) 1931 Bom 164 (166)

2 (1931) 1931 Bom 164 (166)

3 (1925) 1925 Cal 812 (813) 52 Cal 559

4 (1931) 1931 Bom 164 (166)

differences as well as *disputes that may arise in the future*⁶ A dispute may exist even where the liability is fully admitted and only the payment is withheld The facts of each case must be examined to see whether there is a dispute⁶

Further the matter in difference must be one arising in the *suit* and between the parties to the suit The Court has no power to refer to arbitration any questions between the parties to the suit other than those in question in the suit, or any questions in which any person, not a party to the suit is concerned⁷

A reference is competent on a question of law as well as a question of fact⁸ Consequently, an error made by the arbitrators on a point of law referred to them does not vitiate the award and cannot be questioned on the ground that it is not in accordance with the received interpretation of the law⁹ but the matter in difference must relate only to the *private rights* of the parties to the litigation A suit under S 92 of the Code is not one for the determination of the private rights of the parties to the litigation, and matters in such a suit cannot be referred to arbitration¹⁰ Similarly the selection of a guardian for a minor in a proceeding under the Guardians and Wards Act, 1890 is not a matter of private interest and cannot be settled by reference to arbitration¹¹ It has been held that a criminal complaint cannot be referred to arbitration¹²

Where a question arises as to what the matter was that was referred to arbitration, it is for the Court to say on a construction of the reference The arbitrator's belief about it is immaterial¹³ Where a whole case is referred to arbitration the question of costs also must be taken to have been referred and the arbitrators can give a decision thereon¹⁴ (See also Paragraph 13 below)

11 Reference in respect of matters outside suit

Matters outside the suit cannot be referred to arbitration under this Paragraph and the award made on such a reference is invalid¹ An agreement to recognise an award made on matters beyond the scope of the disputes mentioned

(1903) 30 Cal 831 (839 840)

(1914) 1314 Bom 123 (124) 38 Bom 638

(1920) 1920 Cal 143 (143) 54 Ind Cas 285

(256 288) 46 Cal 531

5 (1930) 1930 All 319 (320)

6 (1920) 1920 Cal 143 (143) 54 Ind Cas 285

(256 288) 46 Cal 531

7 (1925) 1925 P C 293 (297) 53 Ind App 1 53 Cal 258 (P C) Confirming 1924 Cal 367

8 (1902) 29 Cal 167 (186) 29 Ind App 51 1902 Pun Re No 25 (P C)

(1933) 1933 Oudh 521 (522) 9 Luck 203
Commission appointed to take evidence—Application addressed to

(1901) 11 Mad L Jour 337 (339)

[See however (1903) 26 Mad 361 (361) Under S 16 of the Religious Endowments Act a Court may refer any matter in difference in the suit for decision by an arbitrator *but not the whole suit*]

[See (1934) 1934 All 368 (3 0) G All 721 Parties litigating for title and possession of mutti in their own right—Mutt not of nature of public charity—Disputes inter se can be referred to arbitration]

Note 11

1 (1921) 1921 Mad 709 (09)

(1870) 14 South W R 469 (4 0)

(1925) 1925 P C 293 (294) 53 Ind App 1 53 Cal 258 (P C)

(1911) 12 Ind Cas 657 (658) 36 Bom 105

in the reference is void² Where, however, an application for reference includes matters outside the suit but the Court orders a reference only as to matters in difference *in the suit*, the order of reference is not illegal³ Again where on the same day parties apply for reference to arbitration of matters in difference between them *in the suit* and also separately make a reference as to matters outside the suit, the order of reference made by the Court with regard to the subject matter of the suit cannot be questioned on the ground of illegality or invalidity⁴

12 Application shall be in writing—See Note 21, below.

13 At any time before judgment is pronounced

The parties are entitled to have the matter in difference between them submitted to arbitration, at any time before judgment is pronounced The Court has no discretion to reject the application made by the parties for a reference to arbitration¹

14 Revocation of submission

Where an order of reference to arbitration is made through Court, all subsequent proceedings are, as has been seen in Note 2 above, under the supervision of the Court Consequently a party to the agreement to refer is not entitled to terminate the reference by any revocation on his part He is bound by it and the arbitration must proceed according to the provisions of the law¹ The Court may, however supersede the arbitration on the application of the parties in the cases specified in Paragraphs 5 and 8 of the Schedule There is a conflict of opinion whether even the Court can revoke the arbitration in cases not falling within the said Paragraphs According to the decisions cited below² the Court has no power to deal with the matter in difference between the parties until the award is made Thus the Court could not even allow the withdrawal of the suit after an order of reference has been made, though if there is any partiality or misconduct on the part of the arbitrator, the Court could, *after the award is made*, set it aside³ On the other hand it has been held in the undermentioned cases⁴ that there is an

2 (1928) 1928 Sind 81 (82) 21 Sind L R 203

3 (1927) 1927 Cal 52 (54)

4 (1927) 1927 Cal 52 (54)

[See also (1865) 3 Suth W R (Misc) 27 (28) They should be distinctly separated and not mixed up together]

Note 13

1 (1910) 1915 Cal 70 (70)

[See also (1911) 11 Ind Cas 935 (935) 33 All 645]

Note 14

1 (1872) 17 Suth W R 516 (517)

(1874 70) 8 Ind H C R 46 (55)

[See also (1865) 7 All 273 (276)]

(1914) 1914 Oudh 327 (328) 17 Oudh Cas 336

2 (1886) 10 Bom 381 (383)

(1934) 1934 Cal 250 (256)

(1923) 1923 Cal 410 (411 416)

(1914) 1914 All 314 (316) 36 All 354

(1927) 1927 Mad 910 (911)

(1912) 16 Ind Cas 177 (177) (All)

(1920) 1920 Pat 731 (735) 5 Pat L J 672

[See also (1906) 3 All LJ 180 (187)]

3 See cases cited in foot notes (1) and (2) in Note 15 *infra*

4 (1929) 1929 All 743 (744, 745) 51 All 1010 This decision purports to follow 1 Ind Cas 14 which was a case under S 5 of the Arbitration Act under which the Court can grant leave to revoke a submission

(1933) 1933 Sind 60 (70)

(1934) 1934 Bom 388 (389) But this jurisdiction should be exercised with great care and caution

(1935) 1935 Mad 349 (350)

(1925) 1925 Pat 720 (723)

[See also (1934) 1934 All 95 (97) Parties and arbitrator agreeing to withdraw reference — Arbitration should be superseded — Reference can be revived only by fresh agreement not by resiling from previous resolve by one of the parties — Any award under such circumstances is not valid]

inherent jurisdiction to intervene and supersede the arbitration in cases not falling within Paragraphs 5 and 8 where such an order is necessary for the ends of justice or to prevent an abuse of the process of the Court

Where an agreement to refer has been entered into without recourse to litigation it may be filed in Court under Paragraph 17 *where no sufficient cause is shown against its being filed*. On an interpretation of S 326 of the Code of 1859 corresponding to Paragraph 17 of this Schedule it was held by their Lordships of the Privy Council in *Pestonji Nusserwanjee v D Maneckjee and Co*, 12 Moore's Indian Appeals 112 that where parties have agreed to submit the matter in difference between them to arbitration of one or more certain specified persons, no party to submission can revoke the submission to arbitration *unless for good cause*, and that a mere arbitrary revocation of the authority is not permitted. And this has been followed in numerous cases. See notes to Paragraph 17, *infra*. In cases falling within the Arbitration Act 1899, a submission to arbitration may be revoked by *leave of the Court*. As to the circumstances under which such leave may be given, see the undermentioned cases.⁵

15 Withdrawal of suit after reference to arbitration

As has been seen in Note 14 above the Court has no jurisdiction to allow a withdrawal of the suit after reference¹ or after an award has been made on such reference.² An application to file an award under Paragraph 20 of the Code can however be allowed to be withdrawn as if it were a suit.³

16 Court—Appellate Court

As has been seen in Note 8 to O 41, R 25 *ante* where the appellate Court remits a case under that Rule the lower Court has no power to refer the case to arbitration.¹ Nor can the appellate Court by its order of remand direct the lower Court to do so.² By virtue of sub section (2) of S 107 *ante* the appellate Court has the same powers of acting under this Schedule as the Court of first instance. Thus the appellate Court can refer, with the consent of parties, matters in dispute in appeal to arbitration.³ Where the Court of first instance passes a decree not in accordance with the award, but the appellate Court holding that the award is not open to any objections passes a decree in accordance with this award, it is final under Paragraph 16 of the Schedule.⁴

17 Death of party if operates as revocation of reference

Under the English Common Law the death of a party to a reference operates as a revocation of the authority of the arbitrator unless the submission contained either expressly or by necessary implication a provision to the contrary

5 (1925) 125 All 202 (202)
(1909) 1 Ind Cas 14 (16 17) 31 Bom 1

Note 15

1 (1887) 9 All 168 (172)
(1919) 1919 Cal 1030 (1031) Portion of the claim under reference to an arbitration cannot be withdrawn without the consent of the other party
2 (1903) 7 Cal W N 186 (187)
(1884) 6 All 211 (213)
(1916) 1916 Oudh 141 (141)
3 (1904) 31 Cal 516 (517)

Note 16

1 (1885) 7 All 523 (526 527)
2 (1874) 22 Suth W R 336 (394)
3 (1911) 11 Ind Cas 985 (990) 33 All 615
(1875) 7 N W P H C R 243 (247 249) (E B)
(1882) 18 Cal 507 (509)
(1886) 12 Cal 173 (177)
(1872) 17 Suth W R 31 (32)
(1874) 21 Suth W R 210 (211)
(1880) 3 Mid 75 (79)
4 (1834) 10 All 8 (11 12)

This view proceeded on the principle that an arbitrator was, in the contemplation of the law, merely an agent appointed by the parties to decide the matter in dispute between them¹. The law in this country is however quite the reverse, and the death of a party pending arbitration proceedings through Court does not necessarily revoke the reference². If on the death of the party the right to sue survives to his representatives, they should be brought on record under the provisions of O 22³. Where no application is made within time for bringing the legal representatives on the record, and the suit abates, the award made by the arbitrators subsequent thereto cannot be filed in Court⁴.

In a proceeding before the arbitrator on a reference made *without the intervention of the Court*, there is no provision of law enabling the arbitrator to bring the legal representatives of a deceased party, to the submission on record, and the fact that the arbitrator failed to do so does not make the award illegal and not binding on the representatives⁵ especially where the party dies after the hearing is terminated and nothing remains for the arbitrators to do but to deliver their award⁶.

18 Authority of pleader to refer

Section 506 of the old Code required a special authority for a pleader to make a reference to arbitration on behalf of his client¹. In the present Paragraph the words as to special authority have been omitted. It has been held by the Sind Judicial Commissioners Court that the effect of the omission is to enable a pleader to make a reference to arbitration even though the vakalatnama does not specifically authorise him to do so². The general trend of opinion is, however, that a pleader has no such authority³. A counsel as distinguished from a *pleader* who derives his authority only from the vakalatnama, has implied authority even to make a reference to arbitration⁴. But neither a counsel nor a pleader expressly authorised to refer to arbitration can delegate his power to refer to arbitration to another pleader without express authorisation to that effect⁵. Nor will the reference to arbitration by the counsel of a party be binding on the party where he had given the counsel express instructions against making any such reference⁶. A pleader has no authority to revoke the appointment of an

Note 17

1 *Halsbury's Laws of England* Vol 1, pp 448 to 450

2 (1910) 7 Ind Cas 590 (591) 4 Sind L R 14 A case under the Arbitration Act

(1933) 1933 Sind 63 (70) (*Quære*)

(1911) 11 Ind Cas 481 (495) (Cal)

(1911) 11 Ind Cas 935 (936) (Cal) 33 All 645 Death after application, but before order of reference — Arbitrator's authority not revoked

3 (1904) 27 Mad 112 (116)

(1924) 1924 Lah 725 (726) If they are not brought on the record the award is not binding on them

4 (1911) 12 Ind Cas 687 (688) 36 Bom 100

5 (1922) 1922 Cal 226 (228)

6 (1912) 13 Ind Cas 161 (166 167) (Cal) It was however observed that if the death occurred before the hearing was

concluded, it would have been necessary to bring the representatives on the record—How this could be done is not clear

Note 18

1 (1907) 29 All 423 (430)
(1899) 23 Bom 679 (684)
(1864) 1 Suth W R 80 (81)
(1900) 7 Cal W N 343 (344)
(1900) 10 Cal W N 11

19 Authority of agent to refer.

20 Authority of guardian or manager of a joint Hindu family

21 Form

The agreement to refer should clearly set forth in the form of issues, what

- 7 (1922) 1922 Nag 39 (40) 18 Nag L R 140

Note 19

1. The first group of authors (e.g., [1, 2]) considers the problem of the stability of the motion of a system of particles in the field of a central force. The results of the calculations show that the system is stable for all values of the parameters of the system. The second group of authors (e.g., [3, 4]) considers the problem of the stability of the motion of a system of particles in the field of a central force. The results of the calculations show that the system is stable for all values of the parameters of the system. The third group of authors (e.g., [5, 6]) considers the problem of the stability of the motion of a system of particles in the field of a central force. The results of the calculations show that the system is stable for all values of the parameters of the system.

(1915) 1915 L B 110 (111)

(1592) 19 Cnl 334 (335)

(1864 G3) 2 Mad II C R 47 (4J)

(1864) 1 Suth W R 280 (281) If injurious
to the minor the award will be set
aside

[See (1932) 1932 P C 75 (80) 7 Luck 1 GJ Ind App 92 (P C). But the mother of a minor Nibomandaa cannot as *de facto* guardian agree to refer to arbitration on behalf of the minor.]

- 2 (1885) 1885 Pun Re No 92 page 204
(1933) 112 Ind Cas 189 (Ring) But if a person agreeing to refer on behalf of a minor has not been appointed his guardian *ad litem* the reference and award are invalid and not binding on the minor
(1930) 1930 All 646 (646)
3 (1911) 11 Ind Cas 481 (488) (Cal) Arbitration without recourse to litigation
(1894) 16 All 231 (233) Award out of Court
(1919) 1919 Mad 878 (879) (Do)
(1927) 1927 Lah 362 (364) 8 Lah 693 Arbitration pending suit
[See also (1935) 1935 Lah 667 (669) *Karta* of joint Hindu family authorising co partner who is also managing member of joint family firm to make reference to arbitration—Such member can make valid reference so as to bind other members]

(1926) 1926 Lch 91 (93) Reference made by one partner on behalf of firm is invalid—All partners must join

(1.32) 1932 Bom 516 (p19)

(1932) 1932 Cal 3:3 (344)

6 (1930) 1930 Sind 40 (41)

(1923) 1923 Lah 212 (213)

[See also (1933) 1933 All 924 (925)
Defendant's son managing the busi-
ness agreeing to reference—Parties
appearing before arbitrator—Sub-
stantial justice done—High Court
will not interfere in revision in such
a case.]

[But see (1932) 1932 Lah 291 (292)]

Note 20

1 (1920) 1920 Dom 32 (33) 44 Bom 202

(1903) 27 Bom 257 (291)

This view proceeded on the principle that an arbitrator was, in the contemplation of the law, merely an agent appointed by the parties to decide the matter in dispute between them¹. The law in this country is however quite the reverse and the death of a party pending arbitration proceedings through Court does not necessarily revoke the reference². If on the death of the party the right to sue survives to his representatives, they should be brought on record under the provisions of O 22³. Where no application is made within time for bringing the legal representatives on the record, and the suit abates, the award made by the arbitrators subsequent thereto cannot be filed in Court⁴.

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Note 17

- 1 *Halsbury's Laws of England* Vol 1
pp 448 to 450

2

concluded, it would have been necessary to bring the representatives on the record—How this could be done is not clear

Note 18

- 1 (1907) 29 All 429 (430)
(1899) 23 Bom 629 (634)
(1864) 1 Suth W R 80 (81)
(1900) 7 Cal W N 343 (344)
(1901) 10 Cal W N 11

- 3 (1904) 27 Mad 112 (116)
(1921) 1924 Lah 725 (726) If they are not brought on the record the award is not binding on them

- 4 (1911) 12 Ind Cas 687 (688) 36 Bom 105

- 5 (1922) 1923 Cal 226 (228)

- 6 (1912) 13 Ind Cas 161 (166 167) (Cal) It was however observed that if the death occurred before the hearing was

- 5 (1928) 1928 Cal 378 (380)

arbitrator by the party himself, without the latter's knowledge or instructions.⁷

19 Authority of agent to refer.

The authorised agent of a party within the meaning of O 3, Rr 1 and 2, can make a reference on behalf of his principal¹. No special power of authorisation is, however, necessary to enable him to do so². The principal can also subsequently ratify the agent's act in referring to arbitration, even where the agent had originally no authority to do so³. A partner is an agent of the firm only for the purpose of the business of the firm⁴. It is not part of the business of the firm to refer matters in dispute to arbitration and therefore one partner cannot, as such, make or authorise a reference to arbitration on behalf of the firm⁵. But the managing partner of the firm can validly make a reference to arbitration so as to bind the firm⁶.

20 Authority of guardian or manager of a joint Hindu family

The next friend or natural guardian of a minor is entitled to refer disputes to arbitration, where there is no pending suit in respect of it, if the same is for the benefit of the minor and the award passed on such a reference will be binding on the minor¹. As to the powers of a guardian *ad litem* to agree to refer the subject-matter of the suit to arbitration, see Note 15 to O 32, R 7 and the undermentioned case². The manager of a joint Hindu family represents the other members of the family and can refer the family disputes to arbitration³.

21 Form

The agreement to refer should clearly set forth in the form of issues, what

7 (1924) 1922 Nag 89 (40) 18 Nag LR 140

(1915) 1915 L B 110 (111)

(1892) 19 Cal 334 (335)

(1864 62) 2 Mag H C R 47 (40)

(1864) 1 Suth W R 280 (281) If injurious
to the minor the award will be set
aside

[See (1932) 1932 PC 6 (80) 7 Luck 1
6) Ind App 92 (1) 1. But the mother
of a minor Mahomedan cannot as

2. $\frac{1}{2} \leq \frac{1}{2} \leq \frac{1}{2}$

(1900) 22 AB 135 (133)

(1912) 1919 M. 1 2161 (1162)

(1926) 1926 Lab 91 (93) Reference made
by one partner on behalf of firm is

award are invalid and not binding

traction

(1534) 16 All 231 (233) Award out of
Court

(1919) 1919 Mad 878 (879) (Do)

(1927) 1927 Lah 362 (364) 8 Lah 693

Arbitration pending suit

[See also (1935) 1935 Lah 607 (669)
Karta of joint Hindu family autho-

3 case1

[But see (1932) 1932 Lab 291 (292)]

Note 20

1 (1920) 1920 Bom 32 (33) 44 Bom 202

(1993) 27 Bom 287 (291)

ference so as to bind other members).

are the matters in difference between the parties on which the arbitrator is required to arbitrate¹ If the agreement is so vague as to make it impossible to ascertain what the dispute was which was referred to arbitration, it is bad for indefiniteness² The Paragraph requires that the agreement to refer shall be in *writing* Where there is no written reference and there is nothing to show what the parties agreed to refer, the reference and the award will be invalid³ But the provision as to the requirement of writing is only *directory* and not *mandatory* the object thereof being merely to avoid a subsequent controversy as to whether there was or was not any such application⁴ An award is not therefore invalid merely because it was not made in writing if it is clear that the parties did agree to refer⁵ In the undermentioned case⁶ an application for an adjournment on the ground that the parties had referred the dispute to arbitration was assumed to be an application for an order of reference It was however held in the case cited below⁷ that the requirement as to writing, cannot be said to be directory but that nevertheless the parties were estopped from defeating the arbitration proceedings on the ground of non compliance with the Paragraph The High Court of Bombay has also held that want of writing undermines the foundation of *jurisdiction* but that it is not sufficient by itself, to set aside the award⁸ These two cases cannot it is submitted, be accepted as correct on principle The breach of a mandatory provision or the want of jurisdiction will render the proceedings void and there can be no question of estoppel

Where the parties have agreed and applied to the Court for a reference the mere fact that one of them has not *signed* the application does not vitiate the reference⁹ Where the pleader of a party duly authorised signs the reference the fact that the party himself does not sign it will not invalidate the award¹⁰ It was

Note 21

- 1 (1930) 1930 All 319 (320)
- 2 (1919) 1919 Pat 74 (76)
- 3 (1917) 1917 Pat 136 (138)
- (1879) 18/9 Pun Re No 67 page 182

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- 5 (1911) 9 Ind Cas 412 (413) (Oudh) Subsequently the parties appeared in person before the arbitrator and even evidence was taken in their

I

Oral consent of both parties recorded by Court

- (1862) 63 1 Mad HCR 106 (106) Case under the Code of 1859—Reference was agreed to by all the parties present in open Court

(1870) 2 N W P HCR 419 (419)

- (1925) 1925 Oudh 203 (270) 23 Oudh Cas 74

- 6 (1922) 1922 Mad 429 (434)

(1917) 1917 All 71 (73) 39 All 401

[See also (1917) 1917 Mad 556 (566)]

- 7 (1924) 1924 Oudh 400 (401)

- 8 (1911) 12 Ind Cas 687 (688) 36 Bom 105

- 9 (1915) 1915 P O 79 (80) 43 Cal 290 43 Ind App 1 (P C)

(1935) 1935 Mad 276 (278)

(1924) 1924 All 457 (457)

Some of the parties not joining, parties appearing before arbitrator through pleader—Defect in reference cured]

- 10 (1921) 1927 Lah 362 (364) 8 Lah 693 [See also (1930) 1935 Pat 16 (1)] Pleader appointed in suit on behalf of all defendants—Agreement for reference signed by pleader as pleader—No objection taken to arbitration proceedings—*Hell* all defendants are parties to reference]

held by the Privy Council in the undermentioned case¹¹ that where the guardian *ad litem* of a minor party is present in Court and assents to the application for reference, the fact that he did not sign the reference did not render it invalid

22 Agreement to abide by the decision of the Court

A consent by the parties to abide by the decision of the *Court* is not such a reference to arbitration as is contemplated by this Schedule¹ But the award of the Court is binding on the parties not because of the fact that this Schedule applies but because on general principles of jurisprudence, parties cannot go back on their consent to abide by the decision of the Court after such decision is given²

P. 2. [S 307, Para 1.] The arbitrator shall be appointed in such manner as may be agreed upon between the parties

[1877—S 307, Para 1; 1859—S 314]

Synopsis

Appointment of arbitrator	Note No 1	Arbitrator—See Note 22 to Paragraph 1 above	Note No 2
Appointment of Court itself as arbitrator			

1 Appointment of arbitrator

It is essential that the parties should either name the arbitrators or consent to the nomination of the arbitrators by the Court The Court has no authority to force upon a reluctant party the decision of any question in the cause by arbitrators selected at its discretion¹ A party may however waive such an irregularity but if he appears before the arbitrator under protest he cannot be held to have forfeited his right to question the validity of the proceedings

Before the Court refers a case to arbitration it should ascertain whether the persons nominated are willing to accept the office and till then it cannot make a reference³

2 Appointment of Court itself as arbitrator—See Note 22 to Paragraph 1 above

11 (1915) 1915 P C 9 (80) 43 Cal 790 43 Ind App 1 (P C)

Note 22

1 (1919) 1919 Mad 150 (151) Doubting (1903) 20 Mad 76 and approving (1899) 13 Bom 752

{191a} 1915 Mad 1074 (1074)

{191c} 1920 Mad 800 (801) 42 Mad 625

[But see (1911) 12 Ind Crs 687 (688) 26 Bom 100 where a contrary view was assumed]

C P C 374 & 375

2 {1919} 1919 Mad 150 (151) (1899) 23 Bom 752 (155) (1906) 10 Cal W N 835 (839) (1907) 4 All L J 89 (91) (1921) 1921 All 310 (310) 43 All 766 (1920) 1920 Mad 800 (801) 42 Mad 625

Sch II Para 2—Note 1

1 (1865) 5 Suth W R P C 21 (24) (P C)

2 (1965) 5 Suth W R P C 21 (25) (P C)

[See also (1864) 7 Suth W R 13 (13)]

3 (1864) Suth W R Gap 339 (339)

P. 3. [S 508] (1) The Court shall, by order, refer to the arbitrator, the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Schedule, deal with such matter in the same suit

[1877—S. 508, 1859—S 315]

Synopsis

	Note No		Note No
Legislative changes	1	sonable	5
The Court shall by order refer	2	Court if can extend time fixed—See	6
Revocation or withdrawal from arbitration—See Notes 14 15 and 17 to Paragraph 1 ante	3	Paragraph 8 <i>infra</i>	7
Matter in difference	4	When award is said to be made	8
Shall fix such time as it considers rea		Effect of order of reference	9
		Form	

Other Topics

Discretion of Court to refuse application for order of reference See Paragraph 1 Note 13

1 Legislative changes

The word *delivery* has been substituted by the word *making* in sub paragraph (1). See Note 7 below

2 The Court shall by order refer

As has been seen in Note 13 to Paragraph 1 *ante* where the parties apply to the Court for an order of reference the Court is *bound* to make an order of reference and has no discretion in the matter. In the absence of an order of reference by the Court under this Paragraph the arbitration proceedings and the award made therein are illegal¹. Where the parties applied for adjournment of the suit from time to time on the ground that the matters in dispute had been referred to arbitration and the Court granted time it was held that the order granting adjournment on the application of the parties should under the circumstances of the case be construed as an order of reference².

3 Revocation or withdrawal from arbitration

See Notes 14 15 and 17 to Paragraph 1 *ante*

4 Matter in difference

See Note 10 to Paragraph 1. Where it is found that one matter in difference agreed to be referred has been omitted from the reference and that consequently the arbitrators have not given any decision thereon the party interested should bring the omission to the notice of the Court so that the Court may send the case

back to the arbitrators with a fresh reference on the point omitted. If he does not do so, the Court is not wrong in deciding the point itself.¹ The decision of the arbitrators on matters not in dispute, nor referred to them is null and void for want of jurisdiction.²

5 Shall fix such time as it considers reasonable

The words are mandatory and imperative and the Court is bound to fix in its order of reference a time for the making of the award.¹ This fixing of a limit of time is in fact the pillar and pivot of the scheme of this Schedule, enabling the Court to have control over the arbitrators, and the power cannot be delegated to the arbitrators themselves.² But where the order of reference does fix a time but describes it as one fixed for the *hearing of the suit* instead of for making the award there is only an irregularity which may not vitiate the reference.³ An award made beyond the time fixed is liable to be set aside under Paragraph 15, *infra*, though an award made within the time fixed but *filed* after time is not bad.⁴

As to the power of the Court to extend time fixed see Paragraph 8 below

6 Court if can extend time fixed

See Paragraph 8 infra

7 When award is said to be made

An award is made when the arbitrators have drawn up, executed and signed it. It is the making of the award that should be within the time fixed. The filing thereof into Court after the time fixed will not vitiate the award.¹ Under the old Code the word used was delivery and even then it was interpreted to mean only the making of the award as distinguished from its being filed in Court.²

8 Effect of order of reference

Where a Court makes an order of reference to arbitration its jurisdiction to deal with the case so long as the proceedings are pending before the arbitrator

Note 4

¹ (15,0) 14 Suth W R 247 (248)

² (18,1) 15 Suth W R 172 (173)

³ 1) 1933 Mad 867 (864) Scope of enquiry that of suit — Arbitrators have no jurisdiction to extend it as regards subject matter or parties affected by it

Note 5

¹ (1891) 13 All 300 (303) 18 I & App 55 (PC)
(1923) 1923 Cal 410 (419)

[See also (1854) 6 Moo Ind App 134 (106 15) (I C) Case under Bombay Regulation VII of 1827 but on analogous provisions]

(1909) 1 Ind Cas 146 (147) (All)

[But see (1895) 18 Mad 22 (22) This decision followed the decision in (1858) 10 All 137 which was subsequently reversed by the Privy

[See also (1913) 20 Ind Cas 773 (774) 16 Oudh Cas 983 Time fixed for filing of award not making it—Award filed before that date not bad]

⁴ See Note 7 *infra*

Note 7

1

[See also (1891) 13 All 300 (303) 18 I & App 55 (PC) page 300 Where the date fixed for filing an award was a holiday it could be filed on the following day]

(1899) 22 Mad 22 (24)

(1916) 1916 Pat 21 (23)

(1918) 1918 Oudh 14 (15)

[But see (1886) 8 All 543 (544)]

² (1907) 1907 Pun Re No 89

(1899) 22 Mad 22 (24)

3, is suspended. It cannot, therefore, deal with the case except as provided in this Schedule 17, Paragraphs 5, 8 and 15¹. Thus it cannot—

- (1) allow the withdrawal of the suit under O 23, R 1²
- (2) dismiss the suit under O 9, R 3,³
- (3) remove the arbitrator or substitute a new one,⁴
- (4) record a compromise between the parties⁵
- (5) deal with the case on the merits⁶

In the following matters, however it has been held that the Court can pass appropriate orders in the suit —

(1) It can deal with an application to appoint an interim receiver or to grant an injunction⁷

(2) It can deal with application to bring the legal representatives of a deceased party on record⁸

As to the power of the Court to revoke the arbitration except as provided by Paragraphs 5 and 8 see Note 14 to Paragraph 1 above

The Court has no power to direct that money should either be deposited or paid to the arbitrators for their remuneration unless the parties had specifically agreed to such a course⁹

9 Form — See Form No 2 to the Appendix to this Schedule

4

Where reference is to two or more arbitrators to provide for difference of opinion

P. 4. [S 509] (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

- (a) by the appointment of an umpire, or
- (b) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail, or
- (c) by empowering the arbitrators to appoint an umpire, or
- (d) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine

Note 8

- 1 (1926) 1926 Nag 37 (39)
(1930) 1930 Lah 26 (30) 11 Lah 312
(1963) 10 Suth W R 398 (400)
- 2 See Note 15 to Paragraph 1 ante
- 3 (1899) 1899 Pun Re No 10 page 52
(1910) 8 Ind Cas 224 (224) (Lah)
(1923) 1923 Pat 115 (116)
(1917) 1917 Lah 379 (381) 1916 Pun Re No 115 Suit dismissed for default pending arbitration proceedings — Subsequent restoration and arbitrators directed to proceed — Award filed without objection — Held award

legal

- 4 (1886) 10 Bom 381 (389)
- 5 (1924) 1924 Cal 722 (724) 51 Cal 43¹
- 6 (1902) 24 All 312 (314)
(1932) 1932 All 183 (184) 54 All 177 Que-
tion of costs referred to arbitrators
Court cannot deal with it

[See also (1933) 1933 Sind 300

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act

[1877—S 509; 1859—S 316]

Synopsis

Scope of the Paragraph	Note No		Note No
Decision of majority—Clause (b)	1	(a) Extension of time for submission by umpire	4
Appointment of umpire by arbitrators	2	Delegation of duty by arbitrators	5
	3		

1 Scope of the Paragraph

Where two or more arbitrators are appointed, the Court is bound to provide, in its order of reference, for a difference of opinion among the arbitrators, in the manner specified in this Paragraph^{1a} Where no such provision was made, and there having been a difference of opinion among the arbitrators the Court decided the case itself on the evidence given *before the arbitrators*, the High Court remanded the case to the lower Court to make a fresh submission to the arbitrators after complying with the requirements of this Paragraph¹ Where, however, under similar circumstances the lower Court decided the case on evidence taken *before itself* it was held by the High Court that it would not be right to remand the case for a fresh reference² See also Note 2 Pts (4) and (5) *infra*

An arbitrator cannot himself be appointed as an umpire under this Paragraph³

2 Decision of majority—Clause (b)

Unless the order of reference provides that the decision of the majority or of the umpire, if any, shall prevail the award must be by *all* the arbitrators An award by only a majority of the arbitrators in such cases is not valid¹ If however the *application for the order of reference* provides that the opinion of the majority shall prevail, the fact that the *order of reference* does not refer to it will not invalidate the award by the majority of the arbitrators² The reason is that the authority of the Court to make a reference depends upon the agreement of the parties that if the parties agree that the opinion of the majority shall prevail the only order that the Court could pass is an order of reference to that effect and that it should therefore be deemed to have passed the order that it ought to have passed⁴ Where one of the parties to a reference is a minor, his guardian can consent to abide by the decision of a majority of the arbitrators^{5a} But the fact that neither the application for an order of reference nor the order of reference makes any such provision as provided by this Paragraph will not nullify an *unanimous*

Sch II Para 4—Note 1

1a (1934) 1934 All 109 (109) Disputes referred to three arbitrators and one of them appointed *sarpanch*—No provision made for difference of opinion—The *sarpanch* cannot be deemed to be an umpire in case there is a difference of opinion among arbitrators

1 (1869) 10 South W R 398 (399)

2 (1870) 14 South W R 150 (151)

3 (1932) 1932 Cal 491 (491)

Note 2

1 (1970) 1920 Mad 130 (130)

(1934) 1934 All 109 (109)

(1919) 1919 Pat 74 (77 78)

(1912) 17 Ind Cas 320 (377) 16 Oudh Cas 94

(1874) 22 South W R 129 (130)

(1865) 4 South W R 4 (4)

(1885) 1885 All W N CO (60)

[But see (1918) 1918 Cal 644 (645)]

2 (1914) 1914 Cal 448 (449)

3 (1918) 1918 Cal 644 (645)

3a (1929) 1929 Mad 141 (144)

is suspended. It cannot, therefore, deal with the case except as provided in this Schedule, viz Paragraphs 5, 8 and 15¹. Thus it cannot—

- (1) allow the withdrawal of the suit under O 23, R 1,²
- (2) dismiss the suit under O 9, R 3,³
- (3) remove the arbitrator or substitute a new one,⁴
- (4) record a compromise between the parties,⁵
- (5) deal with the case on the merits⁶

In the following matters however, it has been held that the Court can pass appropriate orders in the suit —

(1) It can deal with an application to appoint an interim receiver or to grant an injunction⁷

(2) It can deal with application to bring the legal representatives of a deceased party on record⁸

As to the power of the Court to revoke the arbitration except as provided by Paragraphs 5 and 8, see Note 14 to Paragraph 1 above

The Court has no power to direct that money should either be deposited or paid to the arbitrators for their remuneration, unless the parties had specifically agreed to such a course⁹

9 Form — See Form No 2 to the Appendix to this Schedule

Where reference is to two or more arbitrators to provide for difference of opinion

P. 4. [S 509] (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

- (a) by the appointment of an umpire; or
- (b) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail; or
- (c) by empowering the arbitrators to appoint an umpire, or
- (d) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine

Note 8

- 1 (1926) 1026 Nag 37 (39)
(1930) 1930 Lah 26 (30) 11 Lah 342
(1868) 10 Suth W R 398 (400)
- 2 See Note 15 to Paragraph 1, ante

- 4 (1886) 10 Bom 381 (389)
- 5 (1921) 1924 Cal 722 (724) 51 Cal 431
- 6 (1902) 24 All 312 (314)
(1932) 1932 All 163 (184) 54 All 122 Que
tion of costs referred to arbitration
Court cannot deal with it

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act.

[1877—S. 509; 1859—S. 316]

Synopsis.

	Note No		Note No
Scope of the Paragraph	1	(a) Extension of time for submission by umpire	4
Decision of majority—Clause (b)	2	Delegation of duty by arbitrators	5
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1 Scope of the Paragraph

Where two or more arbitrators are appointed, the Court is bound to provide, in its order of reference, for a difference of opinion among the arbitrators, in the manner specified in this Paragraph^{1a} Where no such provision was made, and there having been a difference of opinion among the arbitrators the Court decided the case itself on the evidence given *before the arbitrators*, the High Court remanded the case to the lower Court to make a fresh submission to the arbitrators after complying with the requirements of this Paragraph¹ Where, however, under similar circumstances the lower Court decided the case on evidence taken *before itself* it was held by the High Court that it would not be right to remand the case for a fresh reference² See also Note 2, Pts (4) and (5), *infra*

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Sch II Para 4—Note 1

1a (1934) 1934 All 109 (109) Disputes referred to three arbitrators and one of them appointed *sarpanch*—No provision made for difference of opinion—The *sarpanch* cannot be deemed to be an umpire in case there is a difference of opinion among arbitrators

1 (1869) 10 Suth W R 338 (329)

2 (1870) 14 Suth W R 150 (151)

3 (1932) 1932 Cal 491 (491)

Note 2

1 (1920) 1920 Mad 130 (130)

(1934) 1934 All 109 (109)

(1919) 1919 Pat 74 (77 78)

(1912) 17 Ind Cas 320 (327) 16 Oudh Cas 94

(1874) 22 Suth W R 129 (130)

(1865) 4 Suth W R 4 (4)

(1855) 1855 All W N CO (60)

[But see (1918) 1918 Cal 644 (645)]

2 (1914) 1914 Cal 448 (449)

3 (1918) 1918 Cal 644 (645)

3a (1929) 1929 Mad 144 (144)

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- (d) otherwise as may be agreed between the parties, if they cannot agree, as the Court may determine.

Note 8

- 1 (1926) 1936 Nag 37 (39)
- (1930) 1930 Lah 26 (30) 11 Lah 342
- (1865) 10 South W R 393 (400)
- 2 See Note 15 to Paragraph 1, ante
- 3 (1892) 1899 Pun Re No. 10 page 52
- (1910) 8 Ind Ca. 224 (224) (Lah)
- (1923) 1923 Pat 115 (116)
- (1917) 1917 Lah 379 (381) 1916 Pun Re No. 115 Suit dismissed for default pending arbitration proceedings—subsequent restoration and arbitrators directed to proceed—Award filed without objection—Held award

4. (1886) 10 Bom 351 (353)
- 5 (1924) 1924 Cal 722 (724) 51 Cal 42
- 6 (1902) 24 All 312 (314)
- (1932) 1932 All 183 (184) 54 All 124
- tion of costs referred to a—Court cannot deal with it
- 7 (1925) 1925 Sind 102 (102) 13 Sind 12
- (1928) 1928 Cal 256 (256) 55 Cal 211

[See also (1934) 1934

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act.

[1877—S. 509; 1859—S. 316]

Synopsis.

	Note No		Note No
Scope of the Paragraph	1	(a) Extension of time for submission by umpire	4
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An arbitrator cannot himself be appointed as an umpire under this Paragraph³.

2 Decision of majority—Clause (b)

Unless the order of reference provides that the decision of the majority or of the umpire, if any, shall prevail, the award must be by *all* the arbitrators. An award by only a majority of the arbitrators in such cases is not valid¹. If however the *application for the order of reference* provides that the opinion of the majority shall prevail, the fact that the *order of reference* does not refer to it will not invalidate the award by the majority of the arbitrators². The reason is that the authority of the Court to make a reference depends upon the agreement of the parties, that if the parties agree that the opinion of the majority shall prevail, the only order that the Court could pass is an order of reference to that effect, and that it should therefore be deemed to have passed the order that it ought to have passed³. Where one of the parties to a reference is a minor, his guardian can consent to abide by the decision of a majority of the arbitrators^{3a}. But the fact, that neither the application for an order of reference nor the order of reference makes any such provision as provided by this Paragraph, will not nullify an *unanimous*

Sch II Para 4—Note 1

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1 (1869) 10 Suth W R 398 (399)

2 (1870) 14 Suth W R 150 (151)

3 (1932) 1932 Cal 491 (491)

Note 2

1. (1920) 1920 Mad 130 (130)

(1934) 1934 All 109 (109)

(1919) 1919 Pat 74 (77 78)

(1912) 17 Ind Cas 320 (322) 16 Oudh Cas 94

(1874) 22 Suth W R 129 (130)

(1865) 4 Suth W R 4 (4)

(1855) 1855 All W N 60 (60)

[But see (1918) 1918 Cal 644 (645)].

2 (1914) 1914 Cal 448 (449)

3 (1918) 1918 Cal 644 (645)

3a (1929) 1929 Mad 144 (144)

award by all the arbitrators⁴. Where, in such a case, the arbitrators gave an unanimous award as to *part* and were divided as to *part*, the former is binding on the parties though the opinion of the majority as to the latter is not⁵.

It should be noted that even if a provision is made in the order of reference that the decision of the majority shall prevail it is essential that *all* the arbitrators should be *present* at the deliberations. If they are present at the proceedings but some of them thereafter express their dissent and leave the place, the decision of the majority will be perfectly valid⁶. But if they are not so present and do not take part in the deliberations, the award is invalid and not binding on the parties⁷. See also Note 2 to Paragraph 10, *infra*.

3 Appointment of umpire by arbitrators

When an umpire is appointed he is under no obligation to agree with one or other of the dissenting arbitrators. He is entitled to settle the matter in his own way according to what he thinks proper. He need not confer with the arbitrators¹.

4 Extension of time for submission by umpire

The umpire has the same powers as the arbitrators and could by application get extension of time for filing his award. See Paragraph 8 below.

5 Delegation of duty by arbitrators

The arbitrators appointed by Court under this Schedule cannot delegate their authority to a third person^{2a}, nor can the parties by their consent confer such a power on the arbitrators in derogation of the Court's order³.

But an arbitrator may delegate to a third person the performance of any acts which are merely ministerial in their nature².

Where the arbitrators are empowered to choose an umpire, they have themselves to make the choice and ought not to delegate it to a third person³.

Power of Court to
appoint arbitrator in
certain cases

P. 5. [Ss. 507, 510-511] (1) In any of the following cases, namely:—

(a) where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator, or

(b) where an arbitrator or umpire—

(i) dies, or

(ii) refuses or neglects to act or becomes incapable of acting, or

(iii) leaves British India in circumstances showing that he will probably not return at an early date, or

4 (1912) 13 Ind Cas 161 (166) (Cal)
(1903) 8 Cal L Jour 475 (476 477)
(1872) 17 Suth W R 30 (31)
5 (1865) 2 Suth W R 32 (33)
6 (1920) 1920 Oudh 712 (712)

(1932) 1932 Mad 157 (157)

Note 3

1 (1915) 1915 Lah 98 (99) 1915 Pun Re 20 55
(1933) 1933 Lah 587 (588)
(1891) 1891 Pun Re No 6 page 67

Note 5

1a (1930) 1935 Lah 13 (114)

90

1 (1902) 21 All 312 (314),

not

2 (1902) 29 Cal 854 (858) 29 Ind App 103

1902 Pun Re No 87 (P C)

3 (1893) 17 Bom 129 (142)

affect validity of award

7 (1880) 7 All 523 (528)

(c) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire

(2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the Court may on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire or make an order superseding the arbitration and in such case shall proceed with the suit

[1877—Ss 507 510-511, 1859—Ss 314, 319]

Synopsis

	Note No		Note No
Legislative changes	1	ing	4
Appointment of new arbitrator or umpire	2	Appointment of new arbitrator	5
Arbitrator refusing to act	3	Appointment of an umpire	6
Arbitrator becoming incapable of act		Order superseding arbitration	7
		Revision	8

Other Topics

Duty of Court under this Paragraph	See	Notice to appoint new arbitrator	See Note 5
Note 3 Pts (2) and (3)		Its (1) and (2)	

1 Legislative changes

The words "and the parties desire" that the nomination shall be made by the Court which occurred in S 507 of the old Code have been omitted

2 Appointment of new arbitrator or umpire

Under Ss 507 and 510 of the old Code where the arbitrator nominated *refused to accept the office* the Court could not appoint a new arbitrator unless *all the parties desired* the Court to do so but that where the arbitrator after accepting the office refused to *act* the Court may appoint an arbitrator on the application of some only of the parties¹ In *Sadik Hussain v Kaniz Zhora Begam*² the Judicial Committee pointed out on a true construction of S 510 that there is no room for such a distinction and that the expression *refuses to act* in S 510 included also a case where an arbitrator *refused to accept the office* inasmuch as the acceptance of the office was the first essential act of an arbitrator The omission of the words "and the parties desire" etc has brought the present Paragraph in conformity with the decision of the Privy Council The Court can under the present Paragraph appoint an arbitrator without the consent of *all* the parties in both cases viz where an arbitrator refuses to accept the office as well as where he refuses to act though this can be done only on *application* by either party and after *notice* to the opposite party

3 Arbitrator refusing to act

It is one of the most essential principles of the law of arbitration that the

Sch II Para 5—Note 2

(1864) 1864 Suth W R Gap 338 (399)

- 1 (1889) 6 Mad 414 (416)
 (1891) 18 Cal 324 (327)
 (1909) 1 Ind Cas 351 (356) (All)
 (1900) 1900 Pun Re No 110 page 431

- 2 (1911) 12 Ind Cas 15 (17) 33 All 743 38
 Ind App 191 14 Oudh Cas 289
 (P C)

adjudication of disputes by arbitrators should be the result of their *free consent* to undertake the duties of arbitrating between the contending parties. The finality of an award is based on the principle that the arbitrators are judges chosen by the parties themselves and are *willing* to settle the disputes referred to them. Hence where an arbitrator refuses to act the Court has no power to compel him to arbitrate against his will¹. The duty of the Court in such a case is either to appoint a new arbitrator or supersede the reference and proceed with the suit². If the Court does neither of these two things the further proceedings in arbitration and the resulting award thereon are *invalid*³. But an arbitrator has full power to retract his resignation before it is accepted and acted upon by the Court and an award made subsequent to such retraction is not invalid by reason of the original refusal to act⁴. Similarly if the Court asks the arbitrator to reconsider his refusal or resignation and he thereupon agrees to act and proceeds to arbitrate the award will not be invalid⁵.

A refusal on the part of the arbitrator to act can be implied from his conduct as for instance where he fails to submit the award within the time fixed⁶.

4 Arbitrator becoming incapable of acting

When an arbitrator becomes incapable of acting by reason, for example of illness the Court can supersede the reference or appoint a new arbitrator¹. The Court can act similarly when an umpire leaves British India and there is no evidence to show his intention to return at an early date².

5 Appointment of new arbitrator

Before the Court proceeds to make a new appointment under this Paragraph not only should one of the conditions mentioned in Cls (a) and (b) happen but the requirement as to the notice to the opposite party should also be fulfilled¹. If the Court proceeds to make an appointment without such notice it acts with material irregularity².

Where however the parties by *mutual agreement* make a change in the personnel of the arbitrators without the intervention of the Court and carry on the arbitration proceedings the award is not invalid by reason of the omission to follow the procedure prescribed by this Paragraph. The reason is that the very foundation of arbitration proceedings is the consent of the parties and such consent will cure any defect in the matter of procedure³.

After notice is given to the opposite party as required by sub para (1) it is open to the parties themselves to appoint an arbitrator provided all the parties

Note 4

1 (1870) 1870 Pan Re No 66
Bourke O 359

2 (1880) 4 Beng L R 89 (90)

Note 5

1 (1928) 1928 All 674 (675)
(1933) 1933 Oudh 540 (549) 9 Luck 2 5

(1925) 1925 Loh 374 (375)

(1925) 1925 Oudh 301 (304) The requirement is to notice held fulfilled having regard to the circumstances

[See also cases cited in para (1)]

agree⁴ (Cf the provisions of Para 2, *supra* and S 8 of the Indian Arbitration Act IX of 1899) If the parties fail to make such appointment, the Court can appoint the arbitrator after hearing the parties. But it is not bound to do so in all cases. It has a *discretion* either to appoint the arbitrator or to supersede the reference⁵. In making a new appointment the Court has no power to compel an unwilling party to pay remuneration to the arbitrator chosen by it especially where there is no provision for the same in the original reference⁶.

If a party does not object to the appointment by the Court of the nominee of the opposite party as arbitrator, but acquiesces in it by taking part in proceedings before him he will be estopped from questioning the validity of the appointment later on when the award goes against him⁷.

6 Appointment of an umpire

The power of the Court to appoint an umpire under this Para is not unlimited but is controlled and limited by the terms of the agreement between the parties as to what course is to be adopted if there is a difference of opinion among the arbitrators. Thus where the terms of the submission to arbitration were that an umpire should be selected from *out of seven persons named therein* and the umpire first chosen declined to act it was held that the Court could not ignore the remaining six persons and appoint a stranger as an umpire and that the award in such a case was not valid¹.

7 Order superseding arbitration

The Court cannot supersede the reference under this Paragraph unless the conditions prescribed herein are fulfilled¹. Thus an accusation of partiality against the arbitrator² or an allegation that an umpire has been tampered with³ or the fact that one of the parties fails to pay his share of the remuneration fixed for the arbitrator⁴ are not grounds for superseding the reference under this Paragraph.

The Court cannot *suo motu* supersede the reference without there being any application by the parties and without the procedure as to notice being complied with⁵. Nor can a mere agreement of the parties to refer the matter to a person other than the arbitrator already chosen have the effect of superseding the reference⁶.

Where the Court decides to supersede the reference it is bound to proceed with the suit. Where there is no suit pending and the Court has discharged itself of the *lis* by passing a final decree it cannot supersede the reference. Thus where the parties to a suit settled their disputes as to partition but agreed that the shares should be worked out and properties allotted by certain arbitrators and the Court passed a *decree* in pursuance of the settlement under S 375 (now O 23 R 3) and subsequently one of the arbitrators declined to act as an arbitrator the Judicial Committee held that the Court could not supersede the reference and allot the shares. Their Lordships

⁴ (1918) 1918 Lah 151(152) 1918 P R No 112
(1866) 1 Agra H C R 109 (109-110) Refusal
on the part of a party to nominate
an arbitrator in the place of one
who refused to act does not amount
to a withdrawal from the agreement

(See also (1867) 7 Suth W R 13 (13))

Note 6

1 (1871 74) 7 Mad H C R 77 (76)

Note 7

1 (1907) 4 All L J 691 (694) 30 All 39

2 (1901) 11 Mad L Jour 128 (129)

3 (1874) 18-4 Pun Re No 93 page 135

4 (1903) 30 All 32 (35)

5 (1932) 1932 Oudh 151 (157)

6 (1902) 24 All 312 (314)

observed "To proceed with the suit (to use the language of S 510) was in this case, in their Lordships view, impossible,' and referring to the decree they proceeded to say

It put an end to the suit and that was the very object of the compromise. The alternative in S 510 is impossible because there is no suit now pending with which the Court can proceed. All that the Courts in India could do was to take advantage of the sections of the Code which enabled them to keep the machinery of arbitration going.⁷

Where an arbitration fails and the Court decides to supersede the reference, it ought not to dispose of the suit at once without fixing a date for its hearing and giving due notice thereof to the parties.⁸ But the Court need not consider a second reference to arbitration when it decides to go on with the case.⁹

An order superseding an arbitration can be implied as where the arbitrators refuse to act and the Court proceeds to try the suit.¹⁰

8 Revision

An order passed under this Paragraph is not appealable. But an omission to comply with the formalities prescribed by this Paragraph as to notice amounts to a *material irregularity* and can be revised.¹ An order superseding the arbitration or appointing a fresh arbitrator is an order deciding a 'case' within the meaning of S 115 of the Code.²

Powers of arbitrator or umpire appointed under Para 4 or 5

P. 6. [S 512] Every arbitrator or umpire appointed under Paragraph 4 or Paragraph 5 shall have the like powers as if his name had been inserted in the order of reference

[1877—S 512; 1859—S 319]

Synopsis

Powers of an arbitrator Note No 1

1 Powers of an arbitrator

An arbitrator is not bound by the technical Rules of the Court¹ but should act in accordance with the Rules of equity, justice and good conscience.² Thus it has been held that he is not bound to follow the technical provisions of the Evidence Act and his decision cannot be challenged on the ground that he relied upon a document not admissible under that Act.³ He can administer oath to a witness or party and a party can agree before him to be bound by the oath of the opposite party or witness.⁴

d

Where the arbitrator does not file his award on the day fixed, and the plaintiff applies to withdraw the suit with liberty to bring another suit and the Court grants the application)

Note 8

1. (1929) 1929 All 144 (145) 51 All 501
(1933) 1933 Oudh 540 (542) 9 Luck 225
(1931) 1931 All 761 (763) 53 All 778

- 56 All 721]
Sch II Para 6 - Note 1
1 (1864) 1 Suth W R 12 (18)
(1912) 17 Ind Cas 33 (30) (Mad) An arbitrator need not give reasons for his

(1892) 1 All 302 (304) Agreement to do

An arbitrator cannot however delegate his functions as for instance, the appointment of an umpire when the order of reference does not authorize him to do so⁵. But there is nothing objectionable in his delegating functions which are purely of a ministerial character⁶.

P. 7. [S 513] (1) The Court shall issue the same processes to the parties and witness whom the arbitrator or umpire desires to examine, as the Court may issue in suits tried before it

Summoning witnesses and default

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court

[1877—S 513, 1859—S 317]

Synopsis

Scope of the Paragraph

Note No. 1

Other Topics

Refusing to give evidence See Note (1) Pt (5)

1 Scope of the Paragraph

This Paragraph empowers the arbitrator to seek the assistance of the Court in the matter of summoning witnesses and enforcing their attendance. An arbitrator should notify the date of the hearing to the parties and he cannot take evidence in the absence of the parties and without their knowledge¹. But where after notice either party fails to appear or notifies his withdrawal from the submission² he can proceed *ex parte*. An award passed *ex parte* cannot be set aside unless sufficient cause is shown for the non appearance of the party³.

An arbitrator should take only such evidence as is required by the terms of the agreement referring the question in dispute to arbitration⁴.

The words refusing to give evidence in Cl 2 refer to the case of a person who refuses to give evidence when placed on oath and is required to answer any question put to him and not to a case where a person elects not to produce any evidence⁶.

P. 8. [S 514] Where the arbitrators or the umpire cannot complete the award within the period specified in the Order, the Court may, if it thinks fit, either allow further time, and from time to time,

Extension of time for making award

bound by the oath of a third person not assented to by all the parties—
Held award on oath not valid

5 (1893) 17 Bom 129 (145)

(186) 7 Suth W R 269 (2 0)

6 (1907) 29 Cal 854 (863) 29 Ind A1 p 168

1902 I un Re No 87 (P C)

(1916) 1916 Cal 806 (807)

Sch II Para 7—Note 1

1 (1925) 1925 Mad 1056 (1054)

[See (1933) 1933 Sind 260 (761) 27 Sind L R 96 At the time of reference date of hearing before arbitrator fixed by Court—No fresh notice by arbitrator is necessary]

2 (1906) 29 Mad 44 (45)

3 (1925) 1925 Sind 150 (157) 19 Sind L R 251

4 (1869) 2 Beng L R App 25 (26)

5 (1911) 11 Ind Cas 259 (760) (All)

either before or after the expiration of the period fixed for the making of the award. enlarge such period; or may make an order superseding the arbitration, and in such case shall proceed with the suit

[1877—S 314; 1859—S. 318]

Synopsis

	Note No		See Va
Legislative changes	1	Estoppel	4
Award made out of time—See Notes to Paragraph 3 ante	2	Or may make any order superseding the reference	3
Extension of time	3	Appeal	6

1 Legislative changes

1 The words 'where the arbitrators or the umpire cannot complete the award' have been substituted for the words 'if from the want of necessary evidence or information or from any other cause' which occurred in the corresponding S. 318 of the old Code. The effect of the alteration is that the scope of this Para. 1 has been enlarged.

2 The words 'either before or after the expiration of the period fixed' have been newly added after the words 'from time to time'. They give effect to the undermentioned decisions under the old Code which held that the Court had power to extend the time for the making of an award even after the expiry of the time originally fixed.

2 Award made out of time—See Notes to Para 3, ante

3 Extension of time

The Court can extend the time fixed for making an award at any time before the award is actually made even though the time originally fixed may have expired at the time of such further extension¹. But when once an award is made, the power of the Court to grant further time under this Paragraph becomes spent and cannot be exercised thereafter². Nor has the Court power under S 145 of the Code to extend the time in such a case, for that section does not enable the Court to extend the time for the doing of any particular act when in truth and in fact the act has already been done³. Where, however, an award is simply signed but not announced to the parties or sent to Court, the award cannot be said to be finally made and complete, and an order of extension of time subsequent to such signing is not invalid⁴. On an application for extension of time under this Paragraph, the Court should, as has been seen in Note 3 to Para 3 above, itself fix the further time and cannot delegate the power to do so to the arbitrators.

An order of extension of time can be implied from the proceeding of the

Sch II Para 8—Note 1

- 1 (1855) 10 All 137 (143)
 (1856) 1856 All W N 151 (152)
 (1855) 11 Mad 80 (87)
 (1852) 15 Mad 384 (8-6)
 (1865) 2 Suth W R 297 (29-)

Note 3

- 1 (1851) 10 All 137 (143)
 (1931) 1934 Bom 298 (399) Court has jurisdiction to extend time even in a case where there is an umpire who may be entitled to enter on the reference under Clause (a) of Para J *infra*

- (1921) 1921 Bom 419 (421) 45 B.L. 10 1
 (1916) 1916 Lah 80 (83)
 (1892) 14 All 343 (345)
 (1852) 4 Mad 311 (315)
 2. (1831) 13 All 200 (204) 13 Ind 412 5
 (P C)
 (1934) 1934 Bom 393 (399)
 (1906) 2 Nag L R 81 (85)
 (1886) 9 Mad 475 (476)
 (1854) 6 Moo Ind App 134 (161) (P C)
 [But see (1910) 4 Sindh L R 10 1]
 [See also (1910) 1919 Pat 3 1]
 4 Pat L Jour 265 1
 3 (1911) 12 Ind Cas 13 (14) 33 Cal 5--
 4 (192-) 1923 Lah 753 (755)

Court * In the case cited below⁶ it was held that an *oral* application for extension of time was not incompetent

4 Estoppel

As will be seen from the Notes to Para 15, *infra*, an award passed out of time is not a *nullity* under the present Code. Consequently the parties may, in such cases, be estopped by their conduct from disputing the validity thereof¹

5 Or may make an order superseding the reference

The Court has a discretion under this Paragraph either to extend the time fixed for the award or to supersede the reference^{2a}. Thus, where the arbitrators are guilty of neglect in submitting their award in spite of several extensions of time the Court can supersede the reference and proceed with the suit¹. But the Court has no jurisdiction to deal with the suit and cannot dismiss it for default until and unless it supersedes the reference². An order superseding the reference need not, however be express. It can be implied from the procedure adopted by the Court³.

As already seen in Note 5 to Para 3 above an award made within time but filed into Court later is not invalid and the Court cannot supersede the reference in such a case⁴.

Where the Court supersedes the reference it cannot straightaway dispose of the suit on the same day. It should fix a date for the hearing, and give due notice of the same to the parties⁵. As to whether the Court has power to set aside an order superseding the reference, *see* the case cited below⁶.

6 Appeal.

An order superseding in arbitration where the award has not been completed within the period allowed by the Court is appealable under S 101, sub S (1), Cl (a).

Where umpire may
arbitrate in lieu of
arbitrators

P. 9. [S 515] Where an umpire has been appointed, he may enter on the reference in the place of the arbitrators,—

- (a) if they have allowed the appointed time to expire without making an award, or
- (b) if they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree

[1877—S 515; 1859—S 318.]

5 (1925) 1925 Cal 475 (476) On the date fixed for filing the award the Court ordered— The arbitrators have not submitted their award. Issue Taken: it once fixing the 10th November for hearing—So held that the order may be taken as an order extending the time for filing the award.

6 (1924) 1924 Bom 380 (380) Distinguish (1890) 3 Mad 59

Note 4

1 (1910) 1910 Pat 93 (98) 4 Pat L Jour 265
(1919) 1919 Lah 27 (29) Parties acquiescing in Court's order of extension cannot question the same

Note 5

1a (1923) 1923 Pat 566 (568) Application for extension of time—Court can take all circumstances into consideration

including allegation of misconduct of arbitrator

1 (1920) 1920 Cal 524 (524)

(1902) 24 All 312 (314)

2 See Note 8 to Paragraph 3

3 (1913) 21 Ind Cas 558 (559) (Mad)

(1920) 1920 Pat 731 (734) 5 Pat L Jour 672

4 (1912) 17 Ind Cas 320 (321) 16 Oudh Cas 94

(1934) 1934 Bom 398 (399) Court has power to extend the time for filing the award which is only a ministerial act

5 (1910) 8 Ind Cas 870 (877 S.S.) 13 Oudh Cas 341

(1910) 8 Ind Cas 1107 (1108) (Cal)

(1929) 1929 All 259 (259)

6 (1937) 1937 All 656 (657) Held the Court cannot set aside the order—S 121 does not apply

Synopsis

Umpire when empowered to arbitrate in lieu of arbitrators Note No 1

1 Umpire when empowered to arbitrate in lieu of arbitrators

An umpire can enter on the reference and himself make the award only in two cases —

(1) Where the arbitrators have allowed the appointed time to expire without making an award

(2) When they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree¹

Thus where one of several arbitrators absented himself from the arbitration proceedings and after the expiry of the time fixed for the award the umpire approached the Court for direction it was held that Cl (a) applied to this case and the umpire was himself entitled to make an award². An umpire is under no obligation to agree with one or others of the dissenting arbitrators or to confer with them but is entitled to settle the matter in his own way according to what he thinks proper³. But where the *agreement of reference* provides that the umpire should agree with one or other of the sets of the dissenting arbitrators an award by the umpire which agrees with neither of the two sets of arbitrators is not valid⁴.

Even in a case where an umpire has been appointed and the arbitrators have allowed the appointed time to expire without making an award the Court has jurisdiction to extend the time under Para 8 *ante*⁵. See also Note 3 to Para 8 *ante*.

P. 10. [S 516] Where an award in a suit has been made,

Award to be signed
and filed

the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them, and notice of the filing shall be given to the parties

Synopsis

	Note No		Note No
Award to be signed	1	Notice of the filing shall be given	4
Necessity of presence of arbitrators at meetings	2	Delivery of the award	5
Together with any depositions and documents	3	Form of award	6
		Registration of award if necessary	7

Other Topics

Addition or alteration of award See Note 1
Pts (11) to (13)
Determination by some of the arbitrators

See Note 2 see also Note 1 Pt ()
Filing of award by arbitrator See Note 5
Oral award See Note 1 Pt (15)

1 Award to be signed

An award embodies the decision of an arbitrator and must be signed by him¹ before it is filed into Court². Where there are several arbitrators it is

Sch II Para 9—Note 1

5 (1934) 1934 Bom 393 (399)

1 (1904) 1 All LJ 29 (32)

Sch II Para 10—Note 1

2 (1929) 1929 All 674 (675)

1 (1928) 1928 Pat 931 (932)

3 (1915) 1915 Lah 93 (99) 1915 Pun Re No 55

(1929) 1929 Mad 31 (31)

4 (1953) 7 All W N 197 (197)

o (1916) 1916 Pat 150 (193) 1 Pat LJ

essential that all of them should sign the award³ Where however, the parties agree to be bound by the decision of the majority, it is enough if the award is signed by the majority of the arbitrators⁴ An award made by more persons than those appointed is invalid⁵ unless the parties acquiesce in the same⁶

It is not necessary in the case of several arbitrators that all of them should sign the award at the same time and in the same place⁷ Where an award is duly signed the fact that it is not stamped⁸ or that the fair copy of the award is not signed by all of them⁹ would not affect the validity of the award But where an arbitrator signs a blank paper before the decision is embodied in it the award is not properly signed¹⁰

When once an award is made the arbitrators become *functus officio* and they have no power to alter¹¹ or review¹² the award, unless the Court or the parties by consent remit the matter to them for reconsideration¹³ In the case cited below¹⁴ it was held that an arbitrator was justified in refusing to sign the award before it was engrossed on stamp paper although he had signed the memorandum of award on the ground that owing to some misunderstanding in the language his opinion had to be changed

The provisions of this Paragraph apply only to a reference to arbitration through the intervention of the Court and not to an award made on a private reference out of Court The award in the latter case is not invalid by reason of the want of signature of the arbitrators¹⁵ The reason is that a private award can even be an oral one and an award in writing will not be less valid because it was not signed by the arbitrators

The report of arbitrators embodying a compromise arrived at between the parties subsequent to the reference is not an award¹⁶

2 Necessity of presence of arbitrators at meetings

Where there are several arbitrators appointed it is essential for the validity of the award that all of them should be present at all the meetings including the last, that witnesses should be examined in their presence and all of them should act together and give the award¹ See also Note 2 to Para 4 ante But the

3 (1900) 130 Ind 100 (100) 131 Bom 3
Disseminated from
[But see (1917) 191 Bom 128 (173)
12 Bom 668 Reference to uneven
number of valuers There is a pre-
sumption that parties agree to abide
by the majority decision]
4 (1930) 1330 Oudh 359 (392)
(1916) 1916 Pat 156 (157) 1 Pat L Jour 90

5 (1916) 1916 S. d 13 (14) 13 Sind L R 75
J (1862 63) 1 Mad H C R 178 (180)
10 (1911) 11 Ind Cas 898 (893) (Cal)
(189) 2 Cal W N cccxiv (cccxi)
11 (1901) 23 All 393 (392) 28 Ind App 111
(P C) Entry made in schedule of
property after award is no part of
the award
(1934) 1934 Bom 6 (9) Even with consent
of parties it cannot be done
12 (1918) 1918 Lah 239 (240) 1917 Pun Re
N 60

1 (1914) 1914 Lah 476 (440) 1913 Pun Re
No 92
[But see (1869) 3 Beng L R 4 C 82
(83)]
(1914) 1914 Lah 476 (440) 1913 Pun Re
No 92

Note 2

1 (1919) 1919 Mad 877 (877)

absence of one of them at a meeting in which nothing material was done and no enquiry was made will not invalidate the award²

3 Together with any depositions and documents

Though this Paragraph contemplates the possibility of the depositions of witnesses being reduced to writing by the arbitrators, it does not oblige them to keep such a record¹. The mere fact that an arbitrator has omitted to file along with his award the depositions of the witnesses examined by him or the documentary evidence filed before him will not justify the Court in holding on that ground that the award is invalid though it may lead to the conclusion that the arbitrator has not acted in accordance with law and is guilty of misconduct as stated in Para 15².

An arbitrator should not permit the removal of documents entrusted to him and forming part of the record³. He should return them to the Court. The Court can also call upon him to give up the same to the Court when his right to keep them as arbitrator has come to an end⁴.

4 Notice of the filing shall be given

The provisions of this Paragraph are *mandatory* and the Court is bound to give notice of the filing of the award to the parties¹. Under Article 158 of the Limitation Act, the parties are entitled to ten days time for filing their objections to the award and such period is to be computed from the date on which the notice is given². The omission to give notice is a *material irregularity* and affords a ground for interference by the High Court in revision³. If a decree is passed in terms of the award without the notice required by this Paragraph to be given the decree is bad and is liable to be set aside⁴.

There is a conflict of opinion as to whether a *formal* notice under this Paragraph is necessary where the parties are made aware of the filing of the award without such formal notice. In the undermentioned cases⁵ it has been held that where the parties are made aware of the filing of the award, the absence of a formal notice would not vitiate the proceedings. A contrary view, namely that a *formal* notice under this Paragraph is necessary and knowledge *altunde* is not

2 (1920) 10 Ind Cas 1000 (Mad)

Note 3

Note 4

1 (1912) 17 Ind Cas 430 (430) 15 Oudh Cas 994

(1935) 1935 All 802 (852)
 (1917) 1917 Nag 211 (212)
 (1915) 1915 Lah 302 (302)
 (1916) 1916 Lah 321 (322)
 (1901) 1 Cal W N 813 (815)
 (1912) 17 Ind Cas 431 (431) (Mad)

(1914) 1914 Lah 313 (313) Where parties have accepted the award no formal objections need be allowed

3 (1838) 11 Mad 144 (145)
 (1927) 1927 All 614 (615)
 (1926) 1926 Cal 1018 (1019)
 (1921) 63 Ind Cas 243 (243) (Cal)
 (1877 1901) 2 L B R 24

4 (1921) 1921 Oudh 154 (154) 24 Oudh Cas 263
 (1935) 1935 All 852 (853)
 (1921) 1921 Oudh 148 (148) 21 Oudh Cas 234
 (1928) 1928 Nag 166 (167 168) 107 Ind Cas 668

5 (1927) 1927 Cal 619 (621)
 (1926) 1926 Bom 312 (312) Parties themselves bringing the award into Court held sufficient notice
 (1913) 21 Ind Cas 293 (301) (Lah)
 (1921) 1927 Pat 135 (135) Held that as a waiver of the right to not

sufficient has been taken in the following decisions ⁶

5 Delivery of the award

An award should be filed into the Court and then only the Court can proceed further and pass a decree ¹ But the filing of the award need not be personally made by the arbitrator. It can be handed over to the parties who may file it into Court ² It is, however, necessary that the *arbitrator* should cause the award to be filed into Court. Where an award reached the Court mysteriously by post and none of the arbitrators took the responsibility of saying who caused the same to be sent, it was held that the Court could not act upon the award ³

The act of an arbitrator in handing over an award to the proper officer of the Court for the purpose of being filed is not an application within the meaning of Article 178 of the Limitation Act. Hence the Article does not apply to the delivery of an award by an arbitrator to the Court ⁴

6 Form of award

For form of award see Appendix to this Schedule Form No 5. See also the undermentioned case ¹

7 Registration of award if necessary

An award made by arbitrators appointed by the Court is not compulsorily registrable under S. 17 of the Indian Registration Act ¹

P. 11. [S 517] Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award
[1877—S 517; 1859—S 321]

Statement of special case by arbitrators or umpire

Synopsis

Note No 1 | Appeal

Note No 2

Special case

1 Special case

This Paragraph is intended to provide for cases where any difficult and complicated questions of law arise for consideration before the arbitrators and they require the help of the Court to enable them to complete the award ¹ Though this Paragraph does not expressly state that the special case should relate only to a question of law yet sufficient indication as to the scope of this Paragraph is given by the form prescribed (Form No 4 of Appendix to this Schedule) which

- G (1898) 20 All 474 (475)
(1925) 1925 Lah 619 (619)
(1930) 1330 Lah 23 (223)

Note 5

- 1 (18 0) 19 Suth W R 62 (62)
[See also (1934) 1934 Bom 38 (399)
The mere filing of the award into Court is nothing but ministerial work to be done by the arbitrators]
2 (1870) 5 Leig L Rep 357 (32) The proceedings and depositions ought not to be handed over to parties

C P C 376 & 377

- 3 (1929) 1929 P t 178 (179)
4 (1881) 7 Cal 333 (337)

Note 6

- 1 (1902) 1903 2 U B R Arbitration P 1
Where arbitrators resolve the award to be in the form of a document it is only that document which is award

Note 7

- 1 (1935) 1935 Rang 16 (16)
Sch II Para 11—Note I
1 (1905) 192* Cal 599 (603) 53 Cal 100
(1935) 1935 Rang 16 (16)

absence of one of them at a meeting in which nothing material was done and no enquiry was made will not invalidate the award²

3 Together with any depositions and documents¹

Though this Paragraph contemplates the possibility of the depositions of witnesses being reduced to writing by the arbitrators, it does not oblige them to keep such a record¹. The mere fact that an arbitrator has omitted to file along with his award the depositions of the witnesses examined by him or the documentary evidence filed before him will not justify the Court in holding on that ground that the award is invalid though it may lead to the conclusion that the arbitrator has not acted in accordance with law and is guilty of misconduct as stated in Para 10²

An arbitrator should not permit the removal of documents entrusted to him and forming part of the record³. He should return them to the Court. The Court can also call upon him to give up the same to the Court when his right to keep them as arbitrator has come to an end⁴

4 Notice of the filing shall be given

The provisions of this Paragraph are *mandatory* and the Court is bound to give notice of the filing of the award to the parties¹. Under Article 158 of the Limitation Act the parties are entitled to ten days time for filing their objections to the award and such period is to be computed from the date on which the notice is given². The omission to give notice is a *material irregularity* and affords a ground for interference by the High Court in revision³. If a decree is passed in terms of the award without the notice required by this Paragraph to be given the decree is bad and is liable to be set aside⁴

There is a conflict of opinion as to whether a *formal* notice under this Paragraph is necessary where the parties are made aware of the filing of the award without such formal notice. In the undermentioned cases⁵ it has been held that where the parties are made aware of the filing of the award, the absence of a formal notice would not vitiate the proceedings. A contrary view, namely that a *formal* notice under this Paragraph is necessary and knowledge *alimunde* is not

(1930) 1932 Mad 157 (157)

(1921) 1921 Bom 32 (32) 45 Bom 892.

(1922) 1922 Mad 179 (179)

(1919) 1919 Cal 224 (225) 46 Cal 721

(1914) 1914 Lah 313 (313) Where parties have accepted the award no material objections need be allowed

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3 (1838) 11 Mad 144 (145)

(1927) 1927 All 614 (615)

(1926) 1926 Cal 1018 (1019)

(1921) 63 Ind Cas 243 (243) (Cal)

(1877 1901) 2 U B R 24

(1915) 1915 Oudh 110 (111)

2 (1920) 1920 Mad 283 (289)

Note 3

1 (1929) 1929 Nag 264 (265) 26 Nag L R 168

2 (1926) 1926 Oudh 307 (308 309)

3 (1877) 8 Beng L R 319n

4 (1890) 17 Cal 832 (839)

Note 4

1 (1912) 17 Ind Cas 430 (430) 15 Oudh Cas 294

(1935) 1935 All 832 (852)

2 (1917) 1917 Nag 211 (212)

(1915) 1915 Lah 302 (352)

(1916) 1916 Lah 321 (322)

(1901) 2 Cal W N 813 (815)

(1912) 17 Ind Cas 431 (431) (Mad)

5

3 (1838) 11 Mad 144 (145)

(1927) 1927 All 614 (615)

(1926) 1926 Cal 1018 (1019)

(1921) 63 Ind Cas 243 (243) (Cal)

(1877 1901) 2 U B R 24

4 (1921) 1921 Oudh 154 (154) 14 Oudh Cas 263

(1935) 1935 All 832 (853)

(1921) 1921 Oudh 148 (148) 14 Oudh Cas 234

(1928) 1928 Nag 166 (167 168) 10 Ind Cas 668

sufficient has been taken in the following decisions⁶

5 Delivery of the award

An award should be filed into the Court and then only the Court can proceed further and pass a decree¹ But the filing of the award need not be personally made by the arbitrator. It can be handed over to the parties who may file it into Court² It is however, necessary that the *arbitrator* should cause the award to be filed into Court. Where an award reached the Court mysteriously by post and none of the arbitrators took the responsibility of saying who caused the same to be sent it was held that the Court could not act upon the award³

The act of an arbitrator in handing over an award to the proper officer of the Court for the purpose of being filed is not an application within the meaning of Article 178 of the Limitation Act. Hence the Article does not apply to the delivery of an award by an arbitrator to the Court⁴

6 Form of award

For form of award see Appendix to this Schedule Form No 5. See also the undermentioned case¹

7 Registration of award if necessary

An award made by arbitrators appointed by the Court is not compulsorily registrable under S 17 of the Indian Registration Act¹

P. 11. [S 517] Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award

[1877—S 517, 1859—S 521]

Statement of special case by arbitrators or umpire

Synopsis

Special case Note No 1 Appeal

Note No 2

1 Special case

This Paragraph is intended to provide for cases where any difficult and complicated questions of law arise for consideration before the arbitrators and they require the help of the Court to enable them to complete the award¹ Though this Paragraph does not expressly state that the special case should relate only to a question of law yet sufficient indication as to the scope of this Paragraph is given by the form prescribed (Form No 4 of Appendix to this Schedule) which

G (1899) 20 All 474 (475)
(1925) 1925 Lah 619 (619)
(1930) 1930 Lah 2 3 (22J)

Note 5

1 (18 0) 13 Suth W R 62 (62)
[See also (1934) 1934 Bom 348 (399)
The mere filing of the award into Court is nothing but ministerial work to be done by the arbitrators]
2 (18 0) 5 Ee g L Rep 357 (352) The proceedings and depositions ought not to be handed over to parties.

C P C 376 & 377

3 (1929) 1929 P t 178 (179)
4 (1881) 7 C 1 333 (337)

Note 6

1 (1902 1903) 2 U L R Arbitration P 1
Where arbitrators receive the award to file in the form of a document, it is only that document which is award

Note 7

1 (1935) 1935 Raj 16 (16)
Sch II Para 11—Note 1
1 (1925) 1925 Cal 499 (403) 52 Cal 100
(1935) 1935 Raj 16 (16)

expressly mentions only questions of law² But there is nothing objectionable in the Court's helping the arbitrators with advice and orders when they come to it in a difficulty³

Where a special case is submitted to the opinion of the Court and the Court completes the award by deciding the special case it is bound to give the parties an opportunity of objecting to the award before a judgment is pronounced upon it⁴

A charge of misconduct against the umpire cannot be strengthened from the mere fact that in the exercise of his *discretion*, he refused to state a special case for the opinion of the Court⁵ As to the form of special case in general see O 36 *ante*

2 Appeal

Under S 104 sub section (1) Cl (b) an order on an award stated in the form of a special case is appealable Where an agreement of reference provided that in case of disagreement between the arbitrators the matter in difference should be referred to the umpire who should make the award and the arbitrators who differed on a question of law without referring the matter to the umpire referred it to the opinion of the Court it was held that the order of the Court was not an order on an *award* stated in the form of a special case and was not therefore appealable¹

Power to modify
or correct award

P. 12. [S 518] The Court may, by order, modify or correct an award,—

- (a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred, or
 - (b) where the award is imperfect in form or contains any obvious error which can be amended without affecting such decision, or
 - (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission
- [1877—S 518, 1859—S 322]

Synopsis

	Note No		Note No
Power of Court to modify an award	1	Power of an arbitrator to set aside if	
Part of the award is upon a matter		deed conditional on payment of	5
not referred to arbitration	2	compensation	6
Award imperfect in form or containing		Limitation	7
an obvious error Clause (b)	3	Appeal	8
Clerical mistake Clause (1)	4	Presidency Small Cause Court	

1 Power of Court to modify an award

The general principle is that the parties having by consent substituted a *forum domesticum* of their own choice they are bound by its decisions on questions

2 (1925) 1925 Bom 22 (23-24) 45 Bom 663

3 (1915) 1915 Lih 253 (255) 1916 Pun Re

No 28

4 (1905) 1925 Bom 22 (25) 48 Bom 663

5 (1931) 1931 P C 253 (293) 38 Ind 11 P S 1 (P C)

Note 2

1 (1910) 8 Ind Cas 171 (174) 35 Bom 1 d

tions of fact and law, however erroneous they may be, and the Court has no power to alter or vary the award except in the limited manner prescribed by this Paragraph¹ Where a dispute is referred to arbitration and the arbitrators are empowered to decide upon all the points involved in it, the arbitrators have full power not only to fix the liability between the parties but also the manner in which such liability is to be discharged. Thus the arbitrators can order the amount due to the plaintiff to be paid by instalments, and the Court cannot interfere with such a direction in the award² Nor can the Court add a direction of its own to the award³ It is well settled that a Court acts without jurisdiction if it modifies an award because it takes a different view from that held by the arbitrators⁴

Where the Court modifies an award under this Paragraph, it is the modified award and not the original award with which the decree should accord⁵

The provisions of this Paragraph apply only to an award made *through the intervention of the Court* the Court has no power under this Paragraph to modify or correct an award made on a private reference out of Court⁶

2 'Part of the award is upon a matter not referred to arbitration'

An award should be made with reference to the points in dispute referred to them by the parties. Where the award decides matters extraneous to the reference the award is not valid unless that portion which is in excess can be separated from the rest and does not affect the decision on the matter referred to. In the latter case, the Court can under Clause (a) give effect to the valid portion of the award ignoring the rest¹ Where no separation is possible, the Court can remit the award to the arbitrators for reconsideration under Para 14 and if they fail to reconsider it the award becomes void by virtue of Para 10

Sch II Para 12—Note 1

- 1 (1930) 1930 Lah 26 (31) 11 Lah 342
(1933) 1333 Lah 139 (140) Power to modify award is limited by Cls (a) (b) and (c) of this Paragraph [But see (1868) 1868 Pun Re No 101] [See also (1923) 1929 All 747 (48) 51 All 903 Judge constituted arbitrator — Award such that if it was by another person Court would have to remit it for reconsideration — Judge can amend it] [See also (1933) 1933 Sind 293 (294)]
- 2 (1909) 1 Ind Cas 328 (329) 12 Oudh Cas 23
(1930) 1930 Lah 26 (31) 11 Lah 342
(1890) 8 All 449 (451)
[See also (1920) 1920 Cal 413 (414) Arbitrator has power to award interest]
- 3 (1930) 1930 Lah 26 (32) 11 Lah 342 The Court cannot give a relief as to easement right on the ground that it was omitted in the award
- 4 (1925) 1925 Cal 332 (333)
(1924) 1924 All 800 (800)
(1916) 1916 Lah 4 (6) 1916 Pun Re No 78
(1925) 1925 Sind 59 (90)
- 5 (1933) 1933 Lah 139 (139)

- (1930) 1930 Lah 219 (220)
(1906) 1906 Pun Re No 13 page 47
(1913) 19 Ind Cas 496 (496) (Mad)
- 6 (1912) 14 Ind Cas 918 (978) (L B)
(1932) 1922 Oudh 159 (190 191) 29 Oudh Cas 213
(1897 1901) 2 I B R 297
(1925) 1925 Lah 570 (570)
(1893) 17 Bom 657 (661)
(1913) 1919 Mad 731 (732) (F B)
[See however (1914) 1914 Lah 477 (477) A clerical error in the award can be set right by amending the decree on the award under S 101]

Note 2

- 1 (1914) 1914 P C 105 (106) 56 All 336 17 Oudh Cas 120 (I C)
(1902) 1902 Pun Re No 67 page 364 29 Ind App 108 23 Cal 854 (P C)
(1900) 23 All 391 (401 405) 28 Ind App 190 (P C)
(1870) 2 N W P H C R 150 (153)
(1916) 1916 Cal 506 (807)
(1922) 1922 Cal 399 (400)
(1932) 1932 Cal 713 (714)
(1868) 2 Beng L R App 25 (26)
(1871) 15 Suth W R 172 (173)
(1865) 3 Suth W R Mts 27 (27)
(1928) 1928 Lah 915 (916)
(1892) 1892 Pun Re No 18 page 85
(1924) 1924 Pat 33 (35) 2 Pat 777

3 Award imperfect in form or containing an obvious error Clause (b)

The Court can rectify an obvious error in the award. Thus where an issue as to whether a particular property was endowed property and whether it was partible or not was referred to arbitration and the arbitrators decided that the property was not an endowed one but nevertheless declared that it should not be partitioned it was held that there was an obvious error in the award and that the Court could amend the direction that the property should remain impartible¹

The provisions of this clause can be invoked only if the imperfection in form exists in the award at the time when it is filed in Court and not where it comes into existence at a subsequent stage on the happening of an anticipated event²

4 Clerical mistake Cl (c)

As in the case of decrees the Court has power under this Paragraph to correct clerical mistakes and errors in an award arising from accidental slips or omissions¹. But the Court has no power to go into the merits and award a sum different from that awarded by the arbitrators on the ground that the calculation then made was wrong². The Chief Court of Oudh³ has held that the Court can under this Paragraph as also under its inherent powers amend a clerical slip in the award even after a decree is passed in terms of the award.

5 Power of an arbitrator to set aside gift deed conditional on payment of compensation

Where the parties to a suit agree to refer their disputes in relation to a deed of gift to arbitration and the terms of the reference do not contain any limitation as regards the powers of the arbitrators an award by the arbitrators setting aside the deed of gift upon payment of compensation to the plaintiff and directing the defendant to remain in possession until the amount is paid is perfectly valid. The Court has no power under this Paragraph to interfere with the direction so contained in the award¹.

6 Limitation

No specific provision is made in the Limitation Act for an application to modify or correct an award under this Paragraph. The ten days period prescribed by Article 153 of the Limitation Act does not apply to an application under this Paragraph¹.

In the undermentioned case² it has been held that even a formal application by a party is not necessary.

7 Appeal

By virtue of S. 104 sub S. (1) Cl. (a) an appeal lies from an order modifying or correcting an award.

8 Presidency Small Cause Courts

An order of a single Judge of the Presidency Small Cause Court modifying an award under this Paragraph is not a decree passed on an award and an appli-

Note 3

- 1 (1903) 2 Ind C.S. 9 (S.S.) (All)
2 (1900) 1900 Lah. 2 (31) 11 Lah. 312

(1911) 1917 Mad. 20 (21)

1 1900 1901 1902 1903 1904 1905 1906 1907 1908 1909 1910 1911 1912 1913 1914 1915 1916 1917 1918 1919 1920 1921 1922 1923 1924 1925 1926 1927 1928 1929 1930 1931 1932 1933 1934 1935 1936 1937 1938 1939 1940 1941 1942 1943 1944 1945 1946 1947 1948 1949 1950 1951 1952 1953 1954 1955 1956 1957 1958 1959 1960 1961 1962 1963 1964 1965 1966 1967 1968 1969 1970 1971 1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 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tion to the Full Bench under S 38 of the Presidency Small Cause Courts Act is competent¹

P. 13. [S 519] The Court may also make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

Synopsis

	Note No		Note No
Power of an arbitrator to award costs	1	Award of costs by the Court.	2

1 Power of an arbitrator to award costs

An arbitrator is empowered to deal with the question of costs when it is included in the reference¹ or where all the questions involved in the suit are referred to him². But where only some of the issues arising in the case are the subject of a reference and the question of costs is not one of them, the arbitrator has no power to award costs³. If he nevertheless makes an order as to costs the award is not invalid if the remainder of the award remains unaffected by the order as to costs. In such a case the Court can proceed under Cl (a) of the last Paragraph⁴.

As to the remuneration of the arbitrators see the cases cited below⁵.

2 Award of costs by the Court

Where the award does not make provision for costs it is open to the Court to make an order as to costs under this Paragraph¹. In the undermentioned case² where all the matters in dispute in a suit were referred to arbitration and the award did not deal with the question of costs, the High Court of Allahabad has held that the Court could not, under this Paragraph, award costs incurred up to the date of the reference but could only award the costs incurred subsequent thereto.

The words 'cost of the arbitration' in this Paragraph are not limited to such costs as might be represented by travelling expenses and the summoning of witnesses. The Court has, therefore, jurisdiction to award under this Paragraph remuneration to the arbitrators for their services³.

Note 8

1 (1926) 1926 Mad 8 8 (879)

Sch II Para 13—Note I

1 (1898) Bourke O C 7

2 (1918) 1918 Nag 108 (100)

(1865) 1 Beng L R O C 144 (145)

(1855) 2 Ind Jur N S 12

3 (1888) 1888 Pun Ra No 91, page 243

4 (1918) 1918 Cal 529 (530)

(1885) J Bom 82 (86)

(1914) 1914 Sind 2 (62) 8 Sind L R 136
Held the direction as to costs is nothing more than a recommendation

5 (1930) 1930 Sind 190 (192) Fees fixed not forming part of the award. Award not invalid. But Court may reduce amount.

(1897) 1897 Pun Ra No 22, page 62. Arbitrator can refuse to deliver award

until his charges are paid

(1881) 6 Cal 509 (810). But the Court has no power to sanction an order passed by the arbitrators to whom a matter has been referred making the payment of their fees a condition precedent to their hearing the reference.

Note 2

1 (1900) 1900 Oudh 89 (89)

(1913) 19 Ind Cas 611 (611) 6 Sind L R 226
Court can award arbitration fees as costs where it is silent

(1919) 1919 All 155 (155) Omission of Court to fix the fees before preparation of the decree does not prevent the Court from fixing it later

2 (1932) 1932 All 153 (154) 54 All 122

3 (1934) 1934 Nag 199 (200) 31 Nag L R 85

3 Award imperfect in form or containing an obvious error, Clause (b)

The Court can rectify an *obvious error* in the award. Thus where an issue, as to whether a particular property was endowed property and whether it was partible or not, was referred to arbitration, and the arbitrators decided that the property was not an endowed one, but nevertheless declared that it should not be partitioned, it was held that there was an obvious error in the award and that the Court could amend the direction that the property should remain impartible.¹

The provisions of this clause can be invoked only if the imperfection in form exists in the award at the time when it is filed in Court, and not where it comes into existence at a subsequent stage on the happening of an anticipated event.²

4 Clerical mistake Cl (c)

As in the case of decrees the Court has power under this Paragraph to correct clerical mistakes and errors in an award arising from accidental slips or omissions.¹ But the Court has no power to go into the merits and award a sum different from that awarded by the arbitrators, on the ground that the calculation then made was wrong.² The Chief Court of Oudh³ has held that the Court can, under this Paragraph, as also under its inherent powers, amend a clerical slip in the award even after a decree is passed in terms of the award.

5 Power of an arbitrator to set aside gift deed conditional on payment of compensation

Where the parties to a suit agree to refer their disputes in relation to a deed of gift to arbitration, and the terms of the reference do not contain any limitation as regards the powers of the arbitrators, an award by the arbitrators setting aside the deed of gift upon payment of compensation to the plaintiff and directing the defendant to remain in possession until the amount is paid is perfectly valid. The Court has no power under this Paragraph to interfere with the direction so contained in the award.¹

6 Limitation

No specific provision is made in the Limitation Act for an application to modify or correct an award under this Paragraph. The ten days period prescribed by Article 158 of the Limitation Act does not apply to an application under this Paragraph.¹

In the undermentioned case² it has been held that even a *formal application* by a party is not necessary.

7 Appeal

By virtue of S 104, sub S (1) Cl (a) an appeal lies from an order modifying or correcting an award.

8 Presidency Small Cause Courts

An order of a single Judge of the Presidency Small Cause Court modifying an award under this Paragraph is not a decree passed on an award, and an applica-

Note 3

- 1 (1909) 2 Ind Cas 858 (308) (All)
2 (1900) 1930 Lah 25 (31) 11 Lah 312

Note 4

- 1 (1913) 19 Ind Cas 490 (493) (Mad)
(1921) 1921 Bom 191 (193) 45 Bom 512
(1921) 1 21 All 62 (62) 45 All 628 Appa
rent inconsistencies such as a flat
contradiction in measurement can be
amended

3

- 1 (1928) 1928 Oudh 1 (7) 3 Luck 1 (F B).
Note 6

Note 5

- 2 (1921) 1921 Bom 191 (193) 45 Bom 512

tion to the Full Bench under S 38 of the Presidency Small Cause Courts Act is competent.¹

P. 13. [S. 519.] The Court may also make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

Synopsis

Note No	1	Award of costs by the Court.	Note No
Power of an arbitrator to award costs	1		2

1 Power of an arbitrator to award costs

An arbitrator is empowered to deal with the question of costs when it is included in the reference¹ or where all the questions involved in the suit are referred to him² But where only some of the issues arising in the case are the subject of a reference and the question of costs is not one of them, the arbitrator has no power to award costs³ If he nevertheless makes an order as to costs the award is not invalid if the remainder of the award remains unaffected by the order as to costs In such a case the Court can proceed under Cl (a) of the last Paragraph⁴

As to the remuneration of the arbitrators, *see* the cases cited below⁵

2. Award of costs by the Court

Where the award does not make provision for costs it is open to the Court to make an order as to costs under this Paragraph¹ In the undermentioned case² where all the matters in dispute in a suit were referred to arbitration, and the award did not deal with the question of costs, the High Court of Allahabad has held that the Court could not, under this Paragraph, award costs incurred up to the date of the reference but could only award the costs incurred subsequent thereto

The words "cost of the arbitration" in this Paragraph are not limited to such costs as might be represented by travelling expenses and the summoning of witnesses The Court has, therefore, jurisdiction to award under this Paragraph remuneration to the arbitrators for their services³

Note 8

1 (1926) 1926 Mad 816 (879)

Sch II, Para 13—Note 1

2 (1898) *Louche O C 7*

3 (1918) 1918 Nag 168 (109)

(1865) 1 Long L R O O 144 (145)

(1851) 2 Ind Jur N S 12

4 (1888) 1888 Pun Rs No 91, page 243

5 (1918) 1918 Cal 222 (530)

(1835) J Bom 82 (85)

(1914) 1914 Sind 62 (62) 8 Sind L R 136

Held, the direction as to costs is nothing more than a recommendation

5 (1930) 1930 Sind 100 (192) Fees fixed not forming part of the award—Award not invalid But Court may reduce amount

(1897) 1897 Pun Rs No 22, page 92 Arbitrator can refuse to deliver award

until his charges are paid

(1881) 6 Cal 603 (810) But the Court has no power to sanction an order pressed by the arbitrators to whom a matter has been referred, making the payment of their fees a condition precedent to their hearing the reference

Note 2

1 (1900) 1930 Oudh 89 (89)

(1914) 19 Ind Cas 611 (611) 6 Sind L R 225 Court can award arbitration fees as costs where it is silent

(1919) 1919 All 185 (185) Omission of Court to fix the fee before preparation of the decree does not prevent the Court from fixing it later

2 (1932) 1932 All 183 (184) 51 All 122

3 (1934) 1934 Nag 199 (200) 31 Nag L R 85,

Where award or matter referred to arbitration may be remitted

P. 14. [S. 520] The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit,—

- (a) where the award has left undetermined any of the matters referred to arbitration,³ or where it determines any matter not referred to arbitration,⁴ unless such matter can be separated without affecting the determination of the matters referred;
- (b) where the award is so indefinite as to be incapable of execution;⁵
- (c) where an objection to the legality of the award is apparent upon the face of it.⁶

[1877—S. 520; 1859—S. 323.]

Synopsis

	Note No		Note No
Legislative changes	1	Where an objection to the legality of	
Scope of the Paragraph	2	the award is apparent upon the face	6
Award leaving undetermined any of the		of it	7
matters referred to arbitration	3	Remittal of private awards	8
Award determining matter not referred		Limitation	9
to arbitration	4	Appeal	10
' Where the award is so indefinite as to		Revision	11
be incapable of execution '	5	Arbitration under other Acts	

Other Topics

Remittal of award in part See Note 2, Pts (3) to (5)

1 Legislative Changes

The words "unless such matter can be separated without affecting the determination of the matters referred in Cl (a) have been newly added

2 Scope of the Paragraph

Paragraph 12, *ante*, enables the Court to modify or correct an award under certain circumstances. This Paragraph empowers the Court to remit the award to the *arbitrator himself* for reconsideration where there are omissions or defects therein which are such as cannot be modified or corrected by the Court itself under Paragraph 12¹. The Court is, however, confined to the specific grounds mentioned in this Paragraph and has no power to remit an award on other grounds².

There is a difference of opinion as to whether the Court can remit the award in *part* only and treat the award as to the to the High Court of Allahabad there is no

Sch II, Para 14—Note 2.

(191

1 (1867) 7 South W R 406 (406, 407)

2 (1881) 3 All 636 (642)

(1935) 1935 Lah 113 (114) Court remitting award when none of the grounds mentioned in this section existed—Court acts without jurisdiction

(1912) 13 Ind Cas 520 (523) 14 Oudh Cas 309

award is no ground for remitting.
(1883) 13 Cal L Rep 171 (175) An objection by a party that he did not agree to the terms of the reference is not a ground under this Paragraph
(1917) 1917 Mad 312 (313) The fact that the obligations imposed under the award have been performed between

portion of an award only may be remitted³ "It is impossible to say for any person who is not the arbitrator, how the arbitrator proceeded to frame his award. It may be that the portion objected to has an intimate connection with the portion which is not objected to. The arbitrators, therefore, must be given a free hand to recast the award"⁴ The Judicial Commissioner's Court of Sind has held that where an award is bad as to a part only and is sent back as to that alone, the arbitrator is *functus officio* as to the good parts and cannot alter his judgment as to them⁵ It is submitted, that the former view is correct. When the Court decides to remit the award under this Paragraph, it is not final⁶ and so long as it is not final and is in the hands of the arbitrator, it can be altered by him^{6a}

The Court has a discretion to remit or not to remit an award⁷ Thus, where there is any circumstance in the position of the arbitrator such as tends to produce a bias in his mind, the Court will in its discretion, refuse to remit the award to the arbitrator for reconsideration⁸

3 Award leaving undetermined any of the matters referred to arbitration

Where the arbitrators have not, in their award, decided any matter referred to them, the Court may, under Cl (a), remit the award for reconsideration¹ "The ground upon which an award which does not dispose of all the matters referred has been held to be invalid appears to be that there is an implied condition that it shall do so"² But it is open to the parties to waive this condition³ Thus, where all the parties agree before the arbitrator that an incomplete award may be made or where they all represent that there is no longer any controversy between them upon a particular point, the fact that the award is incomplete or silent on such point will not vitiate it⁴ An award cannot be said to be incomplete because,

the date of the award and the date of the application to file it is no ground

(1912) 15 Ind Cas 573 (573) (Mad) The passing of a conditional award is no

ing certain question to be decided by Court — Award should be remitted for reconsideration

(1925) 1925 All 393 (394)

(1918) 1918 Cal 247 (247) Reference authorising to proceed *ex parte* if a party absent—One party absent—Arbitrator's award without evidence—Held he should have heard the evidence of the other side and therefore re-

[Compare S 10 of the English Arbitration Act 1889 which runs thus — In all cases of references to arbitration the Court or a Judge may from time to time remit the matters referred, or any part of them to the reconsideration of the arbitrators or umpire]

7 (1931) 1931 Lah 215 (216)

[See also (1933) 1933 Mad 697 (697) In the absence of objection by party, Court is not bound *suo motu* to remit

[See (1870) 14 Suth W R 247 (248)]

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Note 3

1 (1881) 3 All 286 (291, 292)

(1933) 1933 Lah 580 (532) Question referred to arbitration — Arbitrators giving only provisional order leave-

[See also (1925) 1925 All 103 (106) Omission to partition one item of property on account of impossibility does not vitiate award]

(1919) 1919 Cal 1030 (1031) Where some of the matters referred to have not been decided, the Court cannot allow a party without the consent of the

in a suit involving a number of issues the arbitrators have not given a decision on each of them. It is enough if they give a decision on the whole matter in issue between the parties⁵

4 Award determining matter not referred to arbitration

It is a fundamental principle of the Law of Arbitration that the submission furnishes the source and prescribes the limits of the arbitrators authority and that therefore the award must conform to the submission both in substance and in form¹. Consequently if the award decides matters not within the scope of the submission it is void as regards the portion in excess of the submission. If such portion is however, separable from and independent of the remainder effect can be given to the rest of the award^{2a} but if the extraneous matters cannot be so separated without affecting the determination of the matters referred the Court may remit the award for reconsideration²

5 Where the award is so indefinite as to be incapable of execution

An award to be capable of execution ought to be certain so that no reasonable doubt can arise upon the face of it as to the arbitrators meaning or as to the nature and extent of the right and duties imposed by it upon the parties¹. The fact that a particular expression used in an award is capable of more than one interpretation does not show, that it is so indefinite as to be incapable of execution². Where the arbitrators give the method for calculating the amount awarded without specifying the actual amount due the award can be considered as sufficiently certain inasmuch as the actual result can be worked out³.

6 Where an objection to the legality of the award is apparent upon the face of it

It has been seen in Note 10 to Paragraph 1 *ante* that parties are entitled to submit questions of law as well as questions of fact for arbitration and that the arbitrators have jurisdiction to decide the same. Where they so decide a question specifically submitted to them for decision but such decision happens to be erroneous in law it cannot nevertheless be said that there is any error apparent on the face of the award,¹ and the Court has no right to sit in judgment over the views of the arbitrator².

Illustration

S sued *V* and others for a share in the family properties. *V* contended in defence that *S* was born blind and that therefore he was not entitled to any share under the Hindu Law. The suit was then referred to arbitration and the arbitrators awarded *S* a life interest in a fourth share of the properties subject to its becoming an absolute interest in case he married. It was held that the award was not

Note 6

I C R 150

(151)]

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- among Burmans
(1878 80) 2 All 181 (187 191)
(1 25) 1 J 25 Sind 186 (188) 10 S and L R 51
(1916) 1916 Oudh 250 (255) 15 Oudh Cas
48
[See also (1931) 1931 Oudh C (7) 6
Luck 424]
2 (1902) 29 Cal 167 (193) 29 Ind App 51
1902 Lun R 20 20 (P C)
(1918) 1918 Mad 296 (29) 41 Mad 1072
3 (1918) 1918 Mad 296 (29) 41 Mad 1022

Note 5

1 (1916) 1916 Oudh 160 (161)

But where a question of law is not specifically submitted to the arbitrators for decision and they state a wrong legal proposition and base their award on the matters referred to them on such proposition, there is an error of law on the face of the award.⁴ In *Chamsey Bhara and Co, Ltd, v Jitraj Baloo Spinning and Weaving Co, Ltd*⁵ their Lordships of the Privy Council observed as follows —

'An error in law on the face of the award means, in their Lordships' view that you can find in the award or a document actually incorporated the etc, as for instance a note appended by the arbitrator stating the reasons for his judgment some legal proposition which is the basis of the award and which you can say is erroneous

Illustrations

1. An arbitrator states a special case and gets an opinion of the Court. In making the award he states that opinion and bases his award upon it. The appellate Court finds that the opinion as given is erroneous. There is an error in law on the face of the award which will entitle the appellate Court to remit the award for reconsideration.⁶
2. A reference was made to arbitrators to divide family properties between a Hindu father and his sons. The eldest son had assisted the father to attain success in his business and thus to acquire the property. In consideration of that the arbitrators awarded him Rs 11,000 in excess of his share describing it as *Jyeshtha Bhagam*. It was held that though the rule of *Jyeshtha Bhagam* is obsolete and illegal the mere use of the term in the award did not make it illegal when the Court is satisfied that the extra amount was really given to the eldest son for services rendered.⁷

See also the undermentioned cases⁸ as to what is and what is not illegality apparent on the face of the award.

An arithmetical error in the award made by the arbitrator in arriving at the

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| <p>4 (1925) 1925 Sind 186 (188) 19 Sind L R 54.</p> <p>5 (1923) 1923 P C 66 (69) 47 Bom 518 50 Ind App 394 (P C) Reversing 1920 Bom 256 44 Bom 780 This case has been followed in the following</p> <p>6 (1912) 1912 A C 673 British Westinghouse Company v Underground Electric Railway Company</p> <p>7 (1930) 19 O Mad 23 (41) (1925) 1925 Mad 101 (101, 102)</p> <p>8 (1869) 1869 Pun Re No 12 Open disregard by arbitrators of proved law or custom is a good ground for remitting the award</p> <p>(1933) 1933 All 656 (55) Reference of dispute to arbitration—Defendants subsequent statement that if plaintiff made certain statement on oath decree might be passed as prayed for in plaint—Plaintiff making</p> | <p>required statement on oath—There is no compulsion as defined in O 23,</p> <p>(1933) 1933 Sind 20 (461) 27 Sind L R 66 Partition suit—Question whether marriage expenses of plaintiff should be provided for was referred to arbitration—Arbitrator awarding for plaintiff—No error apparent on the face of the record</p> <p>(1868) 1869 Pun Re No 101 Award allowing set off founded on wagering transaction is illegal</p> <p>(1919) 1919 Mad 87 (6) Award when of an order given by arbitrators along with some others Comes under Cl (c)</p> <p>(1912) 18 2 Lun Re No 3 page 3 Plaintiff and one defendant agreed to reference—Award against all defendants is illegal</p> <p>(1923) 1923 Cal 125 (126) Private award made after institution of suit is illegal</p> <p>(1915) 1915 Cal 745 (747)</p> <p>(1884) 1884 All W N 43 (44)</p> <p>(1908) 10 All 105 (101)</p> <p>(1924) 1924 Cal 1051 (1053)</p> |
|--|--|

sums due by one party to another is not an illegality apparent on the face of the award⁹

It has been already mentioned above that an error of law, in order to vitiate an award, must be apparent on the face of the award or some other document attached to the award^{9a}. Thus where a dispute arising out of a contract is referred to arbitrators and a reference is made in the award to a contention of one party, it does not open the door to seeing first what the contention is and then going to the contract on which the rights of parties depend to see if that contention is sound¹⁰. Similarly, where an award makes an allusion to the contract very guardedly and for the purpose only of ear marking the origin of the dispute in question it does not enable a party to contend that the contract was incorporated into the award by the reference mentioned above and then to say that the award discloses an error in law in construing the terms of the contract¹¹.

7 Remittal of private awards

Where an award is made without the intervention of a Court and an application is made under Para 20, *infra* to file the award, the Court may under Para 21, file the award if no such ground as is mentioned in Paras 14 and 15 is proved. But the fact that there are any of the grounds specified in this Paragraph does not empower the Court to remit the award for reconsideration of the arbitrators as in the case of an award made through the intervention of the Court¹. Therefore, if the award leaves undetermined any of the matters referred to arbitration² or is so indefinite as to be incapable of execution³ the award is invalid and the application under Para 20 must be dismissed. But where the award determines any matter not referred to arbitration and such matter can be separated without affecting the determination of the matters referred, the whole award is not invalid and the decisions on the portions in excess of the authority of the arbitrators can be treated as null and void⁴.

- 9 (1925) 1925 Lah 86 (86)
 9a (1924) 1924 Snd 117 (119) 17 Sind L R 86
 [See also cases cited in Points (5) and (5 a) *supra*]
 10 (1923) 1923 P C 66 (69) 47 Bom 578 50
 Ind App 324 (P C)
 11 (1927) 1927 P C 164 (165) 54 Ind App 427
 21 Sind L R 101 55 Cal 126 (P C)

- (1920) 1920 All 45 (45) 42 All 217
 (1913) 19 Ind Cas 941 (943) (Cal)
 (1919) 1919 Nag 131 (133)
 (1925) 1925 Pat 810 (816 818) 4 Pat 60
 1923 Pat 410 and 1913 Pat 83 *not*
followed
 (1929) 115 Ind Cas 680 (Pat)

Note 7

- 1 (1927) 1927 Lah 347 (348)
 (1925) 1925 Lah 86 (86)
 (1914) 1914 Lah 436 (440) 1913 Pun Re
 No 92
 (1881 82) G Bom 663 (668)
 (1916) 1916 Oudh 160 (161)
 (1912) 14 Ind Cas 378 (978) (L B)
 2 (1911) 10 Ind Cas 450 (453) (Cal)
 (1881 1882) G Bom 663 (668)
 (1914) 1914 Lah 436 (440) 1913 Pun Re
 No 92
 (1914) 1914 L B 40 (41) 8 L B R 58
 (1916) 1916 All 113 (113) 38 All 350
 3 (1916) 1916 Oudh 160 (161)
 4 (1902) 23 Cal 804 (803) 29 Ind App 163
 1902 L un Re No 87 (P C)
 (1918) 1918 Cal 529 (530)
 (1914) 1914 P C 100 (106) 36 All 336 17
 Oudh Cas 120 (P C)
 (1932) 1932 All 154 (155)

- (1915) 1915 Lah 100 (100)
 No 66
 (1914) 1914 Lah 471 (471) 1914 L un Re
 No 66
 (1918) 1918 Lat 83 (86) 4 Lat 200 336
 (1923) 1923 Rang 130 (131) 4 L J P L R
 157]

8 Limitation

Article 158 of the Limitation Act does not apply to proceedings under this Paragraph and, therefore, there is no period of limitation for making an application under this Paragraph to remit an award for the reconsideration of the arbitrators¹

9 Appeal

An order remitting¹ or refusing to remit² an award for the reconsideration of the arbitrators is not appealable. Where an award is remitted under this Paragraph and the arbitrators refuse to reconsider the award which consequently becomes void under Para 15, *infra* and the Court ultimately passes a decree on the merits, the legality of the order remitting the award may be challenged in an appeal against the decree³. See also S 105, Note 6, Pt 3. But where after remittal, the arbitrators submit a fresh award and the Court passes a decree in accordance with the revised award no appeal will lie from such decree on the ground that the order of remittal under this Paragraph was wrong and that the original award ought to have been accepted and acted upon⁴. See also notes to Para 16 *infra*.

10 Revision

The High Court cannot interfere in revision with an order of the Court remitting an award for reconsideration of the arbitrators¹.

11 Arbitration under other Acts—See Note 6 a to Para 1

In an arbitration proceeding regarding boundary disputes under S 120 of the Bombay Land Revenue Code (V of 1879) the Superintendent of Survey or the Boundary Officer is empowered to remit an award for the reconsideration of the arbitration committee for any of the causes set forth in this Paragraph.

P. 15. [S 521.] (1) An award remitted under Paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider it. But no award shall be set aside except on one of the following grounds

Grounds for setting aside award

namely :—

- (a) corruption or misconduct⁵ of the arbitrator or umpire;
- (b) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed,¹⁰ or of wilfully misleading or deceiving the arbitrator or umpire;
- (c) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court¹² or being otherwise invalid¹³.

Note 8

- 1 (1933) 1933 All 648 (649)
(1919) 1919 Mad 877 (877)

Note 9

- 1 (1881) 3 All 636 (639)
2 (1914) 1914 Cal 497 (498)
(1912) 15 Ind Cas 573 (573) (Mad)
(1881) 7 Cal 490 (493)

- 3 (1893) 22 Mad 202 (204)

(1881) 3 All 636 (642) Per Oldfield J
(But see (1933) 1933 Lah 530 (531)]

- 4 (1908) 31 Mad 479 (481)

(1925) 1925 Lah 267 (267)
(1870) 1870 Pun Re No 64 (F B)

Note 10

- 1 (1868) 1868 All W N 123 (123)

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(2) Where an award becomes void or is set aside under clause (1), the Court shall make an order superseding the arbitration and in such case shall proceed with the suit

[1877—S 521; 1859—S 324]

Synopsis

	Note No		Note No
Legislative changes	1	(iv) Evidence of arbitrator	9
Procedure in inquiry under this Paragraph	2	(b) 'Fraudulent concealment of any matter which he ought to have disclosed'	10
Refusal to reconsider award remitted	3	(c) Award made after order superseding arbitration	11
Grounds for setting aside award	4	(d) Award made after the expiry of the period allowed by the Court	12
(a) 'Corruption or misconduct'	5	(e) "Being otherwise invalid"	13
(i) Acts amounting to misconduct	6	Appeal	14
(ii) Acquiescence in acts amounting to misconduct	7	Revision	15
(iii) Acts not amounting to misconduct	8		

Other Topics

Appeal from decree based on award *See Notes* Limitation for application to set aside award to Para 16 *infra* *See Notes to Para 16 infra.*

1 Legislative changes

1 The words and no award shall be valid unless made within the period allowed by the Court which occurred at the end of S 521 of the old Code have been omitted and the words or after the expiration of the period allowed by the Court or being otherwise invalid have been newly added at the end of Cl (c) of sub-S (1). *See Notes 12 and 13 infra.*

2 Sub-section (2) is new

2 Procedure in enquiry under this Paragraph

Where an application is made to set aside an award on any of the grounds mentioned in this Paragraph, the Court is bound to allow the applicant an opportunity to produce evidence to substantiate his objections¹ and to enquire into the allegations made by him². The burden of proving such allegations is on the person seeking to have the award set aside³.

A party in whose favour an award has been passed cannot object thereto on the ground that the arbitrators exceeded their jurisdiction⁴.

An order deciding objections to an award under this Paragraph should comply with the provisions of O 20, R 5, *ante* and the Court should state its findings or decision on each separate issue with reasons therefor⁵.

3 Refusal to reconsider award remitted

If an award has been remitted to the arbitrators for their reconsideration under Para 14 *ante* and the arbitrators decline to submit a fresh award, the award becomes void and the Court has no alternative but to try the case itself¹. It is not necessary in such a case for the Court to find corruption or misconduct².

Sch II Para 15—Note 2

- 1 (1917) 10 Ind Cas 57 (3J) (Lah)
(1909) 4 Ind Cas 223 (254) (Lah)
2 (1899) 18 JJ Un Re No 12
(18 C) 2 N W P H C R 241 (243)
3 (1914) 1914 P C 105 (10) 36 All 336 17
Oudh Cas 120 (P C)
(1921) 1921 All 753 (78J) 46 All 686.
(1911) 64 Ind Cas 706 (107) (All)

- (1918) 1918 Sind 13 (14) 13 Sind L R 75.
4 (1927) 1927 Sind 206 (206)
5 (1935) 1935 All 519 (519).

Note 3

1. (1850) 16 Cal EC8 (508 810).
(1865) 3 South W R 163 (163)
(1893) 16 J3 All W N 45 (45)
2. (1867) 7 South W R 166 (104).

But where the arbitrators after remittal reconsider the matter to the best of their ability and come to the same conclusion, the award does not become void ³

4. Grounds for setting aside award

An award can be set aside only on one or more of the grounds mentioned in this Paragraph ¹ Therefore a provision in the agreement of reference that any of the parties might object to the award on any account is *ultra vires* and contrary to the procedure prescribed by this Paragraph ²

As to the several grounds on which an award may be set aside see Notes 5 to 13, *infra*.

5 "Corruption or misconduct"

The word "misconduct" when applied to the proceedings of arbitrators does not necessarily imply moral turpitude, it is used in the sense of breach or neglect of such duties and responsibilities as devolve on the arbitrators acting judicially and as the Courts of Justice expect from them before allowing finality to their awards ¹ In other words it comprehends action on the part of the arbitrator which, upon the face of it, is opposed to all rational and reasonable principles that should govern the procedure of any person who is called upon to decide questions in difference referred to him by the parties ²

The word "corruption necessarily implies misconduct but "misconduct" does not of necessity imply corruption Thus an award may be set aside on the ground of misconduct which does not amount to corruption ³

Where it is proved that an arbitrator has been guilty of misconduct, it is not necessary to prove *prejudice* in order that the award may be set aside, but the irregularity may be cured by waiver ⁴

6 Acts amounting to misconduct

We now proceed to discuss some instances of misconduct justifying the setting aside of an award under Clause (a) of this Paragraph —

- (1) Where more than one arbitrator is appointed, the presence of all of them at all meetings and, above all at the last meeting when the final act of arbitration is done, is essential to the validity of the award Therefore the absence of some of the arbitrators at some of the meetings is misconduct within the meaning of this Paragraph ¹ The reason is that in such cases the parties

3 (1931) 1831 All W N 25 (26)

Note 4.

1 (1924) 1924 Cal 630 (665)

2 (1916) 1916 Pat 190 (192) 1 Pat L Jour 306

Note 5

1 (1897) 9 All 203 (236)

(1893) 12 Val 113 (113)

(192) 1923 Bom 49 (50) 52 Bom 116

(1925) 1925 Oudh 307 (309) 1 Luck 130

[See also (1935) 1935 Bom 127 (130)

53 Bom 233 If opportunity is afforded to one side to get advantage with arbitrator over another, and if there is possibility of such advantage influencing mind of arbitrator, proceedings are vitiated—Arbitrator sending for one of parties merely to sort papers, held did not amount to misconduct.]

2 (1883) 1889 All W N 124 (125)

3 (1903) 30 Cal 337 (400)

4 (1931) 1931 Mad 613 (621)

Note 6

1 (1885) 7 All 523 (525)

(1932) 1932 Mad 157 (157)

(1931) 1931 Rang 24 (26) 12 Rang 128
Award signal by four — Meeting of only three — Fifth not given notice of proposed meeting — Award is not valid — Refusal to sign by fifth at place where arbitrators had assembled for some other purpose does not affect question

(1930) 12 Mad 113 (114)

(1919) 1919 Mad 877 (877)

(1918) 1918 Cal 865 (865)

(1911) 11 Ind Cas 638 (699) (Cal)

(1900) 2 Cal L Jour 61 (61)

(1902) 27 Cal 36 (38, 40)

intend that all the persons to whom the reference is made shall meet and discuss together all the matters referred and that the award should be the result of their united deliberations. This conference and deliberation in the presence of all the arbitrators are the very essence of the arbitration and the sole reason why the award is made binding. The facts that the agreement of reference provided for a valid award by the majority of the arbitrators and that a majority of them were present at all the meetings will not make the award valid.² Similarly where a reference was made to three persons and the award purported to be made by four persons, it was set aside on the ground that the association of the fourth person might have influenced the decision of the others.³ The absence of an arbitrator at some of the meetings does not however amount to misconduct if the act done at such meetings is not of a judicial nature, but merely ministerial in its character.⁴

As to the validity of an award made by a majority of arbitrators, see Note 3 to Para 4

(2) "If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator."⁵

(3) The ordinary rule is that an enquiry before the arbitrator is assimilated as near as may be to the proceedings on a trial in the Courts. Therefore if the parties are not given notice of, any meeting at which they should appear and represent their case or are not given a fair and reasonable opportunity to prove their case, that would amount to misconduct on the part of the arbitrators.⁶ But the omission to give notice of a meeting to a party who had, prior to such meeting, notified to the arbitrator his withdrawal from the submission, does not in-

(1874) 22 Suth W R 418 (419)

(1890) 14 Suth W R 211 (212)

(1867) 8 Suth W R 171 (172)

(1882) 1882 Pun Re No 55 page 158

(1922) 1922 Oudh 276 (277) 26 Oudh Cas 1

(1915) 1915 Oudh 110 (111)

(1898) 1 Oudh Cas 181 (182)

(1919) 1919 Pat 74 (77)

[See (1918) 1918 All 426 (427) All arbitrators acting—Failure of one to sign does not make award invalid]

(1920) 1920 Lah 228 (232) 1 Lah 481

Award not signed at same time on the same day by all the arbitrators—It is not invalid

(1883) 9 Cal 906 (907) 2 out of 5 arbitrators ceased with consent of parties—Award valid

(1930) 1930 Sind 190 (192) Both arbitrators pleaders—One appearing for another in other cases—Award valid
[See also (1934) 1934 Bom 6 (9) It is not however necessary that all the arbitrators should sign the award in the presence of each other]

[See (1935) 1935 All 90 (91) Arbitrators arriving at decision but waiting for signing award—One of them changing his mind and not signing it—No misconduct is constituted]

2 (1918) 1918 Cal 860 (860)

(1932) 1932 Mad 157 (157)

(1924) 1924 Rang 153 (154)

(1918) 1918 All 274 (275)

3 (1875) 7 N W P H C R 367 (371)

4 (1924) 1924 Mad 274 (277) Received written statement and documents—Held

not taking evidence and without giving opportunity to a party to prove his case—Held amounts to

validate the award⁷ The arbitrators can make an *ex parte* award if the parties do not attend the hearing after receipt of sufficient notice⁸

(4) The refusal of an arbitrator to examine witnesses produced by either party is misconduct within the meaning of this Paragraph⁹ In order to impeach an award on this ground it must be shown that a witness was distinctly tendered to the arbitrator.¹⁰ But it is not misconduct to refuse to admit evidence which was unnecessary and which would not have in any way helped or affected the decision¹¹

(5) An arbitrator ought not to hear or receive evidence, oral or documentary, from one side in the absence of the other¹² It has, however, been held by the High Court of Madras that there is no misconduct where an opportunity was given to the other side of meeting and answering such evidence^{12a} Similarly if the arbitrator takes evidence in the absence of the parties with their consent¹³ or where one of the parties deliberately absents himself from the hearing¹⁴ the award made thereafter is not bad for misconduct

(6) It is misconduct on the part of an arbitrator when he examines no witnesses where the nature of the dispute is such that it could not

misconduct

(1899) 3 Cal W N 361 (369)

(1927) 1927 Loh 347 (348)

(1922) 65 Ind Cas 577 (578) (Lah)

(1927) 1927 Mad W N 317

(1924) 1924 Sind 27 (28, 29) 17 Sind L R 172

(1920) 1920 Cal 386 (387, 388) 47 Cal 29

[See (1919) 1919 Mad 1029 (1033)

In the case of a minor arbitrator cannot protect minor's interest by removing a defaulting guardian but should adjourn proceedings for securing proper representation of minor]

(1918) 1918 Cal 529 (529) Oral notice is sufficient

(1916) 1916 All 278 (283) Absence of notice of a meeting at which no evidence is

[See (1933) 1933 Sind 300 (301)

Parties given opportunity to produce evidence — Evidence not produced — Arbitrators are not guilty of misconduct in deciding on the evidence already on record]

10 (1912) 13 Ind Cas 161 (162) (Cal)

(1917) 1917 L B 68 (71)

11 (1909) 4 Ind Cas 1151 (1152) 3 Sind L R 164

(1918) 1918 Cal 393 (400) Arbitrator can decline to summon witnesses in the

12 :

arbitrators that they were prepared to receive evidence does not render award invalid

7 (1906) 29 Mad 44 (45)

(1914) 1914 U B 53 (54)

(1916) 1916 All 278 (282)

3 93

read in the absence of one party — No mis

be determined without evidence ¹⁶

(7) An arbitrator who makes private inquiries and bases his award on such information which the parties had no opportunity to check, is guilty of legal misconduct ¹⁶ But where the parties agree to be bound by the decision of an arbitrator in whatsoever manner he might see fit to arrive thereat, the award will not be bad if based on private enquiries of the arbitrator ¹⁷

(8) Ordinarily, an arbitrator has no right to decide a matter referred to him on his personal knowledge and an award based on such knowledge cannot be maintained ¹⁸ But where the submission to arbitration gives him power to decide a case upon his own personal knowledge ¹⁹ or where a particular arbitrator has been selected only because of his personal knowledge of the matters in dispute, ²⁰ it is not misconduct on the part of the arbitrator to import into the consideration of the case his own personal knowledge

(9) An arbitrator has no authority to delegate his functions to a stranger ²¹ except the performance of acts of a merely ministerial character ²²

been substantially affected by such knowledge

(1926) 1926 Mad 752 (751)

(1923) 1925 Mad 1086 (1087)

(1920) 1920 Nag 123 (130)

(1915) 1915 Cal 713 (714) An arbitrator acts illegally in not disclosing to the parties the documents on which he acts

[See (1921) 1921 Mad 271 (272)]

Such knowledge communicated to co arbitrators in the presence of parties—Award is valid

(1922) 1922 Lah 480 (180) Inquiry made in the presence of parties—Is not objectionable

(1925) 1925 Rang 333 (334) 3 Rang 387 Arbitrators not acting upon such knowledge—Award is not vitiated

[See (1935) 1935 Pesh 69 (71) Though private enquiries made by arbitrator, award based merely on documentary evidence is not vitiated]

17 (1922) 1922 All 69 (69)

(1926) 1926 Oudh 333 (334) 20 Oudh Cas 259

[See (1923) 1923 Mad 301 (302, 304) 47 Mad 30 But guardian of a minor cannot so agree, though an adult can do so]

18 (1919) 1919 All 98 (99) 42 All 185

(1935) 1935 Mad 152 (155, 156) But Court will not interfere unless award has

(1925) 1923 Mad 49 (50 52) Guardian of a minor can consent to arbitrator's decision on personal knowledge.

20 (1926) 1926 Bom 527 (529)

(1935) 1935 Mad 152 (155) It is desirable in such cases that arbitrator should tell the parties what his personal knowledge is and give them opportunity to rebut it

(1929) 1929 Mad 144 (145) Arbitrators selected on account of personal knowledge—Used it only in understanding and appreciating evidence—Held award not bad

[See (1931) 1931 Cal 53 (57) 57 Cal 269]

(1916) 1916 Bom 4 (7) 41 Bom 518.

21

[See (1910) 5 Ind Cas 111 (112) Bom 618 Arbitrator examining a witness who was asked to estimate and evaluate—Held no delegation of authority]

22 (1902) 29 Cal 554 (567) 29 Ind App 163 1902 Pun Ro No 87 (P C)

(1935) 1935 Oudh 349 (353) Where a part of award is the dictation of the arbitrator is a ministerial act (1929) 1929 Pun Ro No. 65, Page 527.

It is difficult to prescribe in general terms the precise length to which an arbitrator may go in seeking outside advice upon matters of law. Where he merely takes advice upon the general Rules of law bearing upon the case and does not leave to an outsider the burden of deciding any issue in the case instead of exercising his own judgment thereon, it cannot be said that the award is vitiated by misconduct.²³ In such cases it would be prudent and discreet for arbitrators when they desire to put themselves on the best footing of information as to matters of law to ask all the parties to be present when they communicate with any gentleman whom they may see upon that subject.²⁴

- (10) Where an arbitrator is indebted to one of the parties at the time of reference or becomes indebted after the reference²⁵ or has a personal interest in the subject matter of the dispute²⁶ or where he has come to know of the facts of the case in the capacity of an advisor of one of the parties²⁷ and where such fact is not disclosed to the other party the award is vitiated by misconduct. But a pleader is not incompetent to be an arbitrator simply because he was engaged by one of the parties as his pleader on some former occasions.²⁸
- (11) Where an award is made after a delay of five years it will amount to misconduct unless the delay is properly explained.²⁹ The reason is that it is the duty of the arbitrator to see that the proceedings are conducted with reasonable diligence and not doing so is a failure in his ordinary duties as an arbitrator. But where delay in making an award is caused by the voluntary absence of one of the parties that party cannot impugn the validity of the award on the ground of delay.³⁰
- (12) Where the decision of an arbitrator is perverse it amounts to misconduct on the part of the arbitrator.³¹
- (13) Where one of the arbitrators is guilty of misconduct in having accepted an illegal gratification from one of the parties the award ought to be set aside in its entirety inasmuch as it is difficult to say how far the other arbitrators were influenced by the biased and interested opinion of one of them.³²

See also Note 8 *infra* and the undermentioned cases.³³

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|--|---|--|
| <p>23 (1931) 1331 P C 259 (293) 58 Ind App 291
(I C)
(1925) 1925 Pat 465 (466)</p> | <p>Affirmed in 2 J Cal 851 (PC) on appeal
p 168
p 168</p> | <p>(1845) 1875 Pun Re No 41 page 119 Delay owing merely to inattention and failure to attend on 2 or 3 successive days
contrary to all the evidence which they</p> |
| <p>29 (1928) 1928 Bom 49 (50) 52 Bom 116
[See (1912) 13 Ind Cas 48 (49) (All)
Delay waived by parties objecting]
C P C 378 & 379</p> | <p>Reference of dispute as regards management—Scheme—Arbitrators appointing themselves as managers—Award is bad</p> | <p>5</p> |

5.

7 Acquiescence in acts amounting to misconduct

The principles mentioned in Note 6, *ante* in relation to the various instances of misconduct must be understood subject to the qualification that the parties may agree that a reference may be conducted in a particular way¹. It is also well settled that an objection to the irregular or improper conduct of an arbitrator may be waived by the parties either expressly or by conduct provided the party waiving it has full knowledge of the defect². This is based on the principle that Courts will not permit a party to lie by or act in an indecisive manner so as to obtain the benefit of the award if it is in his favour and endeavour to set it aside if it is not³. Thus where one of several arbitrators is absent at some of their meetings and a party participates in subsequent proceedings without objecting to the irregularity⁴ or where the arbitrators examine the plaintiff's witnesses in the absence of the parties and the defendant who is aware of this makes no protest at that time or later on⁵ the party will be deemed to have waived his right to object to the award.

(1935) 1935 Mad 184 (188) Important evidence improperly admitted by arbitrator—It must have influenced the arbitrator and the award will therefore be set aside

(1933) 1933 Sind 295 (296) 27 B.L.R. 327 Arbitrator authorized to deal with costs as they would be dealt with by Court—Dismissal of suit by arbitrators but plaintiff awarded Rs 2000 as costs ordinary costs being about Rs 100 even though not claimed in suit or even before arbitrator—Award must be set aside

(1923) 1923 Nag 70 (71) Reference to arbitrators to make partition—Arbitrators can make allotment subject to conditions affecting its tenure or devolution

(1978) 3 Cal 375 (379) Arbitrators themselves doubting the correctness of their decision—Award not valid

(1976) 1976 Pun Re No 5 page 8 Reference to examine accounts—Award made without examination of ac

count not
issue

Note 7

1 (1894) 1910 Bom 299 (312) Such agreement may be express or implied from the conduct of the parties during the arbitration

For such instances see Note 6 *ante*

2 (1970) 1970 Sind 79 (81-82) 24 Sind L.R. 351

(1935) 1935 Bom 127 (131) 59 Bom 269

(1935) 1935 Oudh 349 (352) But waiver must be an intentional act with

ing award and asking 3 arbitrators to complete it—Estoppel

(1921) 1921 Cal 665 (666) 3 arbitrators appointed—One refused to act—Change in the personnel of the arbitrators made with consent of defendant

acquiescence in objection to jurisdiction

arbitrators selected to construe a proviso deviate from its terms if agreed to by legates and excoptors
(See (1922) 1929 Rang 106 (107) Rang 156 Signature of party not estop him from doing the same

A stipulation in an agreement of reference precluding the parties from impeaching the validity of the award is within the mischief of S 28 of the Indian Contract Act and will not therefore prevent the Court from setting aside the award on any of the grounds mentioned in this Paragraph.⁶ The reason is that the grounds mentioned in this Paragraph suggest the requisites of a valid agreement as well as of a valid award.

8 Acts not amounting to misconduct

In *Indiens v. Mitchell*¹ Lord Halsbury observed as follows. We must not insist upon too minute observance of the regularity of forms among persons who naturally by their education or by their opportunities cannot be supposed to be very familiar with legal procedure and may accordingly make slips in what is mere matter of form without any interference with the substance of their decisions. Courts will not therefore set aside an award for misconduct of the arbitrators unless there has been something radically wrong and vicious in the proceedings before the arbitrators.²

The following are some instances of acts that do not amount to misconduct.³

- (1) It is not a valid objection to an award that the arbitrators have not acted in strict conformity with the rules of evidence.⁴ Thus the honest though mistaken admission by an arbitrator of a document in violation of a rule of evidence introduced *pro hac vice* (for the occasion) would not be a ground for setting aside an award.⁵ Communications between parties in the course of negotiations between them are inadmissible in evidence. This rule of law based upon grounds of public policy and convenience is as binding on arbitrators as on Courts. But if a party does not object to such evidence being received on this ground it cannot later on be made a ground for setting aside the award.⁶
- (2) If a party offers to abide by the oath of the opposite party the arbitrator can make his award accordingly.⁷
- (3) It is generally desirable that an arbitrator should make and retain for subsequent use if necessary notes of the proceedings before him. But the absence of such notes is not a ground for setting aside the award and especially if the party objecting did not make any *inter* test until after the award was made.
- (4) Until an award is finally published the arbitrator has a right to re-consider the award he has already made.⁸ But once it is published

6 (1893) 6 Mad 363 (37) 30
(1316) 1916 Lch 89 (91) 1916 L R 117
[See (1322) 1322 Vell 1179 (180) C] have a valid set aside on the ground of illegality on the face of it.
[1st ed (1316) 1916 Lch 89] Disentitled from 1916 Lch 89]

7 (1893) 6 Mad 363 (37) 30

Note 8

v. M. L.
33 (353)
29

4 (1314) 1914 Lom 274 (77) 1914 L Ch 934
(9) 33 Bo 110 Reversing (1912)

1 Ind C 3636
(13 7) 4 Cal 31 (36)
[See (13 8) 13 5 Bo (13) 5 L
letter to be used by arbitrator and
ject d—Held in m c 1 t
r (135) 4 All 283 (283)
(13 3) 81 All 335 (5 3) 1 S L k J
contra p. Peron f
7 (1914) 1314 L C 103 (10) 36 All 3 17
Outh C 120 (P C) Affirming (1911)
13 Int C 13 30
[See (1926) 1326 Outh 70 (70s) 1
Luch 139 Pencil etc transcribed
and held—Suspicious circumstances
—Held to be misconduct]
8 (1914) 4 Cal 21 (235)
(1323) 1323 Lch 431 (477)

his authority is exhausted. He is *functus officio* and has no power thereafter to correct or modify the award.⁹

- (5) When a cause or matter in difference is referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact.¹⁰ Therefore, Courts will not sit as Courts of appeal to consider the correctness of an award on the merits in respect of matters of fact or even of law.¹¹ An error in calculation in the award, unless so palpable and gross as to be strong evidence of misconduct, is no ground for interference by the Court.¹² But the committing of a mistake in law and letting it visible on the face of the award is a form of judicial misconduct.¹³ See also Note 6 to Para 14.

- (6) An award need not be a reasoned judicial decision and the arbitrators need not even give their reasons for their conclusion.¹⁴

- (7) An award made by the arbitrators which merely embodies a compromise arrived at before them by the parties is not invalid.¹⁵ The reason is that such a proceeding is as much an adjudication of the case as a decree of a Court founded on a compromise.

(1910) 6 Ind Cas 963 (968) (Lah)
 (1919) 1919 Pat 74 (78)
 9 (1911) 11 Ind Cas 481 (487) (Cal)
 (1918) 1918 Lah 239 (240) 1917 Pun. Re
 No 99
 (1883) 9 Cal 575 (579)
 10 (1923) 1923 P. C. 66 (69) " Bom 578 50

(1924) 1924 Pat 488 (491) 3 Pat 443
 (1917) 1917 T. R. 69 (71)

d App 51

(1897) 17 All W. N. 162 (163)

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 ot to be
 e Court
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on the ground that the
 of property is opposed to Hindu law
 [See (1867) 1 un. Re No 47 in award
 cannot be set aside on the ground
 that the arbitrators were unlettered
 men not versed in law]

(1928) 1928 Oudh 1 (7) 3 Luck 1 Award
 setting aside deed of gift on condi-
 tion of donor's paying to donee com-
 pensation to the extent of benefits
 received by donor is valid

(1924) 1924 Oudh 54 (55) Reference for
 partition—Arbitrators can make pro-
 vision for maintenance of female
 members of the family
 [See also (1934) 1934 Pat 100 (104)
 Arbitrators lightly discarding d. c.

into the question of reasonableness
 of award

(1921) 1921 Lah 34 (34, 35) 2 Lah 114 The
 arbitrator is not controlled in his
 decision by the rules of Hindu law

(1923) 75 Ind Cas 198 (199) (Pesh) The fact
 that the award seemed to be an un-

21 Sind L. R. 101 55 Cal 116 (117)
 (1924) 1924 Sind 75 (53, 84 57) 17 Sind

Note 2

3 All

- (c) Where the arbitrators accept a fee as remuneration for their services at the suggestion and with the consent of all the parties such acceptance of a fee does not involve any misconduct on their part¹⁶

See also the undermentioned cases¹⁷ and other instances mentioned in Note 6 ante

9 Evidence of arbitrator

An arbitrator selected by the parties comes within the general obligation of being bound to give evidence when called as a witness in proceedings to enforce or set aside an award. He may be examined upon the course of procedure which he has adopted, the material which he has utilised in arriving at his decision and as to every matter of fact with reference to the making of the award, so as to put the Court in possession of the history of the litigation up to the time of his proceeding to make the award. But a party can go no further and cannot examine him as to why and how he arrived at a particular decision and scrutinise his decision on matters within his jurisdiction and on which his decision is final¹.

10 Fraudulent concealment of any matter which he ought to have disclosed

In cases of arbitration where a person is appointed by two parties to exercise judicial duties, there should be *uberrima fides*¹ on the part of all the parties concerned in regard to his selection and appointment and every disclosure which might in the least affect the minds of those who are proposing to submit their dispute to the arbitration of any particular individual, as regards his selection and fitness for the post ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made^{1a}. Thus, where the arbitrator is the retained pleader of one of the parties² or is related to him³ or is interested in the

- (1978) 1928 Lah 915 (916) Dispute between partners referred—Two partners compromising and others consenting—Arbitrators can go into the question of compromise and pass award in its terms
[See also (1933) 1933 Mad 862 (864) Partition suit referred to arbitration—Compromise without Court's sanction consented to by guardians on behalf of minors and accepted by arbitrators—Such guardians cannot subsequently plead that consent will not affect minor's rights]
- 16 (1906) 29 Mad 44 (45)
(1905) 1935 Cal 359 (360) Arbitrators taking money for charges or as fee from one of parties may be sufficient to set aside award—But where one of parties has paid it by mutual arrangement between parties award is not vitiated
[See also (1934) 38 Cal WN 784 (793)]
- 17 (1925) 1925 Oudh 927 (228) Arbitrators evenly divided in their opinion—

conduct

- (1885) 7 All 273 (276) Award cannot be set aside on the mere surmise that arbitrator might have been partial he being related to a party
(1924) 1924 Cal 1051 (1053)
(1909) 2 Ind Cas 92 (93) (Mad) May be examined to ascertain whether a proceeding of his is an award
[See (1872) 17 Suth W R 516 (517) Can be examined to prove admission made before him in proceeding after setting aside of award]

Note 9

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- 308
(1924) 1924 Sind 51 (54) 19 Sind L R 152

Note 10

- 1 Abundant confidence
1 (1898) 25 Cal 141 (144)
(1933) 1933 Sind 68 (69 70)
2 (1893) 25 Cal 141 (144)
3 (1925) 1925 Sind L.O. (151, 152) 19 Sind L R 251
(1934) 1935 Oudh 349 (352) Arbitrator related to one defendant and having monetary dealings with another

showing that arbitrator took the party into his confidence, no mis

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subject-matter of the dispute⁴ and such fact is not disclosed by that party to the other side, the award made by the arbitrator is liable to be set aside under Cl (f) of this Paragraph.

11 Award made after order superseding arbitration

If the power of the arbitrator is revoked by the Court passing an order superseding the arbitration, "the arbitrators have no longer *seisin* of the reference, and they are *functi officio* and cease to have any more power to make an award than the man in the street"¹

Where an award was not made in time and consequently the reference to arbitration was cancelled, the Court has no power to look at the award subsequently made and base its judgment on it, as if it were the report of a commissioner.²

12 Award made after the expiry of the period allowed by the Court

It has been already mentioned in Note 1 *ante* that S 521 of the old Code after setting out the grounds on which an award could be set aside in clauses (a), (b) and (c) provided that "no award shall be valid unless made within the time allowed by the Court". It was, therefore, held under that Code that an award made after the expiry of the period allowed was null and void, that is to say, there was no award on which the Court could make a decree.¹

The effect of the alteration made in this Paragraph is that an award made out of time is not *per se* a nullity, but only *aside the award* if the parties so desire to have it made to set aside the award on that ground, and then the award becomes final.² As to appeals against decrees based on awards made out of time see notes to Para 16.

13 Being otherwise invalid

Section 521 of the old Code did not contain the words "or being otherwise invalid". It was held under that Code that an objection to an award could not be taken under S 521 on the ground that the award was invalid for any reason other than those mentioned in that section.¹ The effect of the change made in this Paragraph is that an objection to an award on the ground that it is invalid for any cause whatever must be taken in the Court in which the award is filed and if no objection is there taken or if it is made and disallowed, the award becomes final and cannot be challenged subsequently.² See also notes to Para 16.

4 (1926) 1926 Oudh 307 (309) 1 Luck 199

Note 11

1 (1896) 18 All 122 (497)

2 (1922) 1922 Lah 104 (100)

Note 12

referring to the alterations are it is submitted
erroneous —

(1917) 16 Ind Cas 223 (224) (Cal)

(1920) 1920 Lah 107 (107)

{See also (1933) 1933 Lah 173 (174).}

3 (1916) 1916 Lah 80 (82)

(1933) 1933 Oudh 563 (564)

(1919) 1919 Pat 93 (90) 4 Pat L Jour 205

Note 13

1 (1914) 1914 All 446 (449) 21 Ind Cas 99
(922) 26 All 69

(1906) 11 Cal W N 1152 (1153)

(1908) 5 All L J 614 (616)

(1911) 11 Cal 173 (178) (Mad)

An award made otherwise than in accordance with the authority conferred by the order upon the arbitrators is an award which is 'otherwise invalid' and which may accordingly be set aside by the Court under this Paragraph³ Thus where the arbitrators treat a person who is not a party to the suit which has been referred to them as a party to it and decide disputes between parties to the suit or any of them and such person the arbitrators exceed their jurisdiction and the award is invalid within the meaning of this Paragraph⁴ Similarly where the arbitrators go beyond the scope of the submission and decide matters outside the scope of the suit, the Court will be justified in setting aside the award as invalid⁵ It has been held in the undermentioned case⁶ that such an award cannot be treated partly as one made on a reference through Court and partly as an award by private agreement But where simultaneously with the order of reference, the parties agree to refer to the same arbitrators matters outside the suit and separate awards are made and it appears that the view of the arbitrators in the latter award could not have influenced their minds in deciding the former, the award is not vitiated⁷

There is a conflict of opinion on the question whether an award can be challenged under this Paragraph on the ground that the *order of reference* is itself invalid The High Court of Calcutta has held that the words "being otherwise invalid" in clause (c) of sub-section (1) of this Paragraph refer to the invalidity of the kind mentioned in the preceding sentences of the said clauses and, that therefore, a ground of objection which challenges the validity of the order of reference is not a ground which may be put forward under this Paragraph⁸ The High Court of Allahabad, while expressing conflicting opinions as to whether the words should be construed *ejusdem generis* with those previously stated,⁹ has held that an objection as to the validity of the reference is not an objection within this Paragraph¹⁰ But the High Court of Lahore has held that the doctrine of *ejusdem generis* cannot be invoked to restrict the full and natural meaning of the phrase 'or being otherwise invalid' and that an award can be challenged on the ground that the reference is invalid is not having been agreed to by all the parties¹¹

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(1921) 13 Ind C is 248 (351, 352) 6 Sind L R 163

(1900) 1930 Bom 431 (435) 51 Bom 696
Objections to the validity of the award—A separate suit for that purpose will not lie—The remedy lies under Para 15 (1) (c)
[See (1933) 1933 Mad W N 1475 (1476)
Award referring to arbitration with out authority—Principal becoming aware long after proceedings are over—He has right to substitute a suit to set aside award]

[See also (1926) 1926 Mad 366 (366)
Arbitrators acting beyond scope of reference and giving award on a matter to which all parties agreed—Award on this part is enforceable by suit]

8 (1931) 1931 Cal 109 (110)
(1931) 1931 Cal 211 (216 218) 38 Cal 623
9 (1921) 1921 All 16 (17) 43 All 305 Must not be construed *ejusdem generis*
(1934) 1934 All 95 (97) Must not be construed *ejusdem generis*
(1920) 1920 All 45 (48) 42 All 277 Must be

The High Court of Madras has also held that the words are not *ejusdem generis* with the other cases mentioned in this Paragraph but are meant to include all cases of invalidity on grounds other than those mentioned and that therefore an award is invalid if a minor who is a party to the arbitration is not properly represented in the proceedings¹

14 Appeal

No appeal lies from an order overruling objections to an award¹ Nor does an appeal lie from an order setting aside an award under this Paragraph² except in the case provided for in S 104 sub s (1) Clause (a)

Where a Court sets aside an award under this Paragraph and there after decides the suit on the merits the Court of appeal can on appeal from the decree in the suit inquire into the propriety or otherwise of the order setting aside the award³ See S 105 *ante* But where an order superseding an award is confirmed in appeal in a case coming under S 104 Clause (a) the Court hearing the appeal from the decree in the suit is precluded from re opening the question of supersession of the award⁴

It has been held by the High Court of Calcutta that an order made by a Judge of the High Court in the exercise of original jurisdiction refusing to set aside an award is a judgment within the meaning of Clause 15 of the Letters Patent and that an appeal lies therefrom to the High Court in its appellate jurisdiction⁵ See notes to S 104

15 Revision

No revision lies to the High Court under S 115 against the order of the lower Court refusing to set aside an award on any of the grounds mentioned in this Paragraph merely because the lower Court has proceeded on an erroneous view¹ Nor is an order setting aside an award under this Paragraph open to revision² The reason is that the order is not the decision of a case within the meaning of S 115 and moreover the applicant has got another remedy of challenging the order in an appeal against the decree in the suit if ultimately the suit is decided against him See Note 14 *ante* But where the ground for

12 (1919) 1919 Mad 1029 (1031 1032)
[See also (1920) 1920 Mad 195 (196)]

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page 243 Acquiescence in proceedings after setting aside award—Order cannot be challenged in appeal under S 105]

[But see (1906) 23 All 408 (410)]

4 (1920) 1920 Pat 605 (606)

5 (1898) 26 Cal 361 (368 3 8 350)
(1878) 4 Cal 231 (234)

Note 15

1 (1911) 9 Ind Cas 385 (385) (Lal)

(1933) 1933 Lah 692 (694) 14 Lah 15

Order refusing to set aside award is only interlocutory

(1919) 1919 Lat 93 (98 99) 4 Pat L Jour

(1925) 1925 All 566 (567) 47 All 916

(1922) 1922 All 64 (65)

(1924) 1924 All 761 (61)

(1893) 5 All 293 (294)

(1932) 1932 Bom 232 (233)

(1923) 1923 Bom 402 (402) 47 Dom 741

(1908) 5 All L J 644 (647) 456
(1883) 11 Cal 172 (174)
[Contra (18 0) 14 Suth. W R 327 (327)]

(1928) 1928 Lah 753 (754)

(1881) 1881 Pun Re No 72 page 162

(1910) 15 Ind Cas 62 (63) 1912 Pun Re No 97

(1908) 31 Mad 345 (346)

(1913) 20 Ind Cas 73 (75) 16 Oudh Cas 233

(1916) 1916 Pat 21 (23)

(1912) 15 Ind Cas 928 (930) (Lah)

[See (1876) 1876 Pun Re No 117

revision is the misinterpretation by the Court of the agreement of reference³ or where an award is set aside on very inadequate grounds⁴ or 'where the Court refuses to hear a valid objection properly raised before it,'⁵ the order is open to revision under S 113.

The High Court of Allahabad has held in the undermentioned case⁶ that where an award is set aside on the ground that the reference to arbitration ought not to have been made, the order setting aside the award is without jurisdiction and that therefore a revision lies to the High Court

P. 16. [S 522] (1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired,³ proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award [1877—S 522; 1859—S 325.]

Synopsis

	Note No		Note No
Legislative changes	1	Judgment without hearing objections to award — Appeal if lies against decree	7
Pronounce judgment according to the award	2	Second appeal	8
After the time for making such application has expired	3	Revision	9
Finality of decree in accordance with the award	4	Binding effect of award	10
Finality of decrees not in accordance with the award	5	Enforcement of the award	11
Appeal against decree based upon invalid award	6	Suit to set aside award	12
		Court acting as arbitrator	13
		Valuer and arbitrator	14

Other Topics

Decree based upon a judgment pronounced in contravention of this Paragraph before the period for filing objections—Whether appealable See Note 4 Pts (7) to (16)

Decree in accordance with award submitted after remittal—Whether appealable See Para 14 ante Note 9 Pt (4)

Decree on award in the absence of the

defendant—Whether in *ex parte* decree See Note 2 Pt (3)

No appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award See Note 5 Pt (1)

Objection to validity of award — Whether entertainable in appeal for the first time See Note 6 F N (1)

(1902) 26 Bom 551 (552)

(1903) 30 Cal 337 (401)

(1926) 1926 Lah 191 (192)

(1916) 1916 Lah 89 (91) 1916 Pun Re No 117

(1929) 1929 Oudh 493 (494)

3 (192-) 1928 Lah 500 (551) In this case Court considered that reference gave power to arbitrator to decide upon private enquiry while as a matter of fact it did not so provide

[See (1922) 1922 All 69 (69)]

4 (1916) 1916 Oudh 137 (138)

[See also (1935) 1935 All 519 (519) Lower Court not carrying out directions of High Court in deciding objections High Court has jurisdiction to set aside order setting aside award under S 107 of the Government of India Act]

5 (1924) 1924 All 788 (789) 46 All 606

6 (1921) 1921 All 16 (18) 43 All 305

The High Court of Madras has also held that the words are not *ejusdem generis* with the other cases mentioned in this Paragraph, but are meant to include all cases of invalidity on grounds other than those mentioned and that, therefore an award is invalid if a minor who is a party to the arbitration is not properly represented in the proceedings¹²

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No appeal lies from an order overruling objections to an award¹ Nor does an appeal lie from an order setting aside an award under this Paragraph² except in the case provided for in S 104, sub s (1), Clause (a)

Where a Court sets aside an award under this Paragraph and there after decides the suit on the merits the Court of appeal can, on appeal from the decree in the suit inquire into the propriety or otherwise of the order setting aside the award³ See S 105, ante But where an order superseding an award is confirmed in appeal in a case coming under S 104, Clause (a) the Court hearing the appeal from the decree in the suit is precluded from re opening the question of supersession of the award⁴

It has been held by the High Court of Calcutta that an order made by a Judge of the High Court, in the exercise of original jurisdiction, refusing to set aside an award is a 'judgment' within the meaning of Clause 15 of the Letters Patent and that an appeal lies therefrom to the High Court in its appellate jurisdiction⁵ See notes to S 104

15 Revision

No revision lies to the High Court under S 115, against the order of the lower Court refusing to set aside an award on any of the grounds mentioned in this Paragraph merely because the lower Court has proceeded on an erroneous view¹ Nor is an order setting aside an award under this Paragraph open to revision² The reason is that the order is not the decision of a 'case within the meaning of S 115, and, moreover, the applicant has got another remedy of challenging the order in an appeal against the decree in the suit if ultimately the suit is decided against him See Note 14 ante But where the ground for

12 (1919) 1919 Mad 1029 (1031 1032)
[See also (1920) 1920 Mad 195 (196)]
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page 243 Acquiescence in proceedings after setting aside award—Order cannot be challenged in appeal under S 105]
(But see (1906) 23 All 408 (410)]
4 (1920) 1920 Pat 605 (606)
5 (1898) 26 Cal 361 (368, 378 380)
(1878) 4 Cal 231 (234)

Note 15

1 (1911) 9 Ind Cas 385 (385) (Lah)
(1933) 1933 Lah 692 (694) 14 Lah 15.
Order refusing to set aside award is only interlocutory
(1919) 1919 Pat 93 (98 99) 4 Pat L Jour 265
[But see (1999) 1929 Lah 369 (370)]

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Re No

97
(1908) 31 Mad 345 (346)
(1913) 20 Ind Cas 773 (775) 16 Oudh Cas 233
(1916) 1916 Pat 21 (23)
(1912) 15 Ind Cas 923 (930) (Lah)
[See (1876) 1876 Pun Re No 117,

(1923) 1923 Bom 402 (402) 47 Bom 17

revision is the misinterpretation by the Court of the agreement of reference³ or where an award is set aside on very inadequate grounds⁴ or where the Court refuses to hear a valid objection properly raised before it⁵ the order is open to revision under S 115

The High Court of Allahabad has held in the undermentioned case⁶ that where an award is set aside on the ground that the reference to arbitration ought not to have been made, the order setting aside the award is without jurisdiction and that therefore a revision lies to the High Court

P. 16. [S 522] (1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner afore-said and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired,³ proceed to pronounce judgment according to the award

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with, the award

[1877—S 522, 1859—S 325]

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		Valuer and arbitrator	14

Other Topics

Decree issued upon a judgment pronounced in contravention of this Paragraph before the period for filing objections—Whether appealable See Note 4 Pt. (7) to (16)

Decree in accordance with award submitted after remittal—Whether appealable See Para 14 ante Note 3 Pt (4)

Decree on award in the absence of the

defendant—Whether an *ex parte* decree See Note 2 It (3)

No appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award See Note 5 It (1)

Objection to validity of award — Whether entertainable in appeal for the first time See Note 6 F N (1)

[See (1922) 1922 All 69 (63)]

4 (1916) 1916 Oudh 137 (138)

(1902) 26 Bom 551 (552)

(1903) 30 Cal 397 (401)

(1926) 1926 Lah 191 (192)

(1916) 1916 Lah 89 (91) 1916 Pun Re No

to set aside order setting aside award under S 107 of the Government of India Act]

5 (1924) 1924 All 788 (789) 46 All 606

6 (1921) 1921 All 16 (18) 43 All 305

1 Legislative changes

- 1 The words 'or if the award has been submitted to it in the form of a special case according to its own opinion on such case' which occurred after the word 'award' at the end of sub S (1) have been omitted S 104, Cl (b) now gives a right of appeal against an order on an award stated in the form of a special case. See also Notes to Para 11
- 2 The words 'and shall be enforced in manner provided in this Code for the execution of decrees' which occurred in S 522 of the old Code after the word 'followed in' sub S (2) have been omitted

2 'Pronounce judgment according to the award'

Where the Court sees no ground to remit the award under Para 14 and where no application has been made to set aside the award or where such application has been refused, the Court has no option but to pronounce judgment according to the award¹. Where, however, any portion of the award deals with matters *outside the scope of the suit*, the Court should not embody such portion of the award in its decree².

It is not necessary that the judgment should be pronounced in the presence of the parties. Where, therefore, the defendant does not file any application to set aside the award, and the Court thereupon pronounces judgment in accordance with the award as it is bound to do, the decree which follows thereon is not an *ex parte* decree even though the defendant is absent at the time the decree is passed³. Where an application to set aside such a decree is refused the order is not appealable under O 43, R 1, Cl (d)⁴.

Where an application to set aside an award is dismissed for default an application to restore the same is maintainable notwithstanding that a decree is passed in the meanwhile⁵.

3 After the time for making such application has expired

An application to set aside an award must, under Art 108 of the Limitation Act¹, be made within ten days of the time when notice of the filing of the award is 'given' to the parties². A notice is 'given' to the parties where the parties actually receive the same³. A mere direction to issue notice is not equivalent to the 'giving' of notice within the meaning of the article⁴. S 5 of the

Schedule II Para 16—Note 1

1 See *Statements of Objects and Reasons*

Note 2

1 (1924) 1924 Pat 603 (604) 3 Pat 839

(1924) 1924 All 789 (789) 46 All 656

(1870) 2 N W P H C R 150 (153)

(See also (1933) 1933 Oudh 547 (548) J Luck 219. Transfer of case to another Court after order of reference but before award—Award filed before Court to which case transferred—Latter Court has jurisdiction to pass decree in terms of award]

[See (1935) 1935 All 372 (372) Arbitrator's function is to come to a decision and it is the Court that should decide suit. It is not for the arbitrator to decree or dismiss the suit]

2 (1920) 1920 Mad 615 (617)

3 (1921) 1921 Pat 603 (604) 3 Pat 839
[See also (1900) 1900 Pun Re No 9, page 393]

4 (1921) 1921 Pat 603 (604) 3 Pat 839

5 (1920) 1920 All 215 (215)

Note 3

1 *As amended by Act XI III of 1919*

2 *Same rule held even before Act XI III of*

1919—

(1915) 1915 Lch 352 (352)

(1930) 1930 All 477 (478) *Quere*

open

4 (1930) 1930 All 477 (477)

4. Finality of decree in accordance with the award

But the prohibition as to appeal will apply only where the decree though

- J (1927) 1927 Lsh 23 (274) 8 Lsh 774
 (1917) 1st in 1 C 157 (5) (C 11)
 (1914) 1917 N 10 211 (217) 1st N 10 I R 177
 C (19 3) 1933 R 10 238 (38)
 (1932) 1932 Mid 588 (588)
 (1907) 79 All 34 (546)
 (191) 1919 Cal 224 (755) 46 Cal 771
 [1 ut cc (1914) 1914 M 141 (145)
 S 10 I R 1 01

Note 4

- 1 5 c N 2 a l t r
- (1007) 3 Cal 167 (183) 3 I d Vll 1
1007 I un Re N (I C)
(1007) 3 Cal 16 (183) 3 I d Vll 1
1007 I un Re N (I C)
(15) 3 Suth W R 40 (401) (I C)
(191) 1017 All 71 (73) 39 All 401
(1910) I n l C 99 (J9) (All)
(1910) I n d C 91 (621) (All)
(15 6) 1560 All W N 151 (1 1)
(1585) 1585 All W N 90 ()
(1987) 4 All 83 (885 988)
(1551) 1551 All W N 1 (15)
(1902) 2 Cal L Jour 14 (14)
(1900) 7 Cal 61 (64)
(1591) 7 Cal 106 (160)
(1870) 24 Suth W R 188 (15
(1973) 20 Suth W R 96 ()
(1972) 17 Suth W R 300 (107)
(1872) 17 Suth W R 30 (31)
41916) 1316 L h 901 (902) 1910 I un Re
N C

- (1911) 1914 Oudh 3^o (328) 17 Oudh Cas
86
(1917) 1927 Pat 135 (133)
(1916) 1916 I at 164 (165)
(1916) 1916 I at 403 (403)
(1916) 1916 I at 190 (194) 1 Pat L Jour
306
(1913) 1913 Ind C 348 (351) 6 Sud L R
168
(1916) 1916 Mid 660 (661 667)
(1909) 21 Mid 419 (481)
(1892) 1892 All W N 151 (157)
(1913) 1913 Ind C 404 (405) (Cai)
(1898) 1898 Ind W N 6 (996)
(1905) 1905 Ind Re No 11 I at 118
(1907) J C 116 (185) 9 Ind W N 1
1307 Ind Re 95 (P C)
(1908) 1908 Ind 648 (65) (C) 10 Ind W N
No 35 Ind W N 88 (I C)
(1907) 9 All 457 (467) (E I)
(1890) 18 All 414 (417)
(1907) 1907 All W N 1 (I C)
(1889) 8 All W N 131 (111)
(1900) 20 Ind W N 2 (O)
(1913) 1913 Ind C 405 (405) (C)
(1900) 2 C L Jour 142 (14)
(1904) 4 C L W N 916 (118)
(1862) 8 South W R 171 (1)
(1877) 7 S L W R 903 (O)
(1907) 10 Ind W N 85 (P C 71 (F E))
(1889) 1899 Ind W N 10 (1895 57)
(1889) 1889 Ind W N 10 (1895 140)
(1883) 1883 Ind W N 17
(1907) 1907 Ind L Jour 431 (137)
(1899) 2 Mid 11 (171 175)
(1895) 1895 Ind 404 (406)
(1869) 9 Mid 11 C R 404 (405)
(1929) 1929 Ind 264 (265)
(1912) 1912 Ind C 5 5 (595) (Oudh)
(1907) 9 Oudh Cas 13 (16)

- (1320) 1322 Mid 429 (430)
(1316) 1316 M 1 063 (063)
(1318) 1318 Sag 191 (191)

in accordance with the award, follows upon a judgment "so pronounced" i.e., pronounced after the expiry of the period of limitation for making an application under Para 15. It has accordingly been held by the High Courts of Allahabad,⁷ Calcutta⁸ and Rangoon⁹ and by the Chief Court of the Punjab¹⁰ that where a decree is passed *before* the expiry of such period, an appeal is not barred by this Paragraph. Conflicting views have been expressed by the High Court of Madras, one case holding that an appeal does lie,¹¹ others holding that it does not¹² and a third class of cases holding that a revision will lie in such cases, thus impliedly negating the existence of a right of appeal¹³. According to the High Court of Bombay no appeal will lie in such cases but a revision may lie¹⁴. The Judicial Commissioners Courts of Oudh¹⁵ and Sind¹⁶ have also held that the High Court can interfere in revision in such a case. It is submitted that the view that an appeal lies is correct.

Suppose now that the parties accept the award filed in Court and agree that a decree may be passed in terms of the award, has the Court power to pass the decree without waiting for the expiry of the period prescribed by Art 158 of the Limitation Act? The Chief Court of the Punjab¹⁷ and the Judicial Commissioner's Court of Nagpur¹⁸ have held that the decree so passed is valid, the reason being that it is, in fact, a decree by *consent* of parties. The High Court of Madras¹⁹ and the Judicial Commissioner's Court of Sind²⁰ have, on the other hand, held that such a procedure is without jurisdiction and that the Court has no power to pass a decree even if an application to set aside the award has been disposed of before that time. It is submitted that the former view is correct. The object of waiting till the expiry of the limitation period is only to enable the parties to come in with their objections to the award, if any, and where such parties themselves agree not to object, there is no reason why the Court should wait till the expiry of the period before pronouncing judgment.

5 Finality of decrees not in accordance with the award

An appeal will lie from a decree based on an award where it is in excess of the award or is not in accordance with the award¹. Thus, where the decree allows

- (1929) 1929 Rang 225 (226) 7 Rang 269
- 7 (1927) 1927 All 614 (615)
- (1907) 29 All 584 (586)
- (1896) 18 All 422 (427)
- (1870) 2 N W P H C R 235 (236)
- (1882) 1882 All W N 76 (77)
- [See (1931) 1931 All 453 (454) 53 All 669 Irregularity is covered by S. 99]
- [See (1933) 1933 All 313 (314) Court passing decree in terms of award without giving 10 days time—it is material irregularity—Decree set aside in revision]
- 8 (1873) 20 Suth W R 311 (311)
- 9 (1930) 1930 Rang 307 (307)
- [But see (1925) 1925 Rang 103 (103)]

- (1912) 17 Ind Cas 431 (431) (Mad) Doubtful if appeal lies
- 14 (1921) 1921 Bom 32 (32) 45 Bom 632
- 15 (1921) 1921 Oudh 148 (148) 21 Oudh Cas 234
- 16 (1916) 1916 Sind 79 (80) 9 Sind L R 183
- 17 (1913) 21 Ind Cas 298 (301) (Lah)

- 11 (1919) 1919 Mad 150 (153)
- [See also (1929) 1929 Mad 780 (790)]

- 20 (1910) 1910 Sind 100 (100)
- Note 5
- 1 (1865) 3 Suth W R 168 (169)
- (1869) 11 Suth W R 140 (141)
- (1912) 17 Ind Cas 684 (686) 1913 Pan R. No 52 Court dismissing civil application for award, on ground that no civil

payment of the amount due by instalments² or interest⁴ or costs⁴ not granted by the award, the decree is not in accordance with the award and an appeal will therefore lie. In appeal will lie also where a decree is based partly on an award and partly on the Court's findings.⁵ But the mere fact that the judgment is in excess of the award will not give a right of appeal if the decree is in accordance with the award.⁶

When an award is modified under Para 12, *ante*, the only award according to which judgment can be pronounced is the modified award. Hence an appeal will not lie against a decree based on a modified award, though it may not be in accordance with the original award.⁷ The contrary view taken in the undermentioned cases⁸ is it is submitted, not sound on principle.

Where an appeal lies against a decree which is in excess of or not in accordance with the award, the appellant is not entitled to address the Court on all points which were raised before the lower Court. His appeal would lie only in so far as the decree and the award differ⁹ and his attack must be confined to the legality of the decree as compared with the award.¹⁰

6 Appeal against decree based upon invalid award

Under the old Code prior to the decision of the Judicial Committee in *Ghulam Akbar v. Muhammad Hasan*¹ it was held that S 522 presupposed a valid and legal award and that therefore an appeal lay against a decree based upon an invalid award.¹¹ Thus it was held that an appeal lay in the following cases—

- (1) Where the reference to arbitration was impugned on the ground that some of the parties had not consented thereto.²

forth two awards by the same arbitrator one modifying the other, is not one in accordance with the award.

(1930) 1930 Lah 47 (178) Held to be in accordance with award.

(1927) 1927 Lah 362 (364) 8 Lah 693 Per 3 of 4 not parties to award raising objections—Decree on award shown to them & parties—They having admitted to the proceedings cannot appeal on ground of decree being in excess of award.

(1851) 3 All 286 (231)

(1912) 14 Ind Cas 284 (285) (Lah) Revision does not lie.

(1906) 1906 Pun Re No 13 page 47

8 (1886) 8 All 449 (452)

(1935) 1935 Pat 103 (110)

(1909) 1 Ind Cas 329 (329) 12 Oudh Cas 23

9 (1908) 8 Cal L Jour 475 (477)

10 See case cited in foot note (4) to Note 1b of para 21.

Note 6

1 (1902) 29 Cal 167 (185) 29 Ind App 51
1902 Pun Re No 25 (P C)

14 (1884) 6 All 174 (177)

(1903) 1903 All W N 159 (160)

(1856) 8 All 64 (66)

(1883) 9 Cal 905 (906)

(1888) 1888 Pun Re No 134 page 362

(1902) 15 Muz 348 (348 349)

(1903) 26 Muz 47 (48)

(1888) 11 Muz 85 (86)

(1900) 5 Oudh Cas 13 (16)

(1899) 2 Oudh Cas 355 (359)

(1913) 19 Ind Cas 348 (351) 6 Sind L R 168

See also cases cited in foot notes 2 to 7 *infra*.

[See (1899) 4 Cal W N 4111 Objection taken in appeal for the first time—Not allowed.]

[But see (1883) 6 Muz 414 (416) But revision lies.]

(1870) 14 Suth W R 33 (33)

2 (1903) 31 All 450 (452)

(1883) 1883 Pun Re No 170

(1882) 1882 Pun Re No 4 page 21 (F D)

(1881) 1881 Pun Re No 33 page 60

(1932) 1932 Cal 713 (713) Decree not appealable even though grounds of appeal were directed against order modifying award. But the appeal may be converted into appeal from order modifying award under S 104.

(1933) 1933 Lah 130 (139)

3.

- (2) Where the award was made out of time ³
- (3) Where the genuineness of the award was disputed ⁴
- (4) Where the fact that the arbitrator was the retained pleader of the plaintiff was not disclosed to the defendant ⁵
- (5) Where one of the arbitrators had not concurred in the award ⁶
- (6) Where one of the arbitrators signed the award after the same had been filed in Court ⁷

In the Privy Council decision mentioned above⁸ where the award was challenged on the ground that the minor defendant's guardian had agreed to the reference without the leave of the Court and also on the ground of misconduct of the arbitrators, their Lordships held that no appeal lay against a decree based on the award and observed as follows — "Their Lordships would be doing violence to the plain language and the obvious intention of the Code, if they were to hold that an appeal lies from a decree pronounced under S 522, except in so far as the decree may be in excess of or not in accordance with the award."

As has been already seen in Note 13 to Para. 15, the introduction of the words 'or being otherwise invalid' in that Paragraph, makes it clear that the intention of the legislature is that objections to the award on the ground of its invalidity must be decided by the Court making the reference and that an appeal against the decree on such ground is incompetent ⁹

It has been held by the High Court of Calcutta that this Paragraph contemplates an award made in a case where there is a *valid reference* and that, therefore, where the validity of the reference is itself attacked an appeal against the decree is not barred ¹⁰. But the High Courts of Allahabad,¹¹ Bombay,¹² Lahore¹³ and Rangoon^{13a} and the Chief Court of Oudh¹⁴ have taken the contrary view. The decisions of the Judicial Commissioner's Court of Nagpur¹⁵ are conflicting. It is submitted that the correctness of the Calcutta view is open to question in view of the decision of the Privy Council in *Ghulam Khan v. Muhammad Hassan* ^{16a}

- | | |
|---|-----------------------------|
| 3 (1908) 30 All 169 (141) | |
| (1896) 8 All 248 (200) | |
| (1906) 2 Nag L R 81 (83) | 10 |
| 4 (1907) 29 All 426 (428) | |
| 5 (1898) 20 Cal 141 (143 145) | |
| 6 (1893) 17 Bom 317 (361) | |
| 7 (1906) 33 Cal 498 (501) | |
| 8 (1902) 23 Cal 167 (182) 29 Ind App 51 | (1902) 9 Cal W N 573 (574) |
| 1902 Pan Re No 20 (P C) | (1885) 11 Cal 37 (41) |
| Cases under the Code of 1852 — | (1857) 91 Cal 41 (147) 4731 |
| (1902) 29 Cal 167 (182) (P C) | |

- | | |
|--|-------------------------------------|
| 9 (1911) 1911 All 446 (449) 21 Ind Cas 989 | (1911) 1911 Cal 106 (127) 12 Ind 10 |
| (1911) 26 All 69 | |
| (1912) 14 Ind Cas 400 (400) (All) | |
| (1913) 15 Ind Cas 63 (70) 33 Cal 522 | 31) |
| (1912) 17 Ind Cas 7 (5) (Cal) | |
| (1910) 132 Ind Cas 180 (Lah) | |
| (1916) 1916 Ind 903 (963) | |
| (1914) 1914 Ind 675 (675 676) 21 Ind Cas | |

It has been held by the High Court of Lahore that the Rule prohibiting an appeal against a decree based upon an award does not apply to a case where the Court has no jurisdiction to entertain the suit¹⁶. The High Court of Madras has, on the other hand, held that the remedy in such a case is by way of revision¹⁷. It is submitted that the Lahore view is not correct. A right of appeal is expressly negatived by this Paragraph except in the circumstances specified and the general principle is that unless a right of appeal is given by statute, it does not exist.

7 Judgment without hearing objections to award—Appeal if lies against decree

It has been held by the High Court of Allahabad that where a decree is passed in terms of an award without considering the objections raised against it, the award is not in conformity with the provisions of sub Para (1), and cannot form the basis of an unappealable decree and that, therefore an appeal lies against decree passed on such award¹. The High Courts of Calcutta² Madras³ and Rangoon⁴ and the Chief Court of the Punjab⁵ have, on the other hand, in such cases interfered by way of revision. The Allahabad view cannot, it is submitted be accepted as correct.

Where a decree based upon an award is attacked on the ground that a sufficient opportunity was not given to a party to substantiate his objections to the award it has been held by the High Courts of Calcutta and Lahore and by the J C S Court of Oudh that the Court acts with material irregularity in the exercise of its jurisdiction and that the decree may be set aside in revision⁶. The High Court of Rangoon has however held that an appeal lies in such a case⁷. It is submitted that this view of the Rangoon High Court cannot be accepted as correct.

8 Second appeal

Where a decree is passed in accordance with an award and an appeal is wrongly entertained against it and the decree is set aside in appeal, does a second appeal lie against the decree of the lower appellate Court? The High Courts of Allahabad, Madras and Patna and the Judicial Commissioners Court of Nagpur have held that a second appeal lies the reason being that the decree of the lower Appellate Court is not one in accordance with the award¹. But the High Court of Calcutta² and the Chief Court of Punjab³ have interfered in such cases by way of revision.

Where a Court of first instance wrongly refuses to pass a decree in accordance with an award and a Court of Appeal reverses the decree of the first Court and passes a decree in accordance with the award, such a decree is, according to

16 (1928) 128 Jch 730 (730 731)

17 (1935) 8 Mad 225 (235 236) Decree of award under S. 22 in suit beyond the pecuniary jurisdiction of the Court—Decree set aside in revision.

Note 7

1 (192) 1322 All 120 (121) 49 All 178 (1889) 9 All W N 15 (16)

(1896) 18 All 422 (428 429) (F. I.)

2 (1916) 1916 Cal 806 (807)

3 (1916) 1916 Mad 927 (927)

4 (1933) 1933 Rang 35 (35) No appeal lies.

5 (1915) 1915 Lch 322 (322) [But see (1882) 1582 Lun Re No 184 page 599]

6 (1916) 1916 Cal 806 (807)

(1921) 1921 Jch 249 (250)

(1917) 1917 Oudh 240 (241)

[See also (1934) 1934 Mad 619 (620) Madras High Court interferes in

revision]

7 (192) 1997 Rang 298 (298)

Note 8

1 (1914) 1914 All 446 (446) 21 Ind Crs 399 (931) 26 All 63

(1912) 14 Ind Crs 303 (35) (311)

(1890) 23 Mad 172 (173)

(1903) 26 Mad 76 (77)

(1926) 1926 Pat 164 (164)

(1918) 1918 Nag 191 (193)

2 (1911) 9 Ind Crs 206 (207) 25 Cal 421

(1902) 6 Cal W N 614 (615)

(1909) 14 South W R 33 (33)

[But see (1905) 2 CIL I Jour 142 (143)]

3 (1916) 6 Ind Crs 963 (964) (Lch) Appellate Court's interference even with consent *ultra vires*

(1917) 1917 Lch 373 (381) 1916 Pnn Re No 115

6. the High Courts of Allahabad and Calcutta and the Chief Court of Oudh open to second appeal⁴. The reason given is that the provision in sub para (2) of this Paragraph applies only where a decree has been pronounced in accordance with the award by the Court making the reference. But the Chief Court of the Punjab has held that the decree of the lower appellate Court is entitled to the same finality as that of the first Court and that a second appeal will not lie⁵.

9 Revision

Sub para (2) of this Paragraph only prohibits an appeal from a decree based upon an award. But as observed by their Lordships of the Privy Council in *Ghulam Khan v Mahomed Hassan* I L R 29 Cal 167, 'in the case of an award revision would be more objectionable than an appeal and hence an application for revision against a decree in accordance with an award does not lie merely on the ground of the erroneous decision of the lower Court in respect of any of the grounds of objections falling under Paras 14 and 15, *ante*¹. But where the action of the Court with reference to the arbitration proceedings is attacked on any of the grounds mentioned in S 115 *ante*, the High Court can revise a decree based upon an award². Thus where a Court passes a decree on an award without giving notice of the filing of the award to the parties as required by Para 10 *ante* it

- 4 (1906) 28 All 403 (410)
 (1907) 1907 All W N 110 (110)
 (1905) 2 Cal L Jour 80 (86)
 (1905) 2 Cal L Jour 133 (162)
 (1904) 8 Cal W N 390 (393 394)
 (1883) 12 Cal L Rep 664 (565)
 (1870) 12 Suth W R 93 (93)
 (1923) 1925 Oudh 1 (3) 3 Luck 1 (F B)
 [But see (1888) 10 All 8 (11 12)]
 5 (1904) 1904 Pun Re No 89 page 333
 (1890) 1890 Pun Re No 26 page 75
 (1912) 17 Ind Cas 684 (686) 1913 Pun Re No 52

Note 9

- 1 (1902) 29 Cal 167 (186) 29 Ind App 51
 1902 Pun Re No 25 (P C)
 (1933) 1933 Mad 697 (699) Incomplete award—Decree passed in accordance

- (1933) 1933 Oudh 327 (327)
 (1925) 1925 Oudh 227 (228)
 (1924) 1924 Oudh 400 (400)
 (1923) 1923 Oudh 235 (235) 76 Oudh Cas 107
 (1927) 1927 Pat 135 (140)
 (1919) 1919 Pat 93 (93) 41 at L Jour 260
 (1922) 1922 Sind 1 (3) 15 Sind L R 160
 (1925) 1925 Cal 475 (476) Reference on behalf of minor without leave of Court — Court holding reference valid—No revision lies
 [But see (1926) 1926 Mad 201 (201) Arbitrators deciding matters not

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revision unless there is an illegality and also some substantial harm

- cases
 (1935) 1935 Lah 113 (114)
 (1935) 1935 Mad 184 (185)
 (1933) 1933 All 648 (649)
 (1933) 1933 Oudh 547 (548) 9 Luck 219

acts with material irregularity and revision lies against the decree³ A decree passed without giving a party an opportunity to substantiate his objections by improperly refusing his application for adjournment is vitiated by material irregularity and is open to revision⁴ But where the lower Court has refused an adjournment in the judicial exercise of its discretion, the High Court cannot interfere in revision⁵ Where the Court compels an unwilling arbitrator to decide the matter referred to him a decree passed upon such an award may be set aside in revision⁶

It has been already discussed in Note 6 *ante*, whether an appeal lies against a decree based upon an award where the reference to arbitration is itself impugned as being invalid The High Court of Allahabad has held that such a decree is open to revision on the ground of its being without jurisdiction⁷ But according to the High Court of Lahore and the Chief Court of Oudh, no revision lies in such a case⁸

See also Notes 3, 5 6 and 7 *supra*

10 Binding effect of award

A judgment and decree passed in accordance with an award may constitute *res judicata* as much as a judgment and decree which result from the decision of the Court after the matter has been fought to the end¹ A valid award operates to merge and extinguish all claims covered by the submission and is binding on the parties to the reference even though it has not been made a rule of Court under this paragraph²

An award does not become ineffectual or invalid as between the parties to the reference merely because other parties to the suit have not joined in the reference³

A person, who is a stranger to the reference is neither bound by⁴ nor can

(1873) 1873 Pun Re No 39 page 60 Reference in small cause suit—Decree in terms of award—Revision lies

(1916) 1916 Sind 79 (80) 9 Sind L R 143 Court passing decree on award with out considering if it was beneficial to minor party—Revision lies High Court should use revisional powers very sparingly

(1921) 1921 Mad 271 (271)

(1928) 1928 Mad 48 (50)

(1915) 1915 Lah 253 (253) 1916 P R No 28 [See (1929) 1929 Cal 831 (832) New point cannot be raised in revision]

78

(1868) 11 Mad 144 (144 145)

(1921) 1921 Oudh 154 (154) 24 Oudh Cas 263

4 (1916) 1916 All 65 (66)

(1926) 1926 Cal 1018 (1019)

[See however (1932) 1932 Mad 588 no 1]

is 308

[But see (1917) 1917 All 183 (186) 39 All 489]

8 (1933) 1933 Lah 476 (427) 14 Lah 165

(1916) 1916 Lah 201 (202) 1915 Pun Re No 99 Reference on behalf of minor without leave of Court No revision because remedy by suit to set aside decree is available

(1930) 1932 Oudh 156 (156)

Note 10

1 (1897) 21 Bom 465 (467)

(1891) 7 Cal 727 (729)

(1880) 5 Cal L Rep 338 (340)

(1916) 1916 All 353 (359) Award in mutation proceedings is not *res judicata* on a question of title and possession

[See also (1924) 1924 All 62 (62 63) 45 All 628]

2 (1892) 1892 All W N 238 (238)

(1913) 20 Ind Cas 185 (188) (Lah)

(1920) 1920 Mad 615 (617) Portion of award dealing with matters outside scope of suit and as such in capable of being basis of decree under this Part—Still it is binding on the parties

[See (1912) 15 Ind Cas 810 (821) 5 Sind L R 240]

3 (1921) 1921 Nag 176 (178) Especially when it has been acted upon

4 (1884) 6 All 322 (328) 11 Ind App 20 (P C)

enforce⁵ the award

11 Enforcement of the award

The only way of enforcing an award made in a reference through Court is to have a decree passed in accordance with it under this Paragraph¹. Where a decree is passed in terms of an award, the award can be enforced only by way of execution of the decree and no separate suit will lie therefor². Nor will a suit lie to enforce an award which was declared void by the Court in proceedings under Para 17³.

12 Suit to set aside award

Where an application to set aside an award is refused and a decree is passed in accordance with it no suit will lie thereafter to set aside the award¹. But a minor can sue to set aside a decree against him based on award on the ground that the reference to arbitration was made without obtaining the leave of the Court as required by O 32, R 7².

13 Court acting as arbitrator

It has been already seen in Note 22 to Para 1, *ante*, that a consent by the parties to abide by the decision of the Court is not such a reference to arbitration as is contemplated by this Schedule. The decision of the Court, in such a case, however operates as a consent decree and is, therefore, not appealable¹. In the undermentioned cases² it has been held that such a decision is in the nature of an arbitrator's award and hence is not appealable. It is respectfully submitted that though the actual decision in the said cases is right, the reasoning on which they proceed is not correct.

Where the parties agree not to let in evidence but that the Court may make a local inspection the decision of the Court in the suit is neither a consent decree nor an award and is therefore appealable³.

14 Valuer and arbitrator

It has been already seen in Note 10 to Para 1 that a reference to arbitration implies the existence of some matter in difference which has actually arisen at the time of the reference. Thus where the intention of the parties is that the person to whom the matter is referred should hold an enquiry in the nature of a judicial enquiry, and hear the respective cases of the parties, and decide upon evidence laid before him the case is one of arbitration^{1a}. But where a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, the case is not one of arbitration². No judgment could, therefore, be given under this Paragraph on the basis

5 (1909) 4 Ind Cas 1114 (1114) (Mad)

Note 11

1 (1920) 1920 Mad 615 (617)

2 (1925) 1925 P C 34 (35) 52 Cal 314 52 Ind App 70 (P C)

3 (1907) 1907 Pun Re No 19, page 86

Note 12

1. (1919) 1919 L B 12 (12) 10 L B R 106

2 (1917) 1917 Mad 672 (679) 39 Mad 853

Note 13.

1 (1920) 1920 Mad 800 (802) 42 Mad 625
Same principle applies even if reference is made to presiding Judge and another person jointly

(1919) 1919 Mad 150 (151)

2 (1929) 1929 All 577 (577) 51 All 836.

1920 P C 34 (35)

(1925) 1925 Nag 463 (464) 21 N G L 101
[But see (1915) 1915 Mad 1074 (1074)
Award of Court is itself a decree and
objections to award must be taken
by way of appeal from the decree]

3 (1929) 1929 All 116 (117)

Note 14

of the valuator's decision ²

Illustrations

1. Ruled a suit against C for injunction and damages for encroachment upon her property. In the suit a consent order was made that C was to purchase B's interest in the property at a price to be settled by certain referees. The referees settled the price and the lower Court gave judgment under this Paragraph in favour of B treating the said valuation as an award. It was held by the appellate Court that the referees were valuers rather than arbitrators and therefore the lower Court could not give judgment under this Paragraph ³.
2. Where an agreement to lease contained a clause that at the expiration of the period of lease the lessor should take over all the buildings then standing on the property at a value to be fixed by certain persons, it was held that the valuation made by such persons was not an award within the meaning of Para 20 and could not therefore be filed in Court ⁴.

ORDER OF REFERENCE OR AGREEMENTS TO REFER

P. 17. [S 523] (1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court

Application to file
in Court agreement
to refer to arbitra-
tion

(2) The application shall be in writing and shall be numbered and registered as a suit⁵ between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants

(3) On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed

(4) Where no sufficient cause is shown,⁹ the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement¹⁰ or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator

[1877—S 523, 1859—S 326]

Synopsis

	Note No		Note No
Legislative changes	1	Agreement to refer matters in a pending litigation	3
Scope and applicability of the Paragraph	2	Agreement to refer future differences to arbitration	4

² (1901) 28 Cal 155 (163)

³ (1901) 28 Cal 155 (163)

⁴ (1903) 30 Cal 831 (842)

Agreement must relate to matters within Court's jurisdiction	5	ment	10
Agreement relating to appointment to public office	6	(b) Death or refusal of arbitrator to act	11
Agreement to refer must be in writing	7	(c) Revocation of reference to arbitrator	12
Shall be numbered and registered as a suit — See Note 12 to para 20	8	(d) Court cannot appoint an umpire	13
	9	Abatement of proceedings before arbitrator on death of party	14
		Appeal	15
		Revision	16

Other Topics

Paragraph whether applicable to cases under Arbitration Act See Note 2

1 Legislative changes —

1 The words of any person named in the agreement or to be appointed by any Court having jurisdiction in the matter to which the agreement relates which occurred after the words shall be referred to arbitration in the corresponding section of the old Code have been omitted in Cl 1 of this Paragraph

2 Clause 4 of this Paragraph replaces the following words which occurred in the old Code — If no sufficient cause be shown the Court may cause the agreement to be filed and shall make an order of reference thereon and may also nominate the arbitrator when he is not named therein and the parties cannot agree as to the nomination

It was held under the old Code that an agreement in which the arbitrator was not named could not be filed under S 523¹ Under the present Code in view of the aforementioned changes it is not necessary that the arbitrator should be named in the agreement²

2 Scope and applicability of the Paragraph

This and Paras 18 and 19 *infra* deal with the second class of cases of arbitration referred to by the Judicial Committee in *Ghulam Khan v Muhammad Hassan*, (I L R 29 Cal 167 P O), 117, to references to arbitration without having recourse to litigation

The provisions of this Paragraph apply only to cases where in pursuance of the agreement to refer, the arbitrators have not functioned and made their award Where the award has actually been delivered, the proper course is to take proceedings under Para 20 to enforce the award¹ Similarly, where an application is filed under this Paragraph but before it is disposed of the arbitrators deliver their award the application is rendered infructuous, and the remedy of the parties is to apply under Para 20² A mere filing of an application under this Paragraph does not oust the jurisdiction of the arbitrator to give his award³

Arbitration in a pending suit stands on a different footing from an agreement made out of Court to refer a dispute to arbitration In a pending suit the authority of the arbitrator is derived from the order of the Court making the reference, and if this order is defective there is no proper reference and consequently there can be no legal award On the other hand in a private reference it is the agreement entered into between the parties which confers jurisdiction

Sch II Para 17—Note 1

Note 2

¹ (1896) 20 Bom 232 (237)

² (1911) 9 Ind Cas 600 (657) 1911 Pan Re No 35

on the arbitrators to deal with the dispute. In such a case if proceedings are taken under this Paragraph and a reference secured under Cl 4 thereof, it is not this reference which constitutes the arbitrator as a private tribunal. It is merely the machinery by which the tribunal already constituted by the agreement of parties is made to function⁴.

The provisions of this Paragraph are *permissive* and do not oblige a party to apply under this Paragraph⁵. It is open to a party to the agreement to file a suit in Court notwithstanding the agreement and the only remedy of the other party if he wishes to stand by the agreement is to apply under Para 18, *infra*, (for further discussion, see Para 18). The provisions of this and the following two Paragraphs do not apply to cases governed by the Indian Arbitration Act, 1899 (See S 3 of the Indian Arbitration Act, 1899 and S 89 of the Code) See also the following cases⁶.

If in conciliation proceedings under Chapter 6 of the Dekkhan Agriculturists' Relief Act, XVII of 1879, the parties agree to refer the matter in dispute to arbitration, the conciliator appointed under that Chapter must under S 45 of the Act, forward the agreement to the Court having jurisdiction in the matter and the Court must thereupon proceed in the manner provided by this Paragraph and Para 19, *infra*.

3 Agreement to refer matters in a pending litigation

The provisions of this Paragraph cover only cases where parties without recourse to litigation, agree to refer their differences to arbitration¹. If parties to a litigation who desire to refer their differences to arbitration, desire to avail themselves of the provisions of this Schedule, they can do so only under Paras 1 to 16 thereof². In other words, an agreement to refer made by the parties to a litigation without the intervention of the Court cannot be recognised under this Schedule,³ and cannot be filed under this Paragraph as if it was an agreement to refer without recourse to litigation⁴. If an award has been passed on such a reference it cannot be made the basis of a proceeding under Para 20⁵. As to whether such an agreement can be recognised independent of this Schedule, as an adjustment of the suit under O 23 R 3, there is a conflict of opinion for which see Note 9 to O 23, R 3, *ante*^{6a}.

Where however, after an agreement to refer was entered into in a pending suit, the suit itself was *withdrawn*, an application filed under this Paragraph subsequent to such withdrawal is not incompetent and an award made in pursuance of the same is valid⁶. So also an agreement to refer relating to matters *not involved*

4 (1928) 1928 Lah 170 (173)

5 (1931) 1931 Oudh 127 (129)

(1897 1901) 2 Upp Bur R 256 *Held* suit not barred

6 (1931) 1931 Mad 170 (171) 54 Mad 193

(1902) 29 Cal 793 (195)

(1929) 1929 Lah 246 (246)

Note 3

1 ((1911) 12 Ind Cas 372 (375) 36 Mad 353

2 (1927) 1927 Bom 565 (581) 51 Bom 908 (FD)

3 (1927) 1927 Sind 66 (72)

(1921) 1921 Sind 65 (67, 68) 16 Sind L R 174

4 (1930) 1930 Bom 98 (104) 54 Bom 197

(1903) 30 Cal 218 (223)

(1914) 1914 Bom 194 (186, 187) 38 Bom 637 It cannot be recognised at all

(1926) 1926 Sind 6 (6)

[See also (1882) 1882 Pun Re No 190 page 387]

The following decisions under the old Code which took a contrary view it is submitted are not correct in law in view of

29 Cal 167 P C —

(1905) 2nd All 53 (56)

(1904) 1904 All W N 9 (10)

(1879 80) 4 Bom 1 (4)

o (1912) 15 Ind Cas 140 (143) 1912 Pun Re No 115

5a [See also (1925) 1925 Nag 203 (203) Arbitration—Pending suit—Submission otherwise than through Court is not illegal]

6 (1930) 1930 Lah 1056 (1067)

in the suit is perfectly valid, though entered into pending suit. Thus where during the pendency of probate proceedings the parties agreed to refer to arbitration the question of the division of the estate, and the agreement left untouched the powers of the Court to issue probate, and the arbitrators also did not deal with that question, it was held that the agreement and the award thereon were valid.⁷

4 Agreement to refer future differences to arbitration—See Notes 2 and 10 to Part 1 *ante*

5 Agreement must relate to matters within Court's jurisdiction

Before an application can be filed under this Paragraph it is essential that the agreement to refer should relate to matters which the Court is competent to try and has *jurisdiction* to pass a final decree upon.¹² Thus, where an agreement relates to the partition of revenue paying land, it cannot be filed under this Paragraph as the civil Court has no jurisdiction to partition the revenue.¹ Where an agreement relates to matters partly the Court it has been held that agreement beyond its jurisdiction parties agree to this being done, Paragraph²

The refusal to refer to arbitration is a part of the cause of action for an application under this Paragraph. The application can therefore be filed in the Court within whose jurisdiction the refusal to refer was made.³

6 Agreement relating to appointment to public office

The succession to the trusteeship of a public trust or charity is a matter affecting the public interests and a dispute regarding it cannot be referred to arbitration.¹ It has been held by the High Court of Madras that an agreement to refer to arbitration even if relating to a public office is not necessarily unlawful or opposed to public policy, but must be scrutinised by the Court for the purpose of ascertaining whether it is in violation of the trusts of the institution or affects adversely the interests of the public.²

7 Agreement to refer must be in writing

It is essential that the agreement to refer should be in writing before it can be filed under this Paragraph.¹

8 Shall be numbered and registered as a suit—See Note 12 to Part 20 *infra*

9 Where no sufficient cause is shown

Agreements to refer to arbitration stand on the same footing as all other lawful agreements by which the parties are bound by the terms of what they have

- (1935) 1935 Lah 59 (59)
(1933) 1933 Pesh 18 (22)
(1924) 1924 Pat 488 (490, 491) 3 Pat 443
7 (1923) 1923 Bom 365 (366)

Note 5

- 1a (1934) 1934 Sind 29 (32)
1 (1917) 1917 Lah 218 (218)
See also Note 5 to para 21 *infra*

- above two decisions]
3 (1933) 1933 Lah 18 (21)

Note 6

- 1 (1917) 1917 I at 392 (392)
(1910) 6 Ind Cas 219 (223) 32 All 503
[See also (1915) 1915 Cal 745 ("I")
Executor or administrator cannot
make a reference contradicting a
will]
(1928) 1928 Cal 275 (26) (Do)
2 (1922) 1922 Mad 429 (432)

Note 7

1883 1 un Re No 5 and 1914 Lah
296—Mr Justice Jai Lal also
doubted the correctness of the

- 1 (1903) 30 Cal 219 (225)
(1935) 1935 All 886 (884)

agreed to, and from which, i.e., the agreement to refer they cannot retire unless the scope and object of the agreement cannot be executed or unless it be shown that manifest injustice will be the consequence of binding the parties to the contract.¹ Where therefore no sufficient cause^{1a} is shown against the agreement, this paragraph provides that the agreement shall be ordered to be filed. All grounds on which a contract will be voidable such as fraud, misrepresentation etc., which will enable a party to avoid a contract or which render a contract unenforceable against a party will constitute sufficient cause against filing the agreement under this Paragraph. Thus where the agreement to refer is shown to be vitiated by fraud or mistake² or by misrepresentation³ or is not consented to by all the parties⁴ the Court will decline to file the agreement. Similarly where an agreement to refer is entered into by the *de facto* guardian of a Mahomedan minor it cannot be filed under this Paragraph as such guardian has no authority in law to act for the minor⁵. So also where the conduct of the parties shows that they have abandoned and cancelled the agreement to refer, the Court will refuse to order the same to be filed⁶. Delay in making the application may be a sufficient cause for refusing to order the agreement to be filed but it must be such as to lead to the inference that the parties had abandoned the reference to arbitration anything short of it is not sufficient^{6a}. An agreement the submission under which has been revoked for good cause cannot be filed under this Paragraph⁷.

10 Arbitrator appointed in accordance with the provisions of the agreement

A submission to arbitration must be strictly construed as it deprives the party to the submission of the right which he has under the common law to have the dispute to which the submission relates decided by a Court of Law¹. The jurisdiction of the Court to order a reference under this Paragraph is derived from the agreement of the parties and the Court must refer in accordance with the terms of the agreement². If it fails to do so it acts with material irregularity in the exercise of its jurisdiction³. Thus where the agreement is to refer to the arbitration of two European merchants of Karachi the Court has no power under this Paragraph to order a reference to an Indian merchant of Amritsar⁴. Where according to the terms of an agreement to refer an umpire should be appointed from out of seven persons named the Court cannot appoint as an umpire a person who is not one of the seven persons so named^{4a}. Similarly,

Note 9

- 1 (1866) 63 Ind App 119 (130-131) (P.C.)
- 1a (1911) Lah L Jour 26 (78-279) Agreement of reference providing for appointment of new arbitrator in case the arbitrator originally appointed refuses to act—Resignation of such arbitrator is not sufficient cause for not filing the agreement
- (1933) 1933 Sind GS (70) Sufficient cause is not confined to fraud misrepresentation and undue influence
- 2 (1890) 9 C.P.L.R. 59 (92)
- 3 (1919) 1919 Lah 140 (142)
- (1933) 1933 Sind GS (63) Where the agreement was the result of misuse of confidence
- (1893) 1893 Pun Re No 49 page 216
- 4 (1917) 1917 U.B.C. (6)
- 5 (1921) 1921 Cal 818 (819) 47 Cal 713
- 6 (1920) 1920 Nag 29 (30)
- (1933) 1933 Sind GS (63)

- 6a (1933) 1933 Lah 18 (21)
- 7 (1890) 17 Cal 200 (207-208)

Note 10

- 1 (1930) 1930 Sind GS (203)
- 2 (1931) 1931 Mad 28 (38) 54 Mad 469
- (1934) 1934 Oudh 67 (68) 9 Luck 321
- Court cannot refer the matter to two out of three arbitrators named in the agreement where the third refuses to act
- (1871-74) 7 Mad H.C.R. 72 (76)
- [See also (1921) 1921 Pat 161 (162)
- 6 Pat L Jour 287 Court cannot refer again on the first reference proving abortive on its own motion]
- 3 (1911) 9 Ind Cas 600 (657) 1911 Pun Re No 30
- 4 (1911) 9 Ind Cas 600 (657) 1911 Pun Re No 35 p 173
- 4a (1871-74) 7 Mad H.C.R. 72 (76)

where the agreement is to refer to three arbitrators, the Court has no jurisdiction to add a direction that in case of disagreement among them, the opinion of the majority should prevail. There can be no implied agreement in such cases to be bound by the decision of the majority.⁵

An order under the last portion of Para 4, *ante*, directing a party to nominate an arbitrator, cannot be passed before the agreement is actually filed under the earlier portion.⁶

11 Death or refusal of arbitrator to act

Where an arbitrator dies or refuses to act subsequent to the agreement to refer and the agreement does not contain any provision for such a contingency, has the Court power to appoint a new arbitrator? There are two provisions in this schedule empowering the Court to appoint an arbitrator —

(a) Under Cl 4 of this Paragraph where the agreement does not contain any provision for the appointment of arbitrators and the parties cannot agree thereto

(b) Under Para 5 of this schedule read with Para 19, *infra*

As to the power of the Court to make an appointment under Cl 4 of this Paragraph the High Court of Allahabad¹ has expressed the view that the expression "if there is no such provision and the parties cannot agree" covers also a case where there has been a provision for a particular arbitrator who is either dead or has retired. If he has died or refuses to act it is as though there were no provisions. But this opinion is merely an *obiter dictum* and the High Court of Bombay² has dissented from this view and has held that Cl 4 is not open to such a construction.

As to the power of the Court to proceed under Para 5 and make an appointment it must be noted that that Paragraph applies to agreements without recourse to litigation only by virtue of Para 19 by which the provisions of Para 5 can be applied by the Court "only so far as they are consistent with the agreement." There is a diversity of judicial opinion in the application of Para 5 and in order to understand and appreciate the decisions they may be considered under two heads *viz* —

(1) Where the death or refusal of the arbitrator takes place subsequent to the agreement but before it is filed into Court under this Paragraph

(2) Where such death or refusal takes place subsequent to the filing under Cl 4

In cases falling under the first head, it has been held by the High Courts of Calcutta³ Rangoon^{3a} and Madras⁴ and the Chief Courts of Punjab,⁵ Oudh^{5a} and Lower Burma⁶ that the agreement becomes incapable of performance on the death

5 (1926) 1926 Mad 1183 (1181)

6 (1926) 1926 Lah 505 (505)

Note 11

1 (1927) 1922 All 133 (133) 44 All 523
[But see (1919) 1919 All 48 (49) 42 All 191]

2 (1931) 1931 Bom 523 (531)

3 (1874) 12 Beng L R App 13 (14)
[See also (1926) 1926 Cal 730 (731, 732)]

3a (1933) 1933 Rang 331 (333)

4 (1931) 1931 Mad 23 (31, 32) 54 Mad 469

(1912) 17 Ind Cas 389 (390) (Mad)

5 (1919) 1919 Lah 70 (71) 1913 Lun F2

No 7

(1919) 1919 Lah 231 (232) 1913 Lun F3

No 155 page 414 But where there is a distinct provision authorising a party to appoint another arbitrator it does not become incapable of performance

5a (1934) 1934 Oudh 67 (69) 9 Luck 331

(1935) 1935 Oudh 179 (180)

6 (1918) 1918 L B 114 (115)

or refusal of the arbitrator and that the Court cannot order such agreement to be filed under this Paragraph. Thus, where an agreement is to refer to the arbitration of three specified persons, and one of them dies pending arbitration proceedings, the Court cannot order the agreement to be filed under this Paragraph and direct the remaining arbitrators to act or appoint a new arbitrator in his place as it will not be consistent with the provisions of the agreement to do so.⁷ The High Court of Allahabad⁸ has, on the other hand, held that where an arbitrator refuses to act pending arbitration proceedings, the Court can, on a subsequent application under this Paragraph appoint a new arbitrator. The decision proceeds on the view that a party, acquiescing in the arbitrators commencing proceedings, should be deemed to have waived his right to object to the opposite party obtaining later on an order of reference under this Paragraph. According to the High Court of Lahore where an arbitrator named refuses to act, the question whether a new arbitrator can be appointed is one depending on the intention of the parties. If the dominant intention is that the matter should be referred to arbitration then the fact that the parties agreed on the *personnel* makes no difference, and the Court can appoint a new arbitrator. If, on the other hand, the essence of the agreement is to refer the matter to a particular individual only the Court has no power to appoint a new arbitrator.^{9a}

In cases falling under the second head the power of the Court to appoint a new arbitrator has been assumed in the following cases.⁹ But it is conceived that even in such cases the power of the Court to make a new appointment should be consistent with the terms of the agreement.

12 Revocation of reference to arbitrator

Under the common law of England, a party to a submission might at any time before the award was made, revoke the authority of the arbitrator, the reason being that the arbitrator was, in contemplation of law, merely an agent appointed by the parties to decide the matter in dispute between them and his authority was therefore revocable by either of his principals.¹ This has not been followed in this country.² As pointed out by the Privy Council in *Pestonjee v Manockjee & Co*, 12 Moo Ind App 112, at p 130, no party to an agreement to refer to arbitration can, after a reference has been made, revoke the submission unless for *good cause* and a mere arbitrary revocation of the authority is not permitted.³ The following have been held to be 'sufficient cause' for revoking a submission to arbitration —

- (1) The fact that the arbitrator is colluding with the opposite party.⁴
- (2) The fact that the arbitrator is discovered to have been acting as a mukhtear for one of the parties without remuneration or to be indebted to such party.⁵

3	(1867) 12 Moo Ind App 112 (130) (P C)
	(1885) 8 Mad H C R 46 (55)
	(1904) 27 Mad 112 (115)
	(1914) 1914 Mad 280 (280)
	(1898) 20 All 145 (145)
	(1932) 1932 All 348 (349)
	(1871) 10 Suth W R 331 (331)
	(1877) 2 Cal 445 (463 464)
	(1870) 1870 Pun Re No 80
	(1917) 1917 Lah 65 (68) 1917 Pun Re No 12
	(1901) 4 Oudh Cas 17 (21)
4	(1907) 29 All 13 (14)
5	(1902) 29 Cal 275 (282)

Note 12

- 1 *Halsbury's Laws of England*, Vol 1, p 448
- 2 (1904) 27 Mad 112 (115)

7, where the agreement is to refer to three arbitrators, the Court has no jurisdiction to add a direction that in case of disagreement among them, the opinion of the majority should prevail. There can be no implied agreement in such cases to be bound by the decision of the majority.⁵

An order under the last portion of Para 4, *ante*, directing a party to nominate an arbitrator, cannot be passed before the agreement is actually filed under the earlier portion.⁶

11 Death or refusal of arbitrator to act

Where an arbitrator dies or refuses to act subsequent to the agreement to refer and the agreement does not contain any provision for such a contingency, has the Court power to appoint a new arbitrator? There are two provisions in the schedule empowering the Court to appoint an arbitrator —

(a) Under Cl 4 of this Paragraph where the agreement does not contain any provision for the appointment of arbitrators and the parties cannot agree thereto

(b) Under Para 5 of this schedule read with Para 19 *infra*

As to the power of the Court to make an appointment under Cl 4 of this Paragraph the High Court of Allahabad¹ has expressed the view that the expression "if there is no such provision and the parties cannot agree" covers also a case where there has been a provision for a particular arbitrator who is either dead or has retired. If he has died or refuses to act it is as though there were no provisions. But this opinion is merely an *obiter dictum* and the High Court of Bombay² has dissented from this view and has held that Cl 4 is not open to such a construction.

As to the power of the Court to proceed under Para 5 and make an appointment it must be noted that that Paragraph applies to agreements without recourse to litigation only by virtue of Para 19 by which the provisions of Para 5 can be applied by the Court only so far as they are consistent with the agreement. There is a diversity of judicial opinion in the application of Para 5 and in order to understand and appreciate the decisions they may be considered under two heads *viz* —

(1) Where the death or refusal of the arbitrator takes place subsequent to the agreement but before it is filed into Court under this Paragraph

(2) Where such death or refusal takes place subsequent to the filing under Cl 4

In cases falling under the first head, it has been held by the High Courts of Calcutta³ Rangoon^{3a} and Madras⁴ and the Chief Courts of Punjab,⁵ Oudh^{5a} and Lower Burma⁶ that the agreement becomes incapable of performance on the death

5 (1926) 1926 Mad 1183 (1184)

6 (1926) 1926 Lah 505 (505)

Note 11

1 (1922) 1922 All 133 (133) 44 All 528
[But see (1919) 1919 All 48 (49) 42 All 191]

2 (1931) 1931 Bom 529 (531)

3 (1874) 12 Beng L R App 13 (14)
[See also (1926) 1926 Cal 730 (731)]

3a (1933) 1933 Rang 331 (333)

4 (1931) 1931 Mad 23 (31 32) 54 Mad 463

(1912) 17 Ind Cas 389 (390) (Mad)
5 (1919) 1919 Lah 70 (71) 1313 Ind Re

No 7

(1919) 1919 Lah 231 (232) 1919 Ind Re
No 155 page 414. But where there is a distinct provision authorising a party to appoint another arbitrator it does not become incapable of performance

5a (1934) 1934 Oudh 67 (67) 9 Lu 1 321
(1935) 1935 Oudh 179 (180)
6 (1918) 1918 L B 114 (115)

or refusal of the arbitrator and that the Court cannot order such agreement to be filed under this Paragraph. Thus, where an agreement is to refer to the arbitration of three specified persons and one of them dies pending arbitration proceedings the Court cannot order the agreement to be filed under this Paragraph and direct the remaining arbitrators to act or appoint a new arbitrator in his place as it will not be consistent with the provisions of the agreement to do so.⁷ The High Court of Allahabad⁸ has on the other hand held that where an arbitrator refuses to act pending arbitration proceedings the Court can on a subsequent application under this Paragraph appoint a new arbitrator. The decision proceeds on the view that a party acquiescing in the arbitrators commencing proceedings should be deemed to have waived his right to object to the opposite party obtaining later on an order of reference under this Paragraph. According to the High Court of Lahore where an arbitrator named refuses to act the question whether a new arbitrator can be appointed is one depending on the intention of the parties. If the dominant intention is that the matter should be referred to arbitration then the fact that the parties agreed on the *personnel* makes no difference and the Court can appoint a new arbitrator. If on the other hand the essence of the agreement is to refer the matter to a particular individual only the Court has no power to appoint a new arbitrator.^{9a}

In cases falling under the second head the power of the Court to appoint a new arbitrator has been assumed in the following cases.⁹ But it is conceived that even in such cases the power of the Court to make a new appointment should be consistent with the terms of the agreement.

12 Revocation of reference to arbitrator

Under the common law of England a party to a submission might at any time before the award was made revoke the authority of the arbitrator the reason being that the arbitrator was in contemplation of law merely an agent appointed by the parties to decide the matter in dispute between them and his authority was therefore revocable by either of his principals.¹ This has not been followed in this country.² As pointed out by the Privy Council in *Pestonjee v Manockjee & Co* 12 Moo Ind App 112 at p 130 no party to an agreement to refer to arbitration can after a reference has been made revoke the submission unless for *good cause* and a mere arbitrary revocation of the authority is not permitted.³ The following have been held to be sufficient cause for revoking a submission to arbitration —

- (1) The fact that the arbitrator is colluding with the opposite party.⁴
- (2) The fact that the arbitrator is discovered to have been acting as a mukhtear for one of the parties without remuneration or to be indebted to such party.⁵

Note 12

1 *Halsbury's Laws of England* Vol 1

p 448

2 (1904) 27 Mad 112 (115)

(1937) 1932 All 345 (349)

(18 1) 10 Suth W R 331 (331)

(1877) 2 Cal 445 (463 464)

(1840) 18 O L ut Re No 80

(1917) 1917 Lah 65 (68) 1917 Pan Re

No 12

(1901) 4 Oudh Cis 17 (21)

4 (1907) 29 All 13 (14)

5 (1907) 29 Cal 215 (287)

- (3) Unreasonable delay in the conduct of the proceedings before the arbitrators, not caused by the party seeking to revoke the sub mission⁶
- (4) Relationship of the arbitrator to one of the parties unknown to the other⁷

The following do not constitute "sufficient cause" for revocation of a sub mission —

- (1) Delay in the conduct of the proceedings where such delay is caused by the very party seeking to revoke⁸
- (2) The fact that one of the arbitrators figured as a witness for the prosecution in a security proceeding against the party seeking to revoke⁹
- (3) The fact that the arbitrator is entering into foreign matters and that a minor is likely to be interested in the arbitration and that he would not be bound by it¹⁰

13 Court cannot appoint an umpire

Where the agreement to refer does not contain any provision for appointing an umpire in case of difference between the arbitrators, the Court cannot appoint an umpire under this Paragraph¹

14 Abatement of proceedings before arbitrator on death of party—See Note 17 to Para 1

15 Appeal

An order under this Paragraph filing or refusing to file an agreement is appealable under S 104 sub section (1), Cl (d)¹ But a decree passed in terms of the award made in pursuance of a reference under this Paragraph is not appealable² Nor does an appeal lie against an order revoking the reference to arbitration³

16 Revision

The omission of the Court to register and number the application as a suit is an irregularity But if the irregularity is acquiesced in by the parties it does not affect the merits of the case and affords no ground for interference in revision¹

- 6 (1870) 17 Cal 200 (205)
(1933) 1933 Pesh 18 (21) Not a suit for all purposes
7 (1933) 1933 Sind 68 (69 70)
8 (1918) 1918 Pat 83 (86) 4 Pat L Jour 394
9 (1932) 1932 All 448 (319)
10 (1874) 91 Suth W R 395 (396)
Note 13
1 (1886) 8 All 64 (66)
(1882) 1882 Pun Re No 191 page 558
[See also (1931) 1931 Bom 529 (531 539) Court appointing umpire as sole arbitrator—Held not justified]
- of suit the order is a decree and appealable]
As for decisions under the old Code which held that the order as to costs is a decree see the following —
(1899) 22 Mad 299 (300) 9 Mid L Jour 10
(1881) 3 All 286 (291)
(1881) 3 All 427 (431 432)
(1907) 1907 Pun Re No 126 page 613
contrary

[See also (1916) 1916 Lah 89 (91)
1916 Pun Re No 117 Order setting aside award on a reference under this Para for mis conduct does not fall under S 104 Cl (d) or (f) but as the proceedings are in the nature

No 9
(1921) 60 Ind Cas 590 (590) (Lal)
3 (1926) 1926 All 55 (56) 48 All 27
Note 16
1 (1914) 1914 Lah 145 (146) 21 Ind Cas 23
(1926) 1914 Pun Re No 23

P. 18. [*New.*] Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit² against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit.

[*Cf* Indian Arbitration Act, S. 19.]

Synopsis

	Note No		Note No
Scope and object of the Paragraph	1	Sufficient cause—Burden of proof	5
"Where any party institutes any suit"	2	Direction of Court to stay suit	6
Application for stay of suit must be made at the earliest opportunity	3	Dispute as to agreement to refer—Valid of agreement	7
Effect of award made subsequent to suit in pursuance of agreement to refer before suit	4	Removal of stay order	8
Effect of award made prior to suit	4a	Appeal	9
		Presidency Small Cause Court's power to stay	10

Other Topics

At the earliest possible opportunity and in all cases where issues are settled at or before such settlement See Note 3	Procedure by Court where arbitration is impracticable See Note 6
"May make an order staying the suit" See Note 6	Procedure in case of denial of agreement See Note 7 Pt (3)
	Sufficient reason—Instances See Para 17, Note 9 Pts (2) to (6)

1 Scope and object of the Paragraph

This paragraph must be read with S 28 of the Contract Act, 1872, S 21 of the Specific Relief Act, 1877, and Para 22 of this Schedule. The general rule as declared by S 28 of the Contract Act is that every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of the contract by the usual legal proceedings in ordinary tribunals is void in agreement to refer *future* disputes or an agreement *in writing* to refer *existing* disputes to arbitration has been declared by the said section to be an exception to the general rule. Such agreements are therefore valid and binding on the parties. They are, however, not specifically enforceable (S 21 of the Specific Relief Act, 1877). But if a party to the agreement sues in respect of the matter agreed to be referred to arbitration, the Court may stay the suit under this Paragraph and thus enable the defendant to apply under Para 17 to carry on the arbitration proceedings as under the agreement. Before the present Code, the *existence* of such an agreement could be pleaded as a bar to the suit¹ under S 21 of the Contract Act.

Sch II, Para 18—Note 1

For cases under S 21, Specific Relief Act

see the following —

1 (1900) 27 All 53 (55, 56)

Relief Act That section, so far as it enabled such a plea to be raised is a bar has now been declared by Para 22, *infra*, to be not applicable to cases governed by this Schedule ^{1a}

The object of this Paragraph is to provide against the contumacious conduct of a plaintiff who had agreed to refer a particular matter to arbitration but wants to resile from it, but the *discretion* is in the Court to stay the suit or not, the paramount idea being that a tribunal constituted by the parties should not come in conflict or usurp the function of the tribunal which the Sovereign has provided ²

2 Where any party institutes any suit

This Paragraph is restricted to cases in which a suit is instituted *after* an agreement to refer to arbitration has been entered into. An agreement to refer entered into pending suit does not oust the jurisdiction of the Court, nor can it afford a valid ground for staying the suit under this Paragraph ¹

3 Application for stay of suit must be made at the earliest opportunity

The power vested in the Court to stay a suit under this Paragraph is *discretionary* and can be exercised only on an application made for that purpose at or before the settlement of issues, ¹ of the provisions of S 19 of the Indian Arbitration Act which require that the application should be made at any time after appearance and before filing a written statement or taking any other steps in the proceedings

4 Effect of award made subsequent to suit in pursuance of agreement to refer before suit

Where no application for stay is made within proper time or an application is made and dismissed, the award made subsequently and pending the suit is invalid. When once the suit is filed, the jurisdiction of the arbitrators ceases and they become *functus officio* ¹. The leading case on the point is the decision in *Doleman and Sons v Orsett Corporation*, [(1912) 3 K B 257] which has been quoted with approval and followed by the High Courts in India. Moulton L.J.

(1932) 132 Oudh 265 (266) 8 Luck 98

(1887) 9 All 168 (170)

(1886) 8 All 57 (61)

(1882) 4 All 546 (548)

(1888) 1888 All W N 133 (133)

(1887) 11 Bom 199 (214)

(1875 76) 1 Cal 42 (50 51)

(1859) 5 Cal 498 (500)

(1836) 23 Cal 956 (957) Held the argument rendered inoperative owing to lapse of time

(1918) 1918 Mad 548 (549)

(1911) 1 Ind Cas 80 (82) 33 All 315

(1869) 1 N W P H C R 252 (252)

(1885) 11 Cal 232 (235) Held contract not

suit]

(1831) 1891 Pun Re No 50 page 274

(1899) 4 Oudh Cas 17 (70)

1a (1920) 1320 Cal 975 (975)

(1916) 1916 L B 101 (101)

(See however (1932) 1932 Oudh 265 (266) 8 Luck 98 & 21 of the Special Relief Act was held to be a bar

to the suit—No reference was made to para 22 of this Schedule]

o (1918) 1918 Mad 119 (720) 41 Mad 115

Note 2

1 (1914) 1914 Bom 184 (185 186) 38 Bom 67 (1912) 15 Ind Cas 140 (140 146) 1912 L B

Re No 115

[See also (1909) 4 Ind Cas 103 (113) 34 Bom 312 Cases under S 19 of the Arbitration Act]

Note 3

1 (1914) 1914 L B 436 (437 444) 1913 L B

Re No 17

[See also (1921) 1921 Cal 202 (204) 15 Sind L R 44]

Note 4

1 (1912) 3 K B 257, *Doleman and Sons v Orsett Corporation—Ct of App* (1912) 1921 Cal 710 (770)

(1934) 1934 L B 857 (860)

(1923) 1923 Cal 135 (135)

(1922) 1922 L B 302 (371) 3 L B 44 F 1 following *Doleman's* case

in delivering the judgment in that case observed as follows — The law will not enforce the specific performance of an agreement to refer to arbitration but if duly appealed to it has the power in its discretion to refuse to a party the alternative of having the dispute settled by a Court of Law and thus to leave him in the position of having no other remedy than to proceed by arbitration. If the Court has refused to stay an action or if the defendant has abstained from asking it to do so the Court has *resin* of the dispute and it is by its decision, and by its decision alone that the rights of the parties are settled. It follows that in the latter case, the private tribunal, if it has ever come into existence is *functus officio* unless the parties agree *de novo* that the dispute shall be tried by arbitration and that the action itself shall be referred. There cannot be two tribunals, each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision.

But in order to apply the doctrine that an award made pending suit is invalid the following conditions must be fulfilled —

- (1) The person instituting the suit must be a party to the agreement to refer
- (2) The party wishing to stay the suit must have the right to apply to the Court to stay it
- (3) The subject matter of the dispute must be the same before the arbitrator and the Court²

The validity of the agreement entered into prior to the suit is not however affected by the institution of the suit and it is only the subsequent award that is invalid. Hence it has been held by the High Court of Calcutta that though an award is made subsequent to suit the Court can nevertheless stay the suit in order to enable the defendant to have the invalid award set aside (under Paris 20 and 21) and thereafter re-commence the arbitration proceedings. Otherwise a party to the agreement can nullify the entire arbitration proceedings by filing a suit at the last moment when the award is about to be delivered without giving the opponent any time to obtain a stay of the suit³.

4a. Effect of award made prior to suit

A valid award operates to merge and extinguish all claims embraced in the submission and constitutes a bar to any action on the original demand. See S 11, Note 27.

An award given after the period fixed in the agreement is not binding on the parties unless the period has been extended by the parties. The extension may however be made orally¹. See also Paragraph 8 Note 3.

5 Sufficient cause—Burden of proof

It is for the plaintiff to show that there is sufficient cause as to why the matter should not be referred to arbitration in accordance with the agreement. The burden is not upon the defendant to show that no such cause exists¹ (As to

(1918) 1918 Mad 719 (719) 41 Mad 115
Following Doleman's case

(1906) 1926 Sind 86 (88) Following Doleman's case

(1922) 1922 Oudh 108 (109 160) 25 Oudh Cas 63

[See however (1922) 1922 All 49 (49) 44 All 292 Case arising under S 19 Arbitration Act]

² (1927) 1927 Lah 405 (403)

Sub

(245)
Case under S 19 Arbitration Act]

Note 4a

1 (1933) 1933 Lah 173 (173 174)

Note 5

1 (1922) 1922 Lah 97 (97) 2 Lah 19
(1933) 1933 Rang 331 (332)

what is sufficient cause *see* Note 9 to Para 17, *supra*)

6 Discretion of Court to stay suit

The defendant is not entitled as of *right* to a stay of the suit under this Paragraph. The granting of stay is in the *discretion* of the Court.¹ The Court will however exercise the discretion ordinarily in favour of the stay, for, as observed by Lord Selbourne in *Willesford v Watson*². If parties choose to determine for themselves, that they will have a domestic forum instead of resorting to the ordinary Courts, then since that Act of Parliament, (that is, the Common Law Procedure Act, 1854 S 11, which corresponds to Para 18 of the Civil Procedure Code) was passed a *prima facie* duty is cast upon the Courts to act upon such an agreement.

7 Dispute as to agreement to refer—Validity of agreement

The Court can stay a suit under this Paragraph only when there is a *subsisting* agreement to refer to arbitration. Where the agreement has become void and inoperative as for instance, by the death of the arbitrator specified in the agreement it can afford no valid ground for granting stay under this Paragraph.¹ Similarly where the agreement has been revoked for sufficient cause or is otherwise invalid in law (as where it is vitiated by fraud or mistake) the Court will decline to grant stay.²

Where the parties dispute the agreement, the Court should decide as to the truth and validity of the agreement before it proceeds to grant or refuse a stay under this Paragraph.³ Where the parties have entered into a fresh agreement which materially alters the original agreement containing the arbitration clause the existence of the original agreement cannot be urged as a ground for stay. But if the fresh agreement merely amounts to an extension of time for the performance of the original contract, it has not the effect of superseding the same so as to invalidate the arbitration clause.⁴ Where a contract contains several clauses of which the arbitration clause is one the Court is not *a fortiori* bound to stay the suit. Thus where a seller files a suit upon certain accepted but unpaid bills and there is a clause in the indent by which the buyer is bound to accept and pay at maturity the bills drawn by the seller notwithstanding any objection that the buyer may have regarding any variations in the terms of the indent the buyer is not entitled to rely on a clause in the indent agreeing to refer the dispute to arbitration. Such a suit is governed by S 32 of the Negotiable Instruments Act and the Court should not stay the suit under this Paragraph.⁵

In the undermentioned case⁶ it has been held that where a suit is filed impeaching the very agreement containing the arbitration clause the Court can order a stay of the arbitration proceedings.

8 Removal of stay order

10 of the arbitrators
332 (390) (Mad)
1 Notes J and 12 to Part

Note 6

- 1 (1918) 1918 Mad 119 (720) 41 Mad 115
(1933) 1933 Bom 202 (704)
- 2 (1878) 42 L J Ch 447 Willesford v Watson — Referred to: 1319 Cal 479
(480) 51 Ind Cas 80 (57)

Note 7

- 1 (1931) 1931 Mad 24 (32 33) 54 Mad 460

- 3 (1917) 1917 Lah 261 (705 206) 1917 Ind Fe No 62
- 4 (1914) 1914 Cal 294 (296) 21 Ind C 17
(213) 41 Cal 35
- 5 (1922) 1922 Lah 353 (303) 2 Lah 303
- 6 (1913) 1319 Cal 1042 (1018)
[See also (1919) 1919 Cal 420 (1)
In this case stay was refused]

refuses to act¹ or the defendant neglects to take steps to proceed with the arbitration² the plaintiff is entitled to apply for a removal of the order for stay. The Court cannot, however, proceed with the suit without vacating the stay order.

9 Appeal

An appeal lies from an order under this Paragraph staying or refusing to stay the suit [vide S 104, sub s (1), Cl (e)]. But an order of a revenue Court staying or refusing to stay a suit under this Paragraph is not a decree within the meaning of S 177 of the Agra Tenancy Act and no appeal lies against such an order to the civil Court¹.

10 Presidency Small Cause Court's power to stay

According to the High Court of Bombay¹ the Presidency Small Cause Court has power to stay the suit under this Paragraph as well as under S 19 of the Indian Arbitration Act. The High Court of Calcutta² has, however, held that the High Court can stay under this Paragraph the suit pending before the Presidency Small Cause Court, but has left open the question whether the Small Cause Court has also concurrent power to grant stay.

P. 19. [S. 341] The foregoing provisions, so far as they

Provisions applicable to proceedings under Para 17

made by the Court under that paragraph, and to the award and to the decree following thereon

[1877—S 324; 1859—S 326]

Synopsis

	Note No		Note No
Scope and applicability of the Para	1	Power of Court to remit or set aside award	3
So far as they are consistent with any agreement filed under Para 17 —			
See Note 11 to Para 17 ante	2	Appeal	4

1 Scope and applicability of the Paragraph

This Paragraph empowers the Court to apply the provisions of Paras 1 to 16 to proceedings under Para 17 so far as they are consistent with the agreement to refer. But in order to so apply those provisions it is essential that the agreement should be actually filed under Para 17¹.

2 So far as they are consistent with any agreement filed under Para 17 — See Note 11 Para 17 ante and Note 7 Para 10 ante

3 Power of Court to remit or set aside award — See Paras. 14 and 15 ante and the undermentioned cases¹

4 Appeal — See Note 15 to Para 17 ante

Note 8

1 (1921) 1921 Bom 458 (455) 45 Bom 1181
[See also (1919) 1919 Cal 295 (295)]

2 (1914) 1914 All 215 (276)

Note 9

1 (1918) 1918 All 238 (233) 40 All 219

Note 10

1. (1925) 1925 Bom 275 (277) 57 Bom 420

(1931) 1931 Bom 343 (344) 55 Bom 503

referring to arbitration — Award issued and decree passed — Full Court cannot interfere and order stay [But see (1907) 31 Bom 236 (241)]

2 (1930) 1930 Cal 51 (52) 56 Cal 100

Sch II Para 19—Note 1

Note 3.

1 (1883) 6 Maf 368 (369, 370). The award may

ARBITRATION WITHOUT THE INTERVENTION OF A COURT

P. 20. [S 525] (1) Where any matter has been referred

Filing award in
matter referred to
arbitration without
intervention of Court

to arbitration⁶ without the intervention of a Court, and an award has been made thereon any person interested in the award⁹ may apply to any Court having jurisdiction over the subject matter of the award¹⁰ that the award be filed in Court

(2) The application shall be in writing and shall be numbered and registered as a suit¹² between the applicant as plaintiff and the other parties as defendants

(3) The Court shall direct notice to be given to the parties¹³ to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

[1877—S 525; 1859—S 327]

Synopsis

	Note No		Note No
Legislative changes	1	Any person interested in the award	9
Awards made on arbitration without the intervention of a Court	2	Jurisdiction over the subject matter of the award	10
Scope of the Paragraph	3	(a) Small Cause Court	11
Regular suit to enforce the award	4	Shall be numbered and registered as a suit	12
Award made pending suit—See Note 9 to O 23 R 3 ante See also 1411 10 ante	5	Notice to parties	13
Where any matter has been referred to arbitration—See Para 21 infra	6	(a) Lost award—See Note 9 to Para 21 infra	14
(a) Award determining matters not referred—See Para 21 infra	7	(b) Decision of majority	15
(b) Whether part of award may be filed—See Para 21 infra	8	(c) Parties to reference	16
		Court fee	17
		Limitation	18

Other Topics

Court to which application under this Paragraph should be made See Notes 10 and 11

1

the award have
jurisdiction over

the matter to which the award relates See Note 10 infra

2 Awards made on arbitration without the intervention of a Court

A reference to arbitration out of Court originates in a submission which is an agreement between the parties to be bound by the adjudication of their differences or disputes by an arbitrator appointed with their consent¹² On the reference the arbitrator makes an award or an adjudication of the respective rights of the parties In order to constitute an award therefore the following elements are essential —

be set aside for misconduct of the arbitrators
(1913) 19 Inl Cas 374 (375) 65 Inl L R 146
A mere declaratory award is incon-

plete and should be remitted to arbitrators for completion
Sch 11 Para 20—Note 2
13 Halsbury's Laws of England Vol 1 p 431

- (1) There must be a difference or dispute between the parties ^{1b}
- (2) There must be a submission to arbitration and a reference thereon to an arbitrator appointed by the parties
- (3) There must be an award by the arbitrator on the points referred to him

As between the parties to the submission, a *valid* award is a final adjudication of the disputes between them embraced in the submission, and is conclusive upon the merits of the controversy submitted ¹ It operates, therefore, to merge and extinguish all claims embraced in the submission and, after an award is made the submission and award furnish the only basis by which the rights of the parties can be determined and constitute a bar to any action on the original rights of the parties It is not necessary for the *validity* of the award that it should be filed or enforced in a Court of law ² But if it is desired to enforce the rights created by the award through the Court, the award has to be converted into a *judgment of Court* on which a decree may be made ^{2a} For this purpose a party in whose favour an award has been made has two courses open to him —

- (i) He may proceed by an application under this Paragraph See Note 3
- (ii) He may file a regular suit to enforce the award See Note 4

3 Scope of the Paragraph

This Paragraph provides for a summary procedure for filing in Courts awards made on arbitration without the intervention of a Court ¹ The procedure is, however, optional ² and does not preclude the party from bringing a regular

- 1b (1903) 30 Cal 831 (839) 41 Mad 115 (117)
 [See also Note 10 to Para 1 ante] (1919) 1019 Mad 1113 (1113 1114)
 1 (1906) 33 Cal 881 (888) (1910) 5 Ind Cas 425 (426) 6 Nag L R 1
 (1924) 1324 Cal 72 (73) (1892) 1892 All W N 238 (238)
 (1903) 1 Ind Cas 105 (105 106) (Lom) [See also (1914) 1924 Sind 23 (24)
 (1909) 3 Bom 401 (403 404) 17 Sind L R 178]
 (1927) 1577 Bom 237 (237) But where (1912) 15 Ind Cas 819 (821) 5 Sind L R 240
 award does not replace but merely defines and ascertains original rights
 a suit on original rights not barred
 (1984) 11 Cal 386 (388 392) 12 Ind App 67 (P C)
 (1918) 1918 Lah 239 (240) 1917 Pun Re No 99
 41 Mad 115 (117)
 (1919) 1019 Mad 1113 (1113 1114)
 (1910) 5 Ind Cas 425 (426) 6 Nag L R 1
 (1892) 1892 All W N 238 (238)
 [See also (1914) 1924 Sind 23 (24)
 17 Sind L R 178]
 (1912) 15 Ind Cas 819 (821) 5 Sind L R 240
 (1901) 18 Cal 414 (418) 18 Ind App 73 1901
 Pun Re No 70 (1 C)
 (1927) 1927 All 733 (734)
 (1894) 1884 All W N 148 (148)
 (1893) 1883 All W N 237 (237)
 (1892) 12 All W N 238 (238)
 (1866) 6 South W R 94 (94)
 (1873) 20 South W R 420 (420)
 (1904) 7 Oudh Cas 369 (370)
 (1918) 1918 Lah 239 (240) 1917 Pun Re No 99
 8 Beng L R 315 (325) (B B)
 (1695) 18 Mad 423 (423)
 [See also (1902) 29 Cal 167 (167 168)
 184 29 Ind App 61 1902 Pun Re No 25 (P C)]
 (1925) 1928 Mad 107 (115)
 Note 3
 1 (1932) 1932 Mad 462 (462) 53 Mad 653
 2 (1884) 1884 All W N 148 (149)
 (1921) 1921 All 384 (386) 43 All 103
 (1927) 1927 All 733 (734)
 (1931) 1931 Oudh 127 (129)
 (1904) 7 Oudh Cas 369 (370)
 (1892 96) 2 Upp Bur R 11
 (1897 1901) 2 Upp Lur R 10
- in the alternative if the award is found to be invalid a prayer may be added for adjudication on the merits
 (1917) 1317 Lah 65 (67) 1317 Pun Re No 12
 (1916) 1916 Lah 264 (264)
 (1916) 1916 L B 101 (102) It is however open to the plaintiff to impugn the validity of award and if he succeeds in proving the award to be invalid an adjudication on the original rights may be made
 [See also (1918) 1918 Mad 719 (719)
 C P C 382 & 383

suit to enforce the rights created by the award³ (See Note 4, *infra*) The inquiry under this Paragraph is limited to the conditions specified in Para 21 (See Note 2 to Para 21, *infra*) While, in a regular suit to enforce the award, it is open to the defendant to attack the award on all possible grounds⁴

As to whether a proceeding under this Paragraph is *res judicata* in a subsequent suit to enforce or set aside the award, see Note 27 to S 11 *ante* A refusal to file the award under this Paragraph does not amount to a decree, and therefore does not render the award void or otherwise unenforceable, as against the parties to the award, but leaves the award to have its ordinary legal validity,⁵ unless the validity of the award as an award was directly and substantially in issue in such proceeding⁶

This Para and Para 21 *infra* have no application to awards made by an arbitrator appointed under the Rules made by the Government under the Co operative Societies Act⁷ Such awards can be enforced in the same manner as decrees of civil Courts

4 Regular suit to enforce the award

Apart from the procedure under this Paragraph, a regular suit may be brought to enforce the rights under the award¹ (See Form No 10, Appendix 1 to Sch 1) It has been held in the undermentioned case² that a suit to enforce the terms of the award is in essence one for specific performance of the award But it has been held by the High Courts of Madras^{2a} and Allahabad³ that the question whether a suit to enforce an award is a suit for specific performance of the award, would depend upon the nature and purport of the award, and the period of limitation for the suit would also depend upon the nature and purport of the award It is submitted that the latter view is correct Where the award directs the performance of a duty or condition and where the performance of such a duty or condition may be specifically enforced under the Specific Relief Act, the suit may be one for specific performance of the award⁴ But where the award settles or declares the title of the parties and a claim is made based on the title so conferred, the suit cannot be called a suit for specific performance of the award any more than is a suit upon a sale-deed, a suit for specific performance of a contract of sale^{4a} On the same principle it has been held that a suit for recovery of money due under an award is a suit for money and as such

- 3 (1921) 1921 All 384 (386) 43 All 106
- (1902) 26 Bom 76 (80)
- (1910) 5 Ind Crs 597 (598) 1910 Pun Re No 34
- (1917) 1917 Lah 63 (67) 1917 Pun Re No 12
- (1882) 1882 Pun Re No 77, page 218
- (1868 1869) 4 Mad H C R 113 (120)
- (1892) 15 Mad 99 (100)
- (1932) 1932 Mad 462 (465) 55 Mad 659
- (1932) 1932 Mad 745 (747)
- (1916) 1916 Mad 583 (584)
- (1897 1901) 2 Upp Bur R 293
- 4 (1926) 1926 Lah 125 (127) 7 Lah 42
- 5 (1925) 1925 P C 216 (219) 52 Ind App 265 5 Rang 186 (P C)
6. (1891) 18 Cal 414 (418 419) 18 Ind App 73 1891 Pun Re No 70 (P C)
- (1921) 1921 Bom 389 (391) 45 Bom 329
- (1906) 33 Cal 881 (887)
7. (1933) 1933 Cal 695 (696) 60 Cal 906.

Note 4

1. See S 30 of the Specific Relief Act, 1877

- (1933) 1933 All 748 (748) Civil dispute as to right to share of offerings referred to arbitration — Award directed defendant to deliver half of offerings not filed—Suit for recovery of half of offerings or in the alternative for price is maintainable
- (1935) 1935 Lah 134 (135) In which case art 178 Limitation Act would not apply
- [See (1933) 1933 Cal 407 (408) 60 Cal 767 But a person not a party to the arbitration cannot seek to enforce an award]
- 2 (1918) 1918 Cal 899 (900)
- 2a (1900) 23 Mad 593 (596)
- 3 (1901) 23 All 283 (288)
4. [See (1902) 24 All 164 (168 169)]
- [See also (1906) 33 Cal 831 (837)]
- 4a (1901) 23 All 295 (288)
- (1934) 1934 Bom 140 (143 145)

cognisable by a Court of Small Causes, even though, in such a suit, the validity of the award may be contested.⁵ As to whether a suit, brought after an application to set aside the award under this Paragraph is dismissed is ruled by the rule of *res judicata*, see Note 27 to S 11, *ante*.

5 Awards made pending suit

See Note 9 to O 23, R 3 *ante*. See also Para 10, *ante*.

Where an award is made on a reference to arbitration during the pendency of a suit in which the same subject matter is in issue the award cannot be filed under this paragraph.¹

6 Where any matter has been referred to arbitration —See Para 21 *infra*.

7 Award determining matters not referred —See Para 21 *infra*.

8 Whether part of award may be filed —See Note 7 to Para 21, *infra*.

9 Any person interested in the award

A person who is not a party to the reference to arbitration and therefore is not bound by the award cannot enforce the award even though he may derive an advantage from it.¹ The arbitrator is not a person interested in the award within the meaning of this Para. He cannot, therefore, apply under this Para to file an award.²

10 Jurisdiction over the subject matter of the award

Under the old Code the application had to be filed in the Court of the lowest grade having jurisdiction over the matter to which the award relates.¹ It was held on an interpretation of the words in quotation, that the jurisdiction depended upon the value of the matter to which the *arbitration related* and not on the value of the *matter awarded*.² The use of the words 'having jurisdiction over the *subject matter of the award*' in the present Paragraph makes it clear that the jurisdiction now depends upon the reliefs *awarded* rather than on the matter originally in dispute.³ In order to decide whether the Court has jurisdiction over the subject matter of the award, it is necessary to determine whether the Court would have under Ss 16 to 20 of the Code jurisdiction to try a regular suit between the parties in which the reliefs claimed are the reliefs granted by the award.^{3a} It is, however, the *entire* matter dealt with by the award and not merely a particular portion thereof that must be considered in determining the jurisdiction of the Court.⁴ Where the award deals with matters partly within the jurisdiction of a Court and partly without it, it cannot be filed

5 (1925) 1925 Bom 519 (519) 49 Bom 673
(1919) 1919 All 12 (12) 42 All 169

(1929) 1929 Lah 814 (815)

[See also (1884) 8 All 310 (351)]

2 (1935) 1935 Lah 134 (135)

Note 10

1 [See (1864 66) 2 Bom H C R 91 (93)]

2 (1906) 29 Mad 44 (45)

(1904) 31 Cal 203 (206)

3 (1914) 1914 Cal 683 (684)

(1933) 1933 All 350 (381)

3a (1933) 1933 All 380 (381)

(1934) 1934 Sind 29 (32)

4 (1919) 1919 Mad 22 (23)

(1863 70) 5 Mad H C R 128 (129)

(1932) 1932 Mad 462 (463) 55 Mad 689

(1933) 1933 All 380 (381)

[See however (1931) 1931 Rang 252
(254) 9 Rang 480 Observation of
Vya Bu J in the order of reference
to the effect that where the portion

11
[But see (1924) 1924 Rang 192 (192) 1 Rang
700

(1871) 3 N W P H C R 117 (118)

Note 5

5
fainable

(1935) 1935 Sind 184 (186)

Note 9

1. (1884) 6 All 322 (328) 11 Ind App 20 (P C).

Confirming 2 All 809

under this Paragraph in that Court and no decree can be validly made thereon⁴ Thus an award directing the payment of a sum of money and also declaring the dissolution of a marriage cannot be filed in a Small Cause Court which has no jurisdiction to deal with the question of dissolution of marriages⁵ Similarly, in *Ramlal v Kisan Chandra*,^{6a} where the properties in dispute and dealt with by the award, were all outside British India, it was held by the Privy Council that the award could not be filed in a British Indian Court

Before assuming jurisdiction under this Paragraph the Court has to be satisfied that it has jurisdiction to entertain the application and should, if necessary, take evidence regarding jurisdiction before assuming jurisdiction.⁷

11 Small Cause Court

Where an award merely directs the payment of money a suit to recover the money is cognisable by a Court of Small Causes¹

12 Shall be numbered and registered as a suit

It has been seen in Note 5 to S 2, sub s (2), *ante*, that the word "suit" for the purposes of the Code, means—

- (1) any proceeding under the Code which is instituted by the presentation of a *plaint*, and
- (2) any proceeding which, according to any specific provisions of law should be regarded as a suit under the Code

An application under this Paragraph or under Para 17 must, therefore, be regarded as a suit for the purpose of the Code, inasmuch as it has to be "numbered and registered as a suit"¹ It has accordingly been held that the provisions of O 9, R 13,² O 23, Rr 1 and 3³ and O 39, R 5⁴ can be applied to such applications But though such an application is a "suit" the order thereon is not a "decree" The reason is that such a decision is appealable as an *order* under the provisions of S 104, *ante*, and is thus excluded from the definition of "decree".⁵

It has, however, been held in the undermentioned cases⁶ that an application

within jurisdiction is separable from the other portion without affecting the basis of the award, the case may be different]

5 (1932) 1932 Mad 462 (463) 55 Mad 639

See cases cited in Foot Notes (6) and (7) below

6 (1919) 1919 Mad 22 (23)

6 (1924) 1924 P C 95 (102) 51 Cal 261 51

Ind App 72 20 Nag L R 33 (P C)

(See also 1931 Rang 252 (254)

9 Rang 460 Property outside British India)

(1923) 1923 Lah 24 (26) Award relating to property situate outside British India cannot be filed in British India

(1931) 1931 Sind 47 (48) 25 Sind L R 201 Property outside jurisdiction of Court

(1871) 15 Sath W R 556 (556) Munsif's Court not having jurisdiction over the collection of rent, the award relating to that matter cannot be filed in that Court

7 (1839) 16 Cal 482 (486)

(1932) 1932 Mad 462 (463) 55 Mad 639

Note 12.

3 (1904) 31 Cal 516 (518) O 23 R 1
(1921) 1921 Lah 31 (35) 2 Lah 114 O 23,
R 3

(1910) 5 Ind Cis 994 (995) (Lah)
(1922) 1922 Oudh 189 (196) 2 Oudh Cis
213

4 (1927) 1927 Bom 259 (259, 260)

5 See definition of 'decree' in S 2 sub S 2

6 (1921) 1921 Bom 330 (330) 45 Bom 323

(1921) 1921 Pat 161 (162). 6 Pat L J 287

(1979) 1979 Lah 537 (533) 1921, 1922 37

the Code No decisions as noticed

under Para 17 or under this Paragraph is not a 'suit' at all for the purposes of the Code. It is submitted that this view cannot be accepted as correct.

But an application under Para 17 or under this Paragraph should be regarded as a suit only for the purposes of the Code. It is not a suit within the meaning of the Limitation Act, 1908 or of the Dekkhan Agriculturists Relief Act⁸ or of the Court Fees Act, 1870^{9a} or for the purposes of the taxation of the pleaders' fee on such applications⁹. It has been held by the Judicial Commissioners' Court of Sind in the undermentioned case¹⁰ that an application under this para to file an award is a suit within the meaning of S. 16 of the Provincial Small Cause Courts Act.

13 Notice to parties

The issue of a notice to the parties under sub para (4) is imperative¹. The word parties is not confined to persons who have actually appeared before the arbitrators. A, B and C agreed that in case of any dispute between them the matter should be referred to the arbitration of persons chosen by each party to the dispute and that in the event of any such party refusing to nominate an arbitrator, the arbitrator nominated by the other party should nominate another arbitrator and the two together should nominate an umpire. Disputes having arisen A and B called upon C to nominate an arbitrator. C refused to do so and thereupon A and B nominated an arbitrator who chose another arbitrator and they having appointed an umpire made an award. A applied to file the award in Court. It was held that C was a party to whom notice should go although he did not actually appear before the arbitration.²

14 Lost award See Note 8 to para 71 *infra*

15 Decision of majority

Where a dispute is referred to several arbitrators and the agreement of reference does not provide that the decision of the majority shall prevail an award by the majority of the arbitrators is not valid¹. The mere fact that an uneven number of arbitrators have been appointed does not show that the parties agreed to be bound by the award of the majority². The Court cannot in such cases appoint an umpire³. Even in a case where the parties agree to be bound by the award of the majority the proceedings will be vitiated unless all the arbitrators take part in the proceedings⁴. As to the validity of a decision by the majority of the arbitrators on a reference pending suit see Note 2 to Para 4 *ante*.

(1914) 1314 Sind 122 (123) 8 Sind L R
60 Application under para 17—
Reference and award—Award set
aside—It was held that there was
no suit and therefore no decree and
1

9a (1894) 10 Cal 11 (14)
9 (1930) 1930 Oudh 89 (90) 5 Luck 678
10 (1945) 1935 Sind 208 (209)

Note 13

1 (1933) 1933 All 166 (167)
2 (1880) 8 All 340 (351)

Note 15

1 (1919) 1919 Pat 74 (78)
(19-3) 1923 Oudh 181 (181) 26 Oudh Cas
350

(18-9) 1891 un Re No 57 page 145

(18-3) 19 Suth W R 41 (48)

(1867) Suth W R 26J (270)

(1905) 2 Cal L Jour 61 (64)

(1882) 1882 1 un Re No 191 page 558

2 (1970) 1920 Mad 130 (130) Dissenting from
117 Bom 128

3 (1976) 1976 Mad 1183 (1184)

4 (1918) 1918 Cal 865 (866)

(1903) 23 All W N 159 (160)

para 15 which applies to such
orders and is therefore not a decree
(1921) 1927 Sind 103 (104) 19 Sind L R
of
34

71)

8 (1924) 1924 Sind 23 (24) 17 Sind L R 178
(1897) 21 Bom 63 (67) 68)

16 Parties to reference

An award binds only the parties making the reference. Where a reference is made by some only of several persons having a common interest, and they have no express authority from the others to act on their behalf also the latter are not bound by the award¹. Where one of the parties to a reference is a minor and an application is made to the Court by another party to file the award, the Court before filing the award, should decide definitely whether the reference is for the benefit of the minor so as to be binding on him².

17 Court fee

An application to file an award under this paragraph is not chargeable with a Court fee as if it is a *suit* but is chargeable only as an application¹. See also Art 18, Sch II of the Court fees Act, 1870.

18 Limitation

The period of limitation for an application to file an award is six months from the date of the award¹ (Art 178, Indian Limitation Act). It has been held that the date of the award in Art 178 really means the date on which the award was published or handed over to the parties and not the date on which it was made or signed². The Court has no power to enlarge this period under S 5 of the Limitation Act³. Nor can a party claim the benefit of S 6 of the Act⁴.

P. 21. [S 526] (1) Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon³ and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved,¹⁰ the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

[1877—S 526 ; 1859—S 327]

Synopsis

	Note No		Note No
I Legislative changes	1	on	3
II Scope of the enquiry under this paragraph	2	(a) Validity of reference and award	4
III Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made there		(b) Agreement to refer in consideration of dropping criminal proceedings	4a
		(c) Subject matter of the award	5
		minor son	
	Note 16		Note 17
1 (1927) 1927 All 125 (130)		1 (1884) 10 Cal 11 (14)	Note 18
[See (1932) 1932 Lah 69 (70) Two out of three partners referring to arbitration—Award is valid as between themselves—Award acted on—Persons deriving benefit under it cannot afterwards impeach it]		1 (1915) 1915 All 363 (371) 33 All 80 (91)	
2 (1910) 7 Ind Cas 31 (33) (Cal)		[See also (1916) 1916 Mad 203 (54)]	
[See also (1932) 1932 Pat 60 (61) 11 Pat 131 A reference to arbitration to which the <i>Larta</i> of a joint family was a party is binding on his			
		4 (1923) 1923 Raj 20 (26) 11 Raj 20	

(d) Form of award	6	Note 15 to Para 1	12
(e) Re-issuance of award	6a	VIII Revocation of submission — See	
(i) Part of award if can be filed	7	Note 12 to Para 17 <i>ante</i>	13
(ii) Lost award	8	IX Appeal against an order filing or refusing to file award—See	
IV Grounds of objection under Paras 14 and 15	9	S 104 Note 15 <i>ante</i>	14
V Proved	10	X Appeal against decree on award — Sub Para (2)	15
VI Res judicata	11	(a) Enforcement of award	16
VII Withdrawal of application — See Note 12 to Para 20 <i>ante</i> and		XI Appeal to Privy Council	17
		XII Revision	18

Other Topics

"A decree shall follow" — See Note 16	valid — See Note 9 to N (2)
Award on a vague agreement to refer — While	Matters for enquiry under this paragraph — See
ther valid — See Note 19 F N (j)	Note 2
Delay in making the award — Award whether	Suit to enforce award — See Para 20 Note 4

1 Legislative changes —

- The words where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon are new — See Note 3
- The word proved has been substituted for the word shown — See Note 10
- Sub S (2) new — See Note 15 and S 101 (f) *ante*

2 Scope of the enquiry under this paragraph

It has been seen in Note 4 to Para 14 *ante* that it is a fundamental principle of the law of arbitration that the submission furnishes the source and prescribes the limits of the authority of the arbitrator and that the award must conform to the submission in substance and in form. Subject to this limitation, however the arbitrator is the sole and final judge of law and fact and the Court will not review the award upon the merits nor constitute itself as a Court of appeal to go into the merits of the matter and to see whether the conclusions arrived at are sound and reasonable¹

There is no provision of law which requires the arbitrator to adopt any special procedure in arriving at his award² and the proceedings are not intended to be carried on according to the rules of procedure contained in the Code^{2a}. He is not bound to make any record of the proceedings^{2b} or to give a reasoned judicial decision³. In any inquiry under this paragraph the Court has to satisfy itself only on the following points —

- (1) that there was a matter in difference between the parties existing at the time of the arbitration (see Note 3 *infra*)
- (2) that there was a valid submission of the matter in difference and a reference thereon to arbitration (see Note 4)
- (3) that the subject matter of the reference was such as could be lawfully referred to arbitration and that the Court has jurisdiction over

Sch II Para 21—Note 2

- (1912) 15 Cal L Jour 110 (113 114)
- (1933) 1933 Lah 1034 (1035) Partition award—Unequal distribution by arbitrators — He was not asked to explain it—Court cannot refuse to file award
- (1902) 29 Cal 167 (183) 29 Ind App 51
- 1902 Pun Re No 25 (P C)
- (1910) 38 Cal 143 (147)
- (1909) 4 Ind Cas 503 (503 504) (Lah)

- (1923) 1923 Rang 199 (201) 1 Rang 760
- (1916) 1916 Mad 583 (584)
- (1905) 7 Bom L R 793 (797)
- (1930) 1930 Lah 22 (23)
- (1910) 38 Cal 143 (147)
- (1912) 15 Cal L Jour 110 (113)
- (1922) 1922 Cal 226 (228)
- (1910) 38 Cal 143 (147)
- (1912) 1913 Mad W N 10,6 (1079)
- (1912) 1912 Mad W N 1076 (1079)
- (1912) 23 Mad L Jour 290 (296)

16 Parties to reference

An award binds only the parties making the reference. Where a reference is made by some only of several persons having a common interest, and they have no express authority from the others to act on their behalf also the latter are not bound by the award.¹ Where one of the parties to a reference is a minor and an application is made to the Court by another party to file the award, the Court before filing the award should decide definitely whether the reference was for the benefit of the minor so as to be binding on him.²

17 Court fee

An application to file an award under this paragraph is not chargeable with a Court fee as if it is a *suit* but is chargeable only as an application.¹ See also Art 18 Sch II of the Court fees Act 1870

18 Limitation

The period of limitation for an application to file an award is six months from the date of the award.¹ (Art 178 Indian Limitation Act) It has been held that the date of the award in Art 178 really means the date on which the award was published or handed over to the parties and not the date on which it was made or signed.² The Court has no power to enlarge this period under S 5 of the Limitation Act.³ Nor can a party claim the benefit of S 6 of the Act.⁴

P. 21. [S 526] (1) Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon³ and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved,¹⁰ the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award [1877—S 526; 1859—S 327]

Synopsis

	Note No	Note No
I Legislative changes	1	3
II Scope of the enquiry under this paragraph	2	4
III Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made there		4a, 5
		on (a) Validity of reference and award (b) Agreement to refer in consideration of dropping criminal proceedings (c) Subject matter of the award

Note 16

- 1 (1927) 127 All 125 (130)
[See (1932) 1932 Lah 63 (70) Two out of three partners referring to arbitration—Award is valid as between themselves—Award acted on—Persons deriving benefit under it cannot afterwards impeach it]

- 2 (1910) 7 Ind Cas 31 (33) (Cal)
[See also (1932) 1932 Pat 60 (61) It is not a reference to arbitration to which the *Karta* of a joint family was a party is binding on his

minor son]

Note 17

- 1 (1884) 10 Cal 11 (14)
N 18

- (1843) 21 Satw 26 23
3 (1915) 1915 All 303 (371) 33 (1180) (21)
4 (1923) 1923 Rajg 20 (26 27) 1180
20

(b) Partial award	6	Note 15 to Para 1	12
(c) Revocation of award	6a	VIII Revocation of submission — See	
(i) Part of award if can be filed	7	Note 12 to Para 17 <i>ante</i>	13
(ii) Lost award	8	IX Appeal against an order filing or refusing to file award—See	
IV Grounds of objection under Paras 14 and 15	9	S 104 Note 15 <i>ante</i>	14
V Proved	10	X Appeal against decree on award — Sub Para (2)	15
VI Res judicata	11	(a) Enforcement of award	16
VII Withdrawal of application — See Note 12 to Para 90 <i>ante</i> and		XI Appeal to Privy Council	17
		XII Revision	18

Other Topics

A decree shall follow — See Note 1C
 Award on a vague agreement to refer — Whether valid — See Note 18 P N (a)
 Delay in making the award — Award whether valid — See Note 9 P N (2)
 Matters for enquiry under this paragraph — See Note 2
 Suit to enforce award — See Para 90 Note 4

1 Legislative changes —

- The words "where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon" are new — See Note 3
- The word "proved" has been substituted for the word "shown" — See Note 10
- Subs (2) is new — See Note 15 and S 104 (f) *ante*

2 Scope of the enquiry under this paragraph

It has been seen in Note 4 to Para 14 *ante* that it is a fundamental principle of the law of arbitration that the submission furnishes the source and prescribes the limits of the authority of the arbitrator and that the award must conform to the submission in substance and in form. Subject to this limitation, however the arbitrator is the sole and final judge of law and fact and the Court will not review the award upon the merits nor constitute itself as a Court of appeal to go into the merits of the matter and to see whether the conclusions arrived at are sound and reasonable¹

There is no provision of law which requires the arbitrator to adopt any special procedure in arriving at his award² and the proceedings are not intended to be carried on according to the rules of procedure contained in the Code^{2a}. He is not bound to make any record of the proceedings^{2b} or to give a reasoned judicial decision³. In any inquiry under this paragraph the Court has to satisfy itself only on the following points —

- (1) that there was a matter in difference between the parties existing at the time of the arbitration (see Note 3 *infra*)
- (2) that there was a valid submission of the matter in difference and a reference thereon to arbitration (see Note 4)
- (3) that the subject matter of the reference was such as could be lawfully referred to arbitration and that the Court has jurisdiction over

Sch II Para 21 Note 2

- (1912) 15 Cal L Jour 110 (113 114)
- (1933) 1933 Lah 1034 (1035) Partition award Unequal distribution by arbitrators — He was not asked to explain it — Court cannot refuse to

(1923) 1923 Ring 199 (201) 1 Ring 965

(1916) 1916 Mad 583 (584)

(1905) 7 Bom L R 793 (79)

(1930) 1930 Lah 22 (23)

² (1910) 38 Cal 143 (147)

(1912) 15 Cal L Jour 110 (113)

^{2a} (1922) 1922 Cal 216 (223)

^{2b} (1910) 38 Cal 143 (147)

(1912) 1912 Mad W N 1076 (1079)

³ (1912) 1912 Mad W N 1076 (1079)

(1912) 23 Mad L Jour 290 (296)

the subject matter of the award (see Notes 5 and 10 to Para. 20, ante).

(4) that an award was made thereon (see Notes 6, 7 and 8), and

(5) that no grounds of objection such as those mentioned in Paras 14 and 15 have been proved (see Notes 9 and 10).

The Court should then proceed to give judgment according to the award,^{3a} that is, it should state in the judgment what its construction of the award is as to the rights and interests of the parties,⁴ and a decree dealing with the specific rights of the parties should be drawn up.⁵ The award should be construed reasonably and in accordance with what may be supposed, under the circumstances of the case, to have been the intention of the arbitrator.⁶ Every reasonable presumption should be made in favour of the award being a final and certain termination of the matters in dispute.⁷

3 Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon

Under S 326 of the old Code, it was held by the High Court of Bombay in the cases cited below¹ that the Court had no jurisdiction to enquire into the *factum* or validity of the submission and award, and if the defendant denied any reference to arbitration, the only course open to the Court was to dismiss the application and refer the parties to a regular suit to enforce the award. But this view was dissented from by the same High Court in a later Full Bench case² in which it was held, following the decisions of the other High Courts³ that the existence and validity of the reference and award was the foundation of jurisdiction of the Court under that section, and that, therefore, the Court ought to decide on evidence whether the matter was referred to arbitration and whether an award was made thereon. The addition of these words gives effect to the latter view. See the undermentioned cases.⁴

The word "matter" in this as well as in the previous paragraph, is not wider than the expression "matter in difference" used in Para 1 of this Schedule.⁵ As has been seen in Note 8 to that paragraph, the difference must be one which has actually arisen at the time of the reference though it need not have arisen at the time of the agreement to refer.^{5a} The Court must, therefore, before filing the

3a (1907) 5 Oudh Cas 27 (29)

(1901) 4 Oudh Cas 17 (21)

4 (1891) 13 All 366 (367)

(1883) 7 Bom 316 (318-322)

5 (1891) 13 All 366 (367)

6 (1898) 20 All 245 (248)

7 (1925) 1928 Sind 144 (145)

Note 3

1 (1885) 9 Bom 254 (258)

(1893) 17 Bom 674 (677)

(1896) 20 Bom 526 (601-602)

2 (1905) 29 Bom 621 (627) (FB)

3 (1895) 17 All 21 (26-28)

(1906) 28 All 621 (622)

(1898) 25 Cal 757 (764)

(1882) 4 Mad 319 (320)

(1897) 20 Mad 59 (60)

(But see (1875-76) 1 All 156 (158)

Decided under S 327 of the Code of

1859)

4 (1911-12) 11 Bom 123 (127-128) 47 Bom 258

The Court should be satisfied that

there was a proper reference to arbitration

(1934) 1934 Sind 29 (32) Reference to arbitration deprives a party of his right to resort to ordinary tribunals and should therefore be strictly construed

(1926) 1926 Lah 91 (93) Court can decide whether there was reference and whether there was any dispute for reference

(1903) 30 Cal 631 (542) The question to be determined is whether there was any matter in difference between the parties which could be and was referred to arbitration

(1923) 1923 Rang 179 (201) 1 Rang 253

5 (1911) 12 Ind Cas 633 (640) 5 Sind 11 R 32

5a See the cases cited in foot note 4 (1) & 20 & 10 to paragraph 1.

award satisfy itself that there was a real dispute between the parties, and that there was an arbitration thereon.⁶

4 Validity of reference and award

Before ordering an award to be filed, the Court should satisfy itself not only that the matter in difference was referred to arbitration, but also that the submission was valid in law.¹

An award binds only the parties making the reference and persons who are properly represented in the arbitration proceedings². Thus an award on a question of partition when all the members of the joint family are not parties to the reference is not binding on the non-parties³ though as between the *parties themselves* it will be binding⁴. Again, the capacity to make a submission is co-extensive with the capacity to contract. A person who cannot make a contract cannot make a submission and a person whose capacity to make a contract is *restricted*, can only make a submission to that extent⁵. Thus a minor cannot himself make a submission although a guardian may make it on his behalf for his benefit⁶. An executor or administrator is competent, but only under certain circumstances, to make a reference to arbitration⁷. But though, as a general principle a person who is not properly represented in the proceedings is not bound thereby, the proceedings before arbitrators are not intended to be carried on according to the rules of procedure contained in the Civil Procedure Code. If there is a binding reference to arbitration, all that is necessary to be seen is that there is a substantial representation of the different interests before the arbitrators. There is no rule of procedure by which, on the death of some of the parties, the arbitrators could substitute their legal representatives or appoint guardian *ad litem* for such representatives if they happen to be minors⁸.

An agreement to refer, as has been seen in Para 17 *ante* must, for the purposes of that paragraph, be in writing. In cases, however, of awards without the intervention of the Court, it is not necessary for its validity that the submission should have been in writing it may be oral⁹ or can be gathered from documents connected by oral evidence¹⁰.

4a Agreement to refer in consideration of dropping criminal prosecution

An agreement to refer a dispute to arbitration in consideration that a threa-

[See also (1932) 1932 Lah 459 (460)
Halsbury's Laws of England Vol I
p 627]

(1893) 1893 A C 79 (81) *London and North Western and Great Western Joint Railway Co v Billington*

6 (1911) 12 Ind Cas 639 (610) 5 Sind L R 92

(1921) 1921 Sind 61 (65) 17 Sind L R 211
(1926) 1926 Lah 91 (93)

(1930) 1930 Lah 22 (22) Even if the dispute is not detailed in the reference, it is sufficient if the arbitrators satisfied themselves as to the nature of the dispute

Note 4

1 (1919) 1919 Mad 1029 (1033)
(1922) 1922 Lah 149 (154)

(1906) 29 All 621 (622)

2 (1922) 1922 Cal 226 (228) see Note 16 to paragraph 20

[See also (1932) 1932 Pat 60 (61) · 11

Pat 131 A reference to which the *arta* of the joint family was a party is binding on his minor son

3 (1916) 1916 Pat 132 (135)

4 (1928) 1928 Cal 275 (276)

[See also (1932) 1932 Lah 69 (70)]

5 (1915) 1915 Cal 745 (748)

Halsbury's Laws of England Vol I,
p 625

6 [See Note 20 to para 1 *ante*]

7 (1915) 1915 Cal 745 (748)

8 (1922) 1922 Cal 226 (228)

9 (1911) 14 Cal L Jour 168 (200)

(1935) 1935 Mad 276 (278)

(1932) 1932 Mad 745 (746) 56 Mad 85 Submission in Presidency Town but to which the Arbitration Act does not apply

(1894) 17 All 21 (27)

(1872) 18 Sath W R 593 (591)

(1864) 1864 Sath W R Gap 76 (1)

10 (1920) 1920 All 258 (260) 42 All 525

tened or pending criminal prosecution should be dropped is opposed to public policy and the reference as well as the award if any made thereon are invalid.¹ But an agreement to refer in consideration of the withdrawal of an application under S 476 of the Criminal Procedure Code is not enough to vitiate the award.²

5 Subject matter of the award

Paragraph 20 provides that any person interested in the award (made without the intervention of the Court) may apply to any Court *having jurisdiction over the subject matter of the award*, that the award be filed in Court. It follows that the subject matter of the award must be one over which the Court would have jurisdiction if a suit were brought in respect thereof. Questions therefore which could not be made the subject of a civil suit, under S 9 of the Code such as caste questions could not be the subject of an award enforceable in a Court of law¹. The High Court of Bombay has however held that the jurisdiction of the Court to file an award is conferred by Para 20 and not by S 9 of the Code and that the Court could therefore file an award under Para 20 even though the subject matter of the award is not of a civil nature (such as a decision of *man pan* offerings) and therefore not cognisable by a civil Court under S 9 *ante*². It is submitted that this view is *not correct*. The object of filing an award in Court is to convert it into a decree of Court so that it could be enforced like other decrees under *provisions of the Code*³. It necessarily follows that unless the Court has jurisdiction over the subject matter under S 9, any decree passed in respect of such subject matter would be incapable of execution under the Code.

But the fact that a suit *could* be instituted in a civil Court in respect of a particular matter does not necessarily mean that such matter can be referred to arbitration.⁴ The difference or dispute between the parties should be such that the parties *could* if they were so minded settle the matter between themselves by a *valid* agreement.⁵ Thus a dispute as to the office of a public charity,⁶ or the appointment of a guardian to a minor⁷ not relating to a private right as between the parties cannot be made the subject of an award by arbitrators. On the same principle a dispute arising from some illegal transaction or some transaction opposed to public policy cannot be made the subject of a valid award⁸ as any agreement which the parties themselves could make in settlement of the dispute would not be enforceable and the award of the arbitrator on such a dispute would likewise be invalid and unenforceable.⁹ See also para 1 Note 10 *ante*

Note 4a

- 1 (1930) 1930 P C 100 (102) 5: Ind App 117

57 Cal 1302 (P C)

- (1033) 1933 Cal 817 (813) Non compound
able offence

- 2 (1935) 1935 Sund 10 (11)

Note 5

- 1 (19..J) 1971 Sind I (4) 28 Sind L R 299

(1934) 1934 All 493 (495) Award partitioning joint property including agricultural land by metes and bounds—Civil Court has no jurisdiction to enter *tam* application for filing award [See also (1856) 1856 1 un Re No 56 p4c118]

- 2 (1918) 1918 Lah 69 (69 GJ) As the award merely settled shares of the parties and did not actually partition agricultural land the matter is cognizable by civil Court.

1919 O dh 987 (288) A di puta as to
be
at

Vol I p678

Vol I p 678

- 6 (1910) 32 VII 503 (513)

- 7 (1908) 29 411 137 (139)

8. Halsbury's Laws of England (new ed.)

- Vol 1 p 628
(1934) 1331 All 133 (133)

6 Form of award

An award on a reference *through Court*, should be in writing signed by the arbitrators. See Para 10, *ante*. But as has been seen in Note 1 to that paragraph an award made on a reference made without the intervention of the Court need not be in writing or be signed by the arbitrators. It may be oral.¹ But if the arbitrators resolve that their award is to be put in the form of a document to be signed by them as a final expression of their decision it is only such document that can be treated as their award.²

6a Registration of award

An award on a reference without the intervention of the Court affecting immovable property of the value of more than Rs 100 is compulsorily registrable if it falls within the terms of S 17 of the Registration Act.³

7 Part of award if can be filed

If the parties agree by the terms of the submission or at the time of the arbitration that the matters in dispute may be taken up *seriatim* by the arbitrators and that the award may be delivered in separate parts each part may be treated as a separate award and filed under this paragraph.⁴

But in the absence of any specific provision in the submission if the award (1) determines any matter not referred to arbitration or (2) fails to determine any of the matters referred to arbitration or (3) is indefinite or vague or is illegal in respect of a portion of it the question arises whether the Court can file the valid portion of the award. If in case (1) the matter not referred to arbitration can be separated from the portion referred the latter can be filed the former being treated null and void.⁵ But if the objectionable portion is inseparable from the rest or not so clearly separable that it can be seen that the part of the award attempted to be supported is not at all affected by the faulty portion the whole award will be avoided.⁶

In case (2) the award is not a *complete* award and is therefore invalid.⁷ But the parties may waive this objection⁸ and if they show by their conduct that they do not want a decision upon the points⁹ or if the arbitrators find that there is no matter in difference in respect of these points⁷ the award may be held to the extent it was given. Similarly if an award leaves nothing to be done but the

Note 6

- 1 (1937) 11 D.L.J. 60 (61) 11 L.J. 131
Halsbury's Laws of England Vol I
p 602
(1934) 1934 Bom 6 (8)
(1933) 1933 Lah 173 (174)
(1919) 1919 Mad 1113 (1113 1114)
(1862 63) 1 Mad H.C.R. 178 (180)
- 2 (1872 1873) 2 U.L.R. 216
(1934) 1934 Bom 6 (8)

Note 6a

1

v 7

- (1909) 1909 Sind 200 (203)
(1872) 17 Suth W.R. 352 (359)
[But see (1881) 3 Mad 68 (70) No
longer law.]
[See also (1935) 1935 Rang 34 (35)
benefit
from]

- 4 (1911) 14 Cal I Jour 189 (203)
(1934) 1934 All 493 (494)
[See also (1874) 21 Suth W.R. 182
(189)]
[See also points 2 and 3 to Note 7 to
Paragraph 14 *ante*]
- 5 [See point 3 to Note 3 to Paragraph 14
ante]
(1934) 1934 Lah 302 (306)
- 6 (1912) 1912 Mad W.N. 1076 (1077)
(1911) 14 Cal I Jour 188 (209 310)
(1921) 1921 All 384 (388) 43 All 108
(1921) 1921 All 384 (386 387) 43 All 103

performance of some ministerial act it is not faulty for want of finality on the principle *certum est quod certum reddi protest*⁸ (that is certain, which can be made certain)

In case (3) also, the award is invalid⁹ Where the award did not state either the facts found by the arbitrators or the grounds for their decision and it was consequently impossible to hold that the award proceeded solely on those grounds which entitled the arbitrators to act under the arbitration clause, it was held that if the bad was not separable from the good portion of the award the whole was bad¹⁰

8 Lost award

Where an award in writing is lost secondary evidence of the terms thereof cannot be adduced in a proceeding under this paragraph The remedy of the parties is to file a regular suit to enforce the terms of the award¹

9 Grounds of objection under Paras 14 and 15

See generally Paras 14 and 15 and the notes thereto Where a period of time is fixed in the submission for the making of an award, the arbitrators have no jurisdiction to make the award after the period and the award so made is invalid¹ Where no such period is fixed in the submission the award should be made within a reasonable time which should be decided with reference to the facts of each case²

10 Proved

Under S 526 of the old Code, it was provided that where no ground as was mentioned in Ss 520 and 521 (Paras 14 and 15) was shown the Court should order the award to be filed It was held in some cases that even on a mere *allegation* by affidavit or verified statement that the award was bad on the ground specified in S 520 or S 521 the Court was bound to dismiss the application and refer the parties to a separate suit¹ In other cases it was however held that the word 'shown' which occurred really meant proved and that it is not sufficient to allege cause or make out that there is room for argument, but that the cause must be both alleged and proved to the satisfaction of the Court² The substitution of the word proved gives effect to the latter view

11 Res judicata—See Note 27 to S 11 ante

As has been seen in that note all claims embraced in a submission are put an end to by a valid award which thereafter furnishes the only basis for determining the rights of the parties and constitutes a bar to any action on the original demand¹ See also

¹ (1911) 11 Ind C S

² See post ¶ 3 to Note

10 (1922) 122 Cal 399

No.

1 (1920) 1920 Lah 396

(1887) 12 M d 331 (

Note 9

1 (1933) 1933 Lah 173 (174)

2 (1914) 1919 Lah 406 (407) 1919 Pan Re No

"1 Agreement to refer was in 1905
—Award in 1910—Held award can
not be filed

Note 10

1 (1883) 3 Cal 557 (560)

(1881) 10 Cal 74 (71)

(1887) 11 Cal 106 (115)

2 (1887) 11 Cal 106 (108)

Note 11

1 (1916) 1916 L B 74 (75) 8 L B R 10
(1918) 1919 Sind 13 (16) 1919 Ind 13
(1885) 11 Cal 386 (32) 12 Ind 416 (11 C.)
(1916) 1916 Oudh 181 (283) 18 Oudh Cas
82 Title of persons claim from award
award cannot be defeated merely
because award was not filed in
Court

(1920) 1920 Lah 20 (27-)

(1834) 18 Bom 492 (504)

defence in a subsequent suit between the parties³ even though it was made on a private reference in another pending suit³

12 Withdrawal of application—See Note 12 to Para 20, *ante* and Note 15 to Para 1

13 Revocation of submission—See Note 12 to Para 17, *ante*

14 Appeal against an order filing or refusing to file award—See S. 104 Note 15 *ante*

An appeal against an order filing or refusing to file an award is not a decree or an order having the force of a decree and an appeal against such order is chargeable with Court-fee under Sch. 2, Art. 11 of the Court-fees Act¹. The value for purposes of jurisdiction in such cases is to be based on the same method as that for the original application itself, i.e., the value of the subject-matter of the award².

15 Appeal against decree on award—Sub S. (2)

Section 104 (f) provides for an appeal against an order filing or refusing to file an award under this Paragraph. This right of appeal is not taken away merely because a decree is passed in accordance with the award^{1a}. See S. 104, Note 15 *ante*.^{1a}

But no appeal lies from a decree passed under this sub-paragraph except in so far as the decree is in excess of, or not in accordance with the award¹. Thus where the decree does not correctly interpret the award² or where the decree awards something which the arbitrators having jurisdiction to award did not award,³ an appeal will lie. But the appellant is not entitled in such appeal to re-open the whole case and to address on all questions which were raised before the lower Court, his attack must be confined to the *legality of the decree as compared with the award*⁴.

The decree passed under this Paragraph is a decree "open to appeal" within the meaning of O. 43, R. 1 (d), and, therefore, an appeal lies against an order refusing to set aside an *ex parte* decree passed under this Paragraph⁵.

16 Enforcement of award

An award could not be enforced by execution until it has been made a Rule of the Court by a decree being passed in accordance therewith¹. A person who was a party to the arbitration but who was not a party to the decree which followed the award could not enforce the decree².

2. (1920) 1920 L. B. 6 (7) 3 U. B. R. 210

3. (1896) 20 Bom. 238 (248)

(1889) 16 Cal. 482 (485)

(See also (1914) 1914 L. J. 140 (146).

21 Ind. Cas. 925 (926) 1914 Pun. Re. No. 28 Award in proceedings under paras. 17 and 19—No appeal lies from order filing award

The following cases under the old Code

are no longer law—

(1901) 1901 Pun. Re. No. 84 page 272

(1878) 3 Cal. 375 (378)

(1881) 1881 Pun. Re. No. 70 page 156

(1906) 1906 Pun. L. R. No. 38 page 120

Note 14

1. (1932) 1932 Oudh. 282 (282) 6 Luck. 703

2. (1933) 1935 Mad. 723 (724)

Note 15

1a (1935) 1935 Pesh. 69 (71) The appellate Court can go into question of existence of reference and award and also questions falling under paras. 14 and 15 *ante*

1a [See also (1933) 1933 All. 166 (167) The Court should pass an order filing award and then pass a decree in accordance with award]

¹ [See also (1933) 1933 All. 59 (60)]

1. (1911) 9 Ind. Cas. 39 (39) (Lah)

(1869) 12 Suth. W. R. 85 (85)

(1870) 19 Suth. W. R. 62 (62) But an appeal will lie against an order made in execution proceedings taken in that judgment

17 Appeal to Privy Council

See Note 8 to S 104 *ante* The provisions of sub Para (2) cannot be read so as to affect the right of the parties to go in appeal to the Privy Council under Ss 109 to 111 of the Code and do not bar any such appeal¹

18 Revision

The general principle in the case of awards is that it is final. An appeal is allowed from a decree passed on an award only to a very limited extent. A revision in such a case would be more objectionable than an appeal¹. The High Court should, therefore, proceed very warily in allowing revision in cases of award. No revision will lie where the conditions of S 115 are not satisfied². But where there is no real dispute which could be referred to arbitration in award filed by the arbitrators into Court amounts to an abuse of the process of the Court and therefore the order is open to revision³. Similarly, where the Court assumes jurisdiction which it has not and files the award a revision will lie⁴. It was broadly held in the undermentioned cases⁵ relying upon the decision of the Privy Council in *Ghulam v Muhammad Hassan*^{6a} that no revision at all will lie in any case in which a decree has been passed on an award. It is submitted that this is not correct and that the decision of the Privy Council does not lay down any such broad proposition.

Exclusion of certain words in the Specific Relief Act 1877

P. 22. [New] The last thirty seven words of Section 21 of the Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration, or to any award, to which the provisions of this schedule apply

Synopsis

Exclusion of last thirty seven words in S 21 Specific Relief Act

Note No. 1

1 Exclusion of last thirty seven words in S 21 Specific Relief Act

Section 21 of the Specific Relief Act enumerates the contracts which can not be specifically enforced and the last portion of the section runs as follows—
And save as otherwise provided by the Code of Civil Procedure and the Indian Arbitration Act 1899, no contract to refer present or future differences to arbitration shall be specifically enforced *but if any person who has made such a contract and has refused to perform it sues in respect of any subject which he has contracted to refer the existence of such contract shall bar the suit*. The words in italics are the last thirty seven words of this section referred to in this Paragraph. See also Note 1 to Para 18 *ante*

P. 23. [New] The forms set forth in the Appendix with such variations as the circumstances of each case require, shall be issued for the respective purposes therein mentioned

Forms

Note 17

1 (1912) 15 Ind Cas 2 (3) 15 Oudh Cas 55

Note 18

1 (1902) 29 Cal 167 (187) 29 Ind App 51

1902 Pun Re No 25 (P C)

2 (1921) 1921 Mad 271 (271)

3 (1915) 1915 Lah 105 (105) 1915 Pun Re

No 66 No material irregularity—

No revision

(1932) 1932 All 154 (154)

(1914) 1914 Lah 477 (477) No revision lay in the absence of material irregularity

ties in the proceedings

4 (1914) 1914 Bom 123 (121) 33 Bom 63a

5 (1899) 16 Cal 482 (486) Agreement of reference vague and indefinite—award in pursuance of it is bad and cannot be enforced

(1885) J Bom 82 (82)

(1884) 10 Cal 11 (13)

[See also (1902) 3 Oudh Cas 1

6. (1919) 1919 Lah 349 (349)

Ca (1902) 29 Cal 167 (185) 29 Ind App 51

1902 Pun Re No 25 (P C)

Page 1

Application for a Order of Reference

(Title of sum)

- 1 This suit is instituted for (state nature of claim)
- 2 The matter in difference between the parties is (state nature of difference)
- 3 The applicants being all the parties interested have agreed that the matter in difference between them shall be referred to arbitration
- 4 The applicants therefore apply for an order of reference

$$\begin{array}{cc} A & B \\ C & D \end{array}$$

Dated the _____ day of _____ 19____

If the parties are agreed as to the arbitrators, it should be so stated

20

Order of Reference

(Title of suit)

Upon reading the application presented on the _____ day of _____, 19____, it is ordered that the following matter in difference arising in this suit, namely —

be referred for determination to X and Y, or in case of their not agreeing, then to the determination of Z, who is hereby appointed to be umpire, and such arbitrators are to make their award in writing on or before the day of 19 and in case of the said arbitrators not agreeing in an award, the said umpire is to make his award in writing within months after the time during which it is within the power of the arbitrators to make an award shall have ceased.

Liberty to apply

Given under my hand and the seal of the Court, this day of 19
Judge.

No. 3.

Order for Appointment of New Arbitrator

(Title of suit)

Whereas by an order dated the _____ day of _____ 19____, [state order of reference and death, refusal etc of arbitrator] it is by consent ordered that Z be appointed in the place of X (deceased or as the case may be) to act as arbitrator with Y, the surviving arbitrator, under the said order, and it is ordered that the award of the said arbitrators be made on or before the _____ day of _____ 19____.

Given under my hand and the seal of the Court, this day of 19
Judge.

'No 4.

Special Case.

(Title of sum)

In the matter of an arbitration between *A. B.* of _____ and *C. D.* of _____ the following special case is stated for the opinion of the Court. —

[Here state the facts concisely in numbered paragraphs]

The questions of law for the opinion of the Court —

First, whether _____

Secondly, whether _____

Dated the _____ day of _____ 19 _____

A
Y

No 5

Award

(Title of suit)

In the matter of an arbitration between A B of _____
and C D of _____

Whereas in pursuance of an order of reference made by the Court of _____
and dated the _____ day of _____ 19 _____ the following matter in
difference between A B and C D namely _____

has been referred to us for determination

Now we having duly considered the matter referred to us do hereby make our award as follows —

We award

(1) that _____

(2) that _____

Dated the _____ day of _____ 19 _____

A
1.

THE THIRD SCHEDULE.

EXECUTION OF DECREES BY COLLECTORS.

P. 1. [S. 321.] Where the execution of a decree has been transferred to the Collector under Section 68, he may—

Powers of Collector

- (a) proceed as the Court would proceed when the sale of immovable property is postponed in order to enable the judgment-debtor to raise the amount of the decree; or
- (b) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold; or
- (c) sell the property ordered to be sold or so much thereof as may be necessary.

Synopsis

	Note No		Note No
I Applicability of this Schedule	1	(c) Competency of Court to call back records sent to the Collector	4
II Powers of the Court and of the Collector	1a	(d) Mortgage of part of the property in satisfaction of the decree	5
(1) Ancestral property	2	III Clause (a) —Order 21 Rule 83	6
(2) Application to set aside sale— See Notes 2 to 6 to S 70	3	IV On payment of a premium	6a
		V Appeal	7

Other Topics

Madras Court of Wards Act	See Note 1 V
Pt (1)	tion 17-18 See Note 1 Pt (10)
Power of Collector to dismiss or restore execution	Power of Collector to order payment by instalments See S 70 Note 2 Pt (6)

I Applicability of this Schedule

Section 148, Bengal Tenancy Act (VIII of 1885), provides that this Schedule shall not apply to any suit for recovery of rent. Similarly, S 192, Cl (a) of the Madras Estates Land Act (I of 1908), enacts that this Schedule shall not apply to any suit, appeal or other proceeding under that Act.

Under S 9, sub-S (3) of the Central Provinces Tenancy Act (I of 1920), the Collector executing a decree for rent may, notwithstanding anything contained in this Schedule, allow the tenant time, not exceeding in the aggregate two months, to satisfy the decree.

Section 22-A, sub-S (2) of the Dekkhan Agriculturists' Relief Act (XVII of 1879), provides that a sale under that section shall be deemed to be a sale under the provisions of Para 10 of this Schedule.

The provisions of S 11, Madras Court of wards Act, do not affect the duties of the executing Court or the functions of the Collector under this Rule¹

1a Powers of the Court and of the Collector

As has been seen in Note 2 to S 70, *ante*, where a decree is transferred to the Collector for execution, the Collector has the powers of execution only and not of deciding other matters and even the powers of execution are limited by this Rule to the three courses specified in this Rule¹. Thus he has no power to inquire into the objections to attachment or sale² to entertain applications for rateable distribution³ to decide whether the decree was satisfied⁴ or to decide whether there has been a compromise⁵. Nor can he deal with property not covered by the order of sale⁶ or set aside the acts of the owner of the property before the transfer was made⁷.

Within the limits of the Rule however the Collector has absolute jurisdiction to find out the best method of execution allowed to him by law⁸. Where the execution of a decree obtained against a Hindu father and sought to be executed against the joint family property is transferred to the Collector for execution, he becomes seized of the entire interest including the sons' interest in the property, and can sell it in such execution⁹. He can dismiss an execution application for default and can likewise restore it in proper cases¹⁰. Similarly where an order is passed under a mistake he can set it aside on discovery of the mistake¹¹.

In all matters arising in execution but not covered by the provision of this schedule, the civil Court continues to have jurisdiction. Thus the Court has power to hear objections to the sale held by the Collector¹² or to entertain a suit to set aside the order of the Collector setting aside a sale¹³ or to inquire into the question whether the decree is satisfied^{13a}. Where the Collector fails to effect the sale of property ordered to be sold by the decree it is open to him to return the papers to the Court. But the Court has the power to send the papers back if the reason which prevented the sale was not such as to operate as a complete impediment to the execution of the decree no fresh application for that purpose is necessary¹⁴. It has been held in the undermentioned cases that after the transfer of the decree to the Collector for execution the civil Court cannot entertain an application to add legal representatives of a deceased party¹⁵.

See also Note 2 to S 70 Notes to S 51 and Notes to O 20 R 13

2 Ancestral property

According to the Allahabad Government Notifications, decrees for the sale of ancestral property must be transferred to the Collector for execution. See Note 3

Sch III Para 1—Note 1

1 (1918) 1918 Mad 348 (312) 41 Mad 503

Note 1a

1 (1893) 7 Bom 332 (335)

2 (1921) 1921 Bom 45 (46 47) 45 Bom 817

Collector cannot confirm the sale

3. (1974) 1974 All 307 (303) 46 All 414

9. (1931) 1931 All 541 (517) 411

10 (1927) 1927 Nag 67 (20 21) 15 Nag 22

152 But cannot invest gate 152

13 (1883) 1887 All W N 26 (107)

13a (1933) 1933 S 112 (114 115) 35 L 1

14 (1906) 1906 Oudh 34 (14)

15 (1871) 1873 All W N 164 (164)

to S 70 It has been held that property to which a title is obtained by gift is not "ancestral property"¹

See also the undermentioned case²

3 Application to set aside a sale *See Notes 2 to 6 to S 70*

In Allahabad the Collector has been empowered to set aside sales on grounds similar to those provided for by O 21 Rr 89 and 90¹ The orders passed by the Collector in such matters have been held to be judicial orders² It has also been held that the Collector has an inherent power to set aside a sale held by him if he is satisfied that it is vitiated by the fraud of the decree holder³

4 Competency of Court to call back records sent to the Collector

The Court that has made a decree or judicial order which has been transmitted to the Collector for execution is not deprived of its judicial power with respect to it It has power where necessary, to recall its own records transmitted to the Collector¹ But such judicial power ought not to be exercised unless the Court is set in motion by one of the parties to the proceedings in execution²

See also Note 2 to S 70 and Note 7 to S 54

5 Mortgage of part of the property in satisfaction of the decree

It is open to the executing authority to effect a mortgage of part of the property to satisfy a mortgage decree¹

6 Clause (a)—Order 21 Rule 83

The postponement of the sale should be for a reasonable period It should not be unreasonably long *See Note 3 to O 21 R 83*

6a On payment of a premium

Where the Collector intends to let the land he should do so on a premium to raise the amount of the decree He should not let it out on a yearly rental¹

7 Appeal

See Note 7 to S 70 and the following case¹

P. 2. [S 322] Where the execution of a decree not being a

Procedure of Collector in special cases decree ordering the sale of immovable property in pursuance of a contract specifically affecting the same, but being a decree for the payment of money in satisfaction of which the Court has ordered the sale of immovable property, has been so transferred, the Collector, if, after such inquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immovable property, may proceed as hereinafter provided

Note 2

1 (1916) 1916 All 107 (10ⁿ) 38 All 481

2 (1933) 1933 All 133 (138)

Note 3

1 (1935) 1935 All 668 (871)

2 (1935) 1935 All 668 (871)

3 (1935) 1935 All 668 (869)

Note 4

1 (1883) 7 Bom 332 (370)

(1887) 11 Bom 418 (482)

[See also (1884) 7 All 407 (409)]

(1883) 5 All 314 (315)

2 (1894) 6 Bom 301 (303)

Note 5

1 (1925) 1925 Bom 77 (978)

Note 6a

1 (1933) 1933 Bom 369 (369)

Note 7

1 (1890) 12 All 564 (568) The Government has power to prescribe Rules providing for appeals from Collector's orders

*Synopsis***Decree for the payment of money** *Note No 1***1 Decree for the payment of money**

A decree for sale of ancestral land or of an interest in such land in enforcement of an hypothecation on such land is a decree for the recovery of money within the N W P Government Notification, No 671 of 30th August 1850¹

P. 3. [S 322-A] (1) In any such case as is referred to in paragraph 2, the Collector shall publish a notice, allowing a period of sixty days from the date of its publication for compliance and calling upon—

Notice to be given to decree holders and to persons having claims on property

(a) every person holding a decree for the payment of money against the judgment debtor capable of execution by sale of his immoveable property and which such decree-holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder,

(b) every person having any claim on the said property to submit to the Collector a statement of such claim, and to produce the documents (if any) by which it is evidenced

(2) Such notice shall be published by being affixed on a conspicuous part of the court-house of the Court which made the original order for sale, and in such other places (if any) as the Collector thinks fit, and where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise

Synopsis

Scope of the Para

Note No

1

Power of Collector to hear objections

Note No 2

1 Scope of the Para

The persons who are entitled to notice under this Paragraph are —

(1) Persons holding decrees for money—

(a) which are capable of execution by sale of the immoveable property of the judgment debtor, or

(b) in which proceedings for sale of such property are pending and

(2) persons having any claim on the property of the judgment debtor

Where properties have been placed under the management of the Collector the Court cannot, under the provisions of Part II, *infra* issue any process

against such properties in execution of a decree for the payment of money. The holder of decree passed *after* the property comes under the management of the Collector is therefore not a person whose decree is capable of execution by sale of the immovable property of the judgment debtor and is not entitled to be placed on the list of creditors named under the following Paragraph¹

2 Power of Collector to hear objections

The Collector is not authorized to hear any objection to the sale of the property advertised for sale. He can only call for claims¹. Where the Collector acting under this Paragraph called on every person who had claim on the property of the judgment debtor to submit a statement thereof and in pursuance of the authority vested in him satisfied the claims made it was not competent to a person who had not made the statement required to claim to set aside the arrangement made by the Collector².

P. 4. [S 322-B] (1) Upon the expiration of the said period,

Amount of decrees for payment of money to be ascertained and immovable property available for their satisfaction

the Collector shall appoint a day for hearing any representations which the judgment-debtor and the decree holders or claimants (if any) may desire to make and for holding such inquiry as he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment debtor's immovable property, and may, from time to time, adjourn such hearing and inquiry.

(2) Where there is no dispute as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed or as to the relative priorities of such decrees or claims or as to the liability of any such property for the satisfaction of such decrees or claims the Collector shall draw up a statement specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immovable property available for that purpose.

(3) Where any such dispute arises the Collector shall refer the same with a statement thereof and his own opinion thereon, to the Court which made the original order for sale, and shall, pending the reference stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof is within its jurisdiction, or transmit the case to a competent Court for disposal and the final decision shall be communicated to the Collector, who shall then draw up a statement as above provided in accordance with such decision.

Synopsis

Note No 1 | Appeal

Note No 2

Statement of debts

Sch III Para 3—Note 1

Note 2

1 (1890) 19 All 313 (31C)

1 (1898) 20 All 423 (42D)

2 (1891) 4 C I L R 118 (118)

1 Statement of debts

In the statement of debts to be prepared by the Collector under this paragraph only such persons are to be entered as are referred to in Para 3 above. As has been seen in Note 1 to that paragraph a person who has obtained a decree for money *after* the management of the debtor's property has been placed in the hands of the Collector is not a person referred to in that paragraph and is not therefore entitled to be placed in the statement prepared under this paragraph¹

2 Appeal See Para 6 *infra*

P. 5. [S 322-C] The Collector may, instead of himself issuing the notices and holding the inquiry required by paragraphs 3 and 4, draw up a statement specifying the circumstances of the judgment-debtor and of his immovable property so far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court and such Court shall thereupon issue the notices, hold the inquiry and draw up the statement required by paragraphs 3 and 4 and transmit such statement to the Collector

Where District
Court may issue
notices and hold in
quiry

P. 6. [S 322-D] The decision by the Court of any dispute arising under paragraph 4 or paragraph 5 shall as between the parties thereto have the force of and be appealable as a decree

Effect of decision
of Court as to dispute

Synopsis

Appeal	Note No	
	1	Court fee
1 Appeal		

1 Appeal

The decision by the Court of any dispute arising under Para 4 and 5 under the terms of the paragraph appealable as a decree. Where a District Judge to whom a dispute was referred by the Collector, wrongly sent back the same to the Collector and he decided it it was held that the remedy of the aggrieved party was to have *appealed* against the order of the District Judge and not to go to the Collector for a declaration of his right¹

2 Court fee

Article 11 of Sch II of the Court fees Act 1870 applies only to decrees and orders of appeal against decisions which are not decrees or orders having the force of decrees. An order made by the Court under paras 4 and 5 has as set out in this paragraph the force of a decree and is consequently not within Art 11 of the second schedule of the Court fees Act 1870. A memorandum of appeal against such an order is therefore chargeable with an *ad valorem* fee under Art 1 Sch I of that Act¹. The High Court of Madras has however, taken a contrary view and held that it is chargeable only with a fixed fee². The decision cannot be accepted as correct.

Sch III Para. 4—Note 1

1 (1896) 19 All 313 (315)

Sch III Para. 6—Note 1

1 (1896) 18 All W N 69 (70)

Note 2

1 (1896) 7 All 600 (601)

2 (1896) 4 Mad 40 (41)

P. 7. [S 323] (1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5 the Collector may,—

Scheme for liquidation of decrees for payment of money

- (a) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property, or
- (b) if it appears that the amount with interest (if any) in accordance with the decree, and when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding the original order for sale)—
 - (i) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property, or
 - (ii) by mortgaging the whole or any part of such property, or
 - (iii) by selling part of such property, or
 - (iv) by letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale; or
 - (v) partly by one of such modes, and partly by another or others of such modes

(2) For the purpose of managing the whole or any part of such property, the Collector may exercise all the powers of its owner

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrancer which has become payable or compound the claim of any incumbrancer whether it has become payable or not, and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a suit in the proper Court, either in his own name or the name of the judgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators one to be chosen by each party, or of an umpire to be named by such arbitrators

(4) In proceeding under this paragraph the Collector shall be subject to such Rules consistent with this Act as may, from time to time, be made in this behalf by the Local Government

Synopsis

Scope of the paragraph Note No 1

1 Scope of the Paragraph

Where a decree is transferred to the Collector for execution the latter has absolute jurisdiction to decide and find out the best method of execution allowed to him by law¹. The civil Court has no power to pass orders in such matters. Thus where certain properties were sold by the Collector but the whole of the sale amount was not deposited by the auction purchaser it is entirely in the discretion of the Collector to decide whether he would re sell the property or not in order to realise the balance of the purchase money². But as has been seen in Note 1 to Para 1 above the Collector, has no jurisdiction to decide whether the decree is satisfied³.

Where in exercise of his powers the Collector has granted lease to the decree holder in satisfaction of his decree he cannot subsequently resale from it nor can the Court interfere in the matter⁴ as, for example authorising the grant of a fresh lease^{5a}. Where a decree was transferred to the Collector for making suggestions for the satisfaction of the decree and the Collector suggested that half the attached land should be farmed out to the decree holder for certain period in satisfaction of the decree but the latter was not prepared to take such lease and the executing Court thereupon merely filed the proceedings it was held that the procedure was wrong and the proceedings could be filed only if all the lawful means for satisfying the decree had been tried and found to be impracticable⁵.

An order of a Collector under this Rule disallowing the application of a decree holder that the amount of the decree might be satisfied by a temporary alienation instead of by a sale is not appealable⁶.

P. 8. [S 324] Where, on the expiration of the letting or management under paragraph 7, the amount to be recovered has not been realized, the Collector shall notify the fact in writing to the judgment debtor or his representative in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property, and, if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property or part accordingly.

Sch III Para 7—Note 1

1 (1924) 1924 All 807 (303) 46 All 414

2 (1924) 1924 All 64 (63) 46 All 62

3 (1911) 17 L J Cas 147 (143) 37 Bom 37

P. 9. [S 324-A] (1) The Collector shall, from time to time, render to the Court which made the original order for sale an account of all moneys which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of the Court

Collector to render
accounts to Court

(2) Such charges shall include all debts and liabilities from time to time due to the Government in respect of the property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and, if the Collector so directs, the expenses of any witnesses summoned by him

(3) The balance shall be applied by the Court—

(a) in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit, and

(b) where the Collector has proceeded under paragraph 1, in satisfaction of the original decree in execution of which the Court ordered the sale of immovable property, or otherwise as the Court may under Section 73 direct; or

(c) where the Collector has proceeded under paragraph 2—

(i) in keeping down the interest on incumbrances on the property,

(ii) where the judgment-debtor has no other sufficient means of subsistence, in providing for his subsistence to such amount as the Court thinks fit, and

(iii) in discharging rateably the claims of the original decree holder and any other decree holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered

(4) No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judgment-debtor or such other person as the Court directs

Synopsis

Scope of the Paragraph	Note No	Note No
Maintenance of judgment debtor's family	1	3
	2	4
		Charges
		Claim for rateable distribution—Sub
		Para 3 (c) (iii)

Other Topics

Accounting by Collector See Note 1

1 Scope of the Paragraph

Where a decree has been sent to the Collector for execution he is bound to render, to the Court, an account of all monies which came into his hands and must hold the balance of the amount after deducting necessary charges at the disposal of the Court¹. But he cannot be compelled either to give up the account books into the Court nor does the Paragraph require him to pay the balance into Court².

2 Maintenance of judgment debtor's family

The provision for the maintenance of the judgment debtor's family is a matter for the determination by the Court and not by the Collector¹.

3 Charges

The Collector is entitled to recover as expenses of sale fees on the scale prescribed for sales under the Land Revenue Code. Poundage fee may also be allowed in addition to such expenses¹.

4 Claims for rateable distribution—Sub Para 3 (c) (iii)

The omission, by the person claiming rateable distribution, to invite the attention of the Collector to his own right of rateable distribution does not deprive him of the right to claim such distribution in a regular suit the fact that the decree which is noted to be satisfied will have to be re-opened does not affect the question¹.

See also Note 4 to S 73 *ante*

P. 10. [S 325] Where the Collector sells any property under this schedule, he shall put it up to public auction in one or more lots, as he thinks fit, and may—

Sales how to be conducted

- (a) fix a reasonable reserved price for each lot;
- (b) adjourn the sale for a reasonable time whenever, for reasons to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property,
- (c) buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit

*Synopsis***Scope of the Paragraph Note No 1****Sch III Para 9—Note 1**

- 1 (1894) 16 All 1 (2) He cannot make over the whole proceeds to the decree holder
- (1931) 1931 All 700 (701) He cannot dispose of the balance in excess of the decree amount without instructions
- (1912) 16 Ind Cas 59 (60) 36 Bom 519
- (1904) 6 Bom L R 825 (830 831)
- (1890) 3 C P L R 147 (149)

- 2 (1904) 6 Bom L R 825 (830 831)

Note 2

- 1 (1904) 6 Bom L R 822 (824)
- (1904) 6 Bom L R 825 (830 831)

Note 3

- 1 (1927) 1927 Bom 17 (18)
- (1926) 1926 Bom 335 (336)

Note 4

- 1 (1933) 1933 All 665 (669)

1 Scope of the Paragraph

As soon as a sale is confirmed, the Collector is *functus officio* and his only duty is to return the papers to the civil Court¹

According to the Bombay civil circulars an application by the decree holder for permission to bid at the auction held by the Collector must be made to the Collector²

P. 11. [S 325-A] (1) So long as the Collector can exercise

Restrictions as to alienation by judgment debtor or his representative and prosecution of remedies by decree holders

or perform in respect of the judgment-debtor's immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money

(2) During the same period no Civil Court shall issue any process of execution either against the judgment debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived

Synopsis

	Note No.		Note No.
Incompetency to transfer	1	Power of civil Court to issue process	4
Alienation subsequent to adjustment	2	Termination of the Collector's power	5
Permission of the Collector	3	Limitation	6

Other Topics

Alienation subsequent to adjustment See Note 1 Pt (17)

1 Incompetency to transfer

This paragraph imposes a *personal disqualification* on the judgment debtor and his representatives by declaring that they are incompetent to mortgage, charge, lease or alienate their properties whilst they are under the management of the Collector under the provisions of this schedule¹ A mortgage charge lease or other alienation made in contravention of the provisions of this paragraph is wholly void² and not merely voidable as against the Collector and persons claiming through him³ It is incapable of ratification or of enforcement in equity⁴ Where

Sch III Para 10 Note 1

- 1 (198) 11 Bom 48 (481-487)
2 (1913) 1918 Bom 216 (217) 42 Bom 671

Sch III Para 11 Note 1

- 1 (190) 3 Nag L R 171 (176)
2 (1913)

A mortgagee under a mortgage which is void as being in contravention of the provisions of this paragraph pays off a prior mortgage he will have no right to be subordinated to the rights of the prior mortgagee⁶

But the incompetency of the judgment debtor under this paragraph is confined to the property in respect of which the Collector has assumed management and does not extend to property which has been excluded from such management. A transfer by the judgment debtor of such property is not within the prohibition of this paragraph⁶. Again the disability to transfer property in respect of which the Collector has assumed management will not affect the validity of any agreement to pay money recoverable from his person or other property. Such an agreement is enforceable in law and is as valid as any other contract^{6a}.

A member of a joint Hindu family against the manager of which a decree has been obtained as representing the family is a judgment debtor within the meaning of this paragraph and is incompetent to alienate any portion of the properties in the management of the Collector⁷. But the incompetency does not extend to the lessee from the Collector and he can therefore alienate his interest in the lease⁸. The disability to alienate begins from the date of the order of transfer to the Collector and continues so long as any of the debts, for the satisfaction of which the property was taken under the management of the Collector, remains unpaid⁹. In other words the disability continues until the decree is satisfied and the proceedings in appeal and revision therefrom are complete¹⁰.

Illustrations

1. If the judgment debtor makes a transfer of his property after the Court has made an order transferring the decree for execution to the Collector and before that order reaches the Collector the transfer is void¹¹.
2. A decree was transferred to the Collector for execution. A portion of the property of the judgment debtor was sold by the Collector the price realized being more than sufficient to satisfy the decree. Before the sale was confirmed the debtor died. The sale was confirmed. The sale was valid.
3. The execution of a decree against a joint Hindu family was transferred to the Collector and he sold the property to the manager of the family for the purpose of such execution. The Collector granted a lease of the property to A for a certain number of years. A mortgaged the demised properties during the subsistence of the lease. The mortgage was valid. The incompetency of A continues so long as the scheme for liquidation is in progress.

Where, however, a sale takes place in contravention of this paragraph without either party knowing that he was violating the law, the vendor will in equity be compelled to refund the purchase money received by him¹⁴. Again

5 (1914) 1914 Oudh 302 (303)	27 Oudh	7 (1926) 1926 P C 165 (165)	24 Nig L R 1
Cis 56		(P C)	
6		(1931) 1931 All 541 (544)	
		8 (1919) 1919 Nig 29 (30)	16 Nig L R 61
		9 (1926) 1926 Nig 246 (247)	

10 (1914) 1914 Oudh 302 (303)	27 Oudh	7 (1926) 1926 P C 165 (165)	24 Nig L R 1
Cis 56		(P C)	
11 (1914) 1914 Oudh 302 (303)	27 Oudh	7 (1926) 1926 P C 165 (165)	24 Nig L R 1
Cis 56		(P C)	
12 (1914) 1914 Oudh 302 (303)	27 Oudh	7 (1926) 1926 P C 165 (165)	24 Nig L R 1
Cis 56		(P C)	
13 (1914) 1914 Oudh 302 (303)	27 Oudh	7 (1926) 1926 P C 165 (165)	24 Nig L R 1
Cis 56		(P C)	
14 (1914) 1914 Oudh 302 (303)	27 Oudh	7 (1926) 1926 P C 165 (165)	24 Nig L R 1
Cis 56		(P C)	

where a suit is brought by a mortgagee on a mortgage executed by the judgment debtor in contravention of this paragraph but the latter does not raise any plea as to the void character of the mortgage and a decree is passed thereon he cannot raise such objection in execution of the decree¹⁵

A contract of sale does not create a charge within the meaning of this Para¹⁶ The word *alienate* is used *ejusdem generis* with the preceding words 'mortgage charge or lease' and contemplates a transfer which would have a *present* effect and not a devise such as a will or a *donatio mortis causa* which can have operation only after the death of the testator¹

A family settlement based on the assumption of antecedent title in the parties is not an alienation and does not contravene this Para¹⁸

2 Alienation subsequent to adjustment

After an adjustment has been certified and is recorded by the Collector the prohibition against alienation imposed by this paragraph no longer subsists. It is competent to the judgment debtor to mortgage sell or otherwise alienate his property thereafter¹

Where a mortgage is made in contravention of the Para but the decree is paid out of the mortgage amount the mortgage is not void as the Collector cannot after the decree is satisfied exercise any of the powers given to him under the Cole and the disability of the mortgagor ceases²

3 Permission of the Collector

So long as the properties of the judgment debtor are in the management of the Collector his *written permission* is absolutely necessary to validate a mortgage or other alienation executed by the judgment debtor. The permission need not however take any special form. Nor is it necessary that every detail of the transaction should be sanctioned by the Collector nor should there be a separate permission in respect of each deed when it is clear that the whole transaction had his permission¹

Permission to alienate can be inferred from written words employed by the Collector from time to time²

A sale will be valid even if permission is obtained before the registration of the document³

A sale by a judgment debtor with the permission of the Collector under this schedule has not the same effect as a sale by a Collector himself in execution but amounts only to a private sale⁴

4 Power of civil Court to issue process

Where a Collector holds a judgment debtor's property under his control by virtue of the powers conferred on him by S 68 a new process cannot be issued by a civil Court in execution of a decree for the payment of money¹ But any attach

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4

5, 22, 144

Note 2

1 (1911) 12 I d Cas 512 (o 4) 35 Bom 516

2 (1933) 1933 Nag 234 (239 240)

(1931) 1934 Nag 33 (3a)

Note 3

1 (1921) 1921 Oudh 176 (181 182)

2 (1930) 1930 Oudh 510 (v18)

(1929) 1929 Oudh 441 (443) Permittitur in

valid
(1921) 1921 Oudh 176 (180) A process which is illegal cannot become legal when the Collector's powers cease

ment effected before the papers which had been returned by the Collector are sent back to the Collector will be valid² An attachment before judgment can be effected since it is not a *process in execution*³ The surplus sale proceeds after satisfaction of a mortgage decree may be attached in execution as it is not an attachment of any immovable property⁴ But no Receiver can be appointed to take an account of the annual income of the property within the control of the Collector⁵ The Allahabad High Court has held that the prohibition does not apply to a mortgage decree in which the Court has ordered the sale of specific property⁶

5 Termination of the Collector's powers

The powers of the Collector under the schedule terminate as soon as the decree is certified as satisfied¹ Thus where a deposit is made of the amount which would fully satisfy the decree² or where the Collector leases the property to the decree holder for a certain number of years in full satisfaction of the decree and the decree is certified as satisfied³ the Collector's powers under this schedule cease and an alienation made by the judgment debtor thereafter is not void But the mere fact that the property is sold and fetches more than the decretal amount does not put an end to the management of the Collector His powers continue to exist till the *confirmation* of the sale⁴ The presumption is that such powers continue until they are proved to have ceased⁵ Where a civil Court draws up

Form C in respect of the properties attached by it and sends the same to the Collector but the latter returns it to the civil Court for some corrections to be made therein the proceedings before the Collector must be deemed to be pending even during the period during which the Form C was pending in the civil Court for correction⁶

6 Limitation

This paragraph expressly excludes from calculation the period during which the decree is before the Collector for execution¹ The reason is that during such period the decree holders have no remedy by execution against the property of the judgment debtor in the management of the Collector² But the exclusion is permissible, only in cases where a provision has been made under Para 7 for the satisfaction of the decree and where the decree holder has in consequence been deprived of his remedy Consequently if no such provision is made the period cannot be excluded³

The words *period of limitation* in this Paragraph apply to the restrictions placed upon the right of the decree holder both by the Limitation Act 1908 and by S 48 of the Code⁴ Where at a sale held by the Collector no bidders appear and the Collector sends the papers back to the civil Court but the civil Court returns the papers again to the Collector the period from the

2 (1921) 1921 Oudh 176 (180)

3 (1922) 1922 Nag 238 (238)

4 (1927) 1927 Oudh 216 (217)

5 (1925) 1925 Oudh 448 (451) 23 Oudh Cas

6 (1931) 1931 All 38 (40)

5 (1931) 1931 All 541 (543)

6 (1922) 1922 Nag 267 (269) 18 Nag L R 15--

Note 6

7 (1908) 7 Ind Cn 500 (500) (Mad)

(1972) 11 Nag L R 3

4 (1913) 1913 All 64 (65) 42 All 118

(1910) 8 Ind Cn 311 (315) 13 Oudh Cas

date of the original application will be excluded for the purposes of S 48 of the Code⁵

P. 12. [S 325-B] Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct

**Provision where
property is in several
districts**

P. 13. [S 325-C] In exercising the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a civil Court to compel the attendance of parties and witnesses and the production of documents

**Powers of Collector
to compel attendance
and production**

⁵ (1926) 1926 All 831 (331)
(1920) 1920 Oudh 75 (76) An application
to send back papers is governed by

Art 181 or 182 according as it may
be for continuance or as a step in aid

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ment, effected before the papers which had been returned by the Collector are sent back to the Collector will be valid² An attachment before judgment can be effected since it is not a *process in execution*³ The surplus sale proceeds after satisfaction of a mortgage decree may be attached in execution as it is no an attachment of any immovable property⁴ But no Receiver can be appointed to take an account of the annual income of the property within the control of the Collector⁵ The Allahabad High Court has held that the prohibition does not apply to a mortgage decree in which the Court has ordered the sale of specific property⁶

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2 (1921) 1921 Oudh 1 6 (180)

3 (1922) 1922 Nag 238 (238)

4 (1927) 1927 Oudh 216 (21)

5 (1925) 1925 Oudh 448 (451) 23 Oudh Cas

330

6 (1931) 1931 All 38 (40)

Note 5

5 (1931) 1931 All 541 (543)

6 (1922) 1922 Nag 267 (269) 18 Nag L R 157

Note 6

1 (1908) 71 A C 780 (880) (Mad)

(972) 11 Nag L R 25

4 (1913) 1913 All 64 (65) 42 All 113

(1910) 8 Ind Cas 311 (31) 13 Oudh Cas

date of the original application will be excluded for the purposes of S 48 of the Code⁵

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Provision where
property is in several
districts

of the Collectors of the said districts as the Local Government may by general rule or special order direct

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Powers of Collector
to compel attendance
and production

— — —

⁵ (1926) 1926 All 331 (331)
(1920) 1920 Oudh 75 ("C) in application
to send back papers is governed by

Art 181 or 182 according as it may
be for continuance or as a step in aid

THE FOURTH SCHEDULE

(See Section 155)

ENACTMENTS AMENDED.

1	2	3	4
Year	No	Short title	Amendment
1870	VII	The Court fees Act, 1870	<p>In article 1 of Schedule I after the word "plaint" the words 'written statement pleading a set off or counter claim' and after the word 'Act' the word 'or defence' shall be inserted</p> <p>From article 11 of Schedule II the words 'from an order rejecting a plaint or' shall be omitted</p> <p>For the entry in the first column of Schedule II relating to article 19 the following entry shall be substituted, namely —</p> <p>"Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908"</p>

APPENDIX I.

The High Courts Act or the Charter Act, 1861.

An Act for establishing High Courts of Judicature in India.

(24 & 25 Vict., C. 104), (6th August, 1861)

[Repealed and re-enacted with slight modifications by the Government of India Act

5 & 6 Geo 5 Ch 61 (1915)]

Be it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same as follows —

- (1) It shall be lawful for Her Majesty by Letters Patent under the Great Seal of the United Kingdom to erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William aforesaid and by like Letters Patent to erect and establish like High Courts at Madras and Bombay for those Presidencies respectively. Such High Courts to be established in the

High Courts may be established in the several Presidencies of India

said several Presidencies at such time or respective times as to Her Majesty may seem fit and the High Court to be established under any such Letters Patent in any of the said Presidencies shall be deemed to be established from and after the publication of such Letters Patent in the same Presidency or such other time as in such Letters Patent may be appointed in this behalf

- (2) The High Court of Judicature at Fort William in Bengal and at the Presidencies of Madras and Bombay respectively shall consist of a Chief Justice and as many Judges not exceeding fifteen as Her Majesty may from time to time think fit and appoint who shall be selected from—

Constitution of High Courts

1st Barristers of not less than five years standing or

2nd Members of the Covenanted Civil Service of not less than ten years standing and who shall have served as Zillah Judges or shall have exercised the like powers as those of a Zillah Judge for at least three years of that period or

3rd Persons who have held judicial office not inferior to that of Principal Sudder Ameen or Judge of a Small Cause Court for a period of not less than five years, or

4th Persons who have been pleaders of a Sudder Court or a High Court for a period of not less than ten years if such pleaders of a Sudder Court shall have been admitted as pleaders of a High Court

Provided that not less than one third of the Judges of such High Courts respectively including the Chief Justice shall be Barristers and not less than one third shall be Members of the Covenanted Civil Service

- (3) Provided always that the persons who at the time of the establishment of such High Court in any of the said Presidencies are Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Presidency shall be and become Judges of such High Court without further appointment for that purpose and the Chief Justice of such Supreme Court shall become the Chief Justice of such High

Certain existing Judges herein named to be the first Judges of the High Courts

Court

- (4) All the Judges of the High Courts established under this Act shall hold their offices during Her Majesty's pleasure provided that it shall be lawful for any Judge of a High Court to resign such office of Judge to the Governor General of India in Council or Governor in Council of the Presidency in which such High Court is established

Tenure of office of High Courts

(5) The Chief Justice of any such High Court shall have rank and precedence before the other Judges of the same Court and such of the other Judges of such Court as on its establishment shall have been transferred thereto from the Supreme Court shall have rank and precedence before the Judges of the High Court not transferred from the Supreme Court and except as aforesaid all the Judges of each High Court shall have rank and precedence according to the seniority of their appointments unless otherwise provided in the patents

(6) Any Chief Justice or Judge transferred to any High Court from the Supreme Court shall receive the like salary and be entitled to the like retiring pension and advantage as he would have been entitled to if and in respect of service in the Supreme Court if such Court had been continued his service in the High Court being reckoned as service in the Supreme Court and except as aforesaid it shall be lawful for the Secretary of State in Council of India to fix the salaries allowances furloughs retiring pensions and (when necessary) expenses for equipment and voyage of the Chief Justices and Judges of the several High Courts under this Act and from time to time to alter the same Provided always such alterations shall not affect the salary of any Judge appointed prior to the date thereof

(7) Upon the happening of a vacancy in the office of Chief Justice and during any absence of a Chief Justice the Governor General in Council or Governor in Council as the case may be shall appoint one of the Provision for vacancy of the office of Chief Justice or other Judge

entered on the discharge of from such absence and upon such High Court and during any absence of any such Judge or on the appointment of any such Judge to act as Chief Justice it shall be lawful for the Governor General in Council or Governor in Council as the case may be to appoint a person with such qualifications as are required in persons to be appointed to the High Court to act as a Judge of the said High Court, and the person so appointed shall be authorized to sit and to perform the duties of a Judge of the said Court until some person has been appointed by Her Majesty to the office of Judge of the same Court and has entered on the discharge of the duties of such office or until the absent Judge has returned from such absence or until the Governor General in Council or Governor in Council as aforesaid shall see cause to cancel the appointment of such acting Judge

(8) Upon the establishment of such High Court as aforesaid in the Presidency Abolition of Supreme of Fort William in Bengal the Supreme Court and the Court of Courts and Sudder Sudder Dewany Adawlut and Sudder Nizamut Adawlut at Calcutta in the same Presidency shall be abolished

And upon the establishment of such High Court in the Presidency of Madras the Supreme Court and the Court of the Sudder Adawlut and Foujdarry Adawlut in the same Presidency shall be abolished

And upon the establishment of such High Court in the Presidency of Bombay the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Foujdarry Adawlut in the same Presidency shall be abolished

And the records and documents of the several Courts so abolished in each Presidency shall become and be records and documents of the High Court established in the same Presidency

(9) Each of the High Courts to be established under this Act shall have and Jurisdiction and powers of High Courts exercise all such Civil Criminal Admiralty and Vice Admiralty Testamentary Intestate and Matrimonial Jurisdiction original and appellate and all such powers and authority for and in relation to the administration of justice in the Presidency in which it is established as Her Majesty may by such Letters Patent as aforesaid grant and direct subject however to such directions and limitations as to the exercise of Original Civil and Criminal Jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby and save as by such Letters Patent may be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council the High Court to be established in each

Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts.

(10) Until the Crown shall otherwise provide under the powers of this Act all jurisdiction now exercised by the Supreme Courts of Calcutta Madras and Bombay, respectively over inhabitants of such parts of India as may not be comprised within the local limits of the Letters Patent to be issued under this Act establishing High Courts at Fort William, Madras and Bombay, shall be exercised by such High Courts, respectively.

(11) Upon the establishment of the said High Courts in the said Presidencies respectively all provisions then in force in India of Acts of Parliament or of any orders of Her Majesty in Council, or Charters, or of any Acts of the Legislature of India which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at Fort William in Bengal Madras and Bombay respectively, or to the Judges of the said Courts, shall be taken to be applicable to the said High Courts and the Judges thereof respectively, so far as may be consistent with the provisions of this Act and the Letters Patent to be issued in pursuance thereof and subject to the legislative powers in relation to the matters afore said of the Governor General in Council.

(12) From and after the abolition of the Courts abolished as aforesaid in any of the said Presidencies the High Court of the same Presidency shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof and such proceedings and all previous proceedings, in the said last mentioned Courts, shall be dealt with as if the same had been had in the said High Court save that any such proceedings may be continued, as merely as circumstances permit under and according to the practice of the abolished Courts respectively.

(13) Subject to any laws or regulations which may be made by the Governor General in Council, the High Courts established in any Presidency under this Act may by its own rules provide for the exercise by one or more Judges or by Division Courts constituted by two or more Judges, of the said High Court of the original and appellate jurisdiction vested in such Court in such manner as may appear to such Court to be convenient for the due administration of justice.

(14) The Chief Justice of each High Court shall from time to time determine what Judge in each case shall sit alone and what Judges of the Court whether with or without the Chief Justice, shall constitute the several Division Courts as aforesaid.

(15) Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction and shall have power to call for returns and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction and shall have power to make and issue general rule for regulating the practice and proceedings of such Courts and also to prescribe forms for every proceeding in the said Court for which it shall think necessary that a form be provided and also for keeping all books, entries and accounts to be kept by the officers and also to settle tables of fees to be allowed to the sheriffs, Attorney, and all clerks and officers of Courts and from time to time to alter any such rule or form or table, and the rules so made and the forms so framed, and the tables so settled, shall be used and observed in the said Courts provided that such general rules and forms and tables be not inconsistent with the provisions of any law in force, and shall before they are issued, have received the sanction, in the Presidency of Fort William of the Governor General in Council, and in Madras or Bombay, of the Governor in Council of the respective Presidencies.

ct,

(16) It shall be lawful for Her Majesty, if at any time hereafter Her Majesty sees fit so to do, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in India not included within the limits of the local jurisdiction of another High Court to consist of a Chief Justice and of such number of other Judges with such qualifications as are required in persons to be appointed to the High Courts established at the Presidencies hereinbefore mentioned, as Her Majesty, from time to time, may think fit and appoint, and it shall be lawful for Her Majesty by such Letters Patent to confer on such Court any such jurisdiction, powers, and authority as under this Act is authorised to be conferred on or will become vested in the High Court to be established in any Presidency hereinbefore mentioned, and, subject to the directions of such Letters Patent

by such
governor
far as
circumstances

and to the Chief Justice and other Judges thereof, and to the person administering the Government of the said territories

(17) It shall be lawful for Her Majesty, if Her Majesty shall so think fit at any time within three years after the establishment of any High Court under this Act by Her Letters Patent, to revoke all or such parts or provisions as Her Majesty may think fit, of the Letters Patent by which such Court was established and to grant and make such other powers and provisions as Her Majesty may think

Other or supplement
ary Charters may be
granted within three
years after establishment

have been granted or made in the first instance

(18) It shall be lawful for Her Majesty from time to time, by Her Order in Council, to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established under this Act and generally to alter and determine the territorial limits of the jurisdiction of the said several Courts as to Her Majesty, with the advice of Her Privy Council may seem meet

Territorial limits of
jurisdiction of Court may
be altered by order in
Council

(19) The word 'Barrister' in this Act shall be deemed to include Barristers in England or Ireland, or members of Faculty of Advocates in Scotland, and the words 'Governor General and Governor shall comprehend the officer administering the Government

Interpretation of terms

APPENDIX II.

GOVERNMENT OF INDIA ACT, 1915

[5 & 6, *Geo. V*, *Ch* 61 (1915), as amended by 6 &
7 *Geo V*, *Ch* 37 (1916), 9 & 10 *Geo V*, *Ch* 101 (1919)]

An Act to consolidate enactments relating to the Government of India

29th July 1915

Enacted by the King's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same as follows

PART IV

THE INDIAN HIGH COURTS

Constitution

101 (*Ch Act, Ss 2, 19*)—(1) The High Courts referred to in this Constitution of High Act are the High Courts of Judicature for the time being Courts. established in British India by Letters Patent

(2) Each High Court shall consist of a Chief Justice and as many other Judges as His Majesty may think fit to appoint Provided as follows —

- (i) The Governor General in Council may appoint persons to act as additional Judges of any High Court, for such period, not exceeding two years, as may be required, and the Judges so appointed shall, whilst so acting, have all the powers of a Judge of the High Court appointed by His Majesty under this Act.
- (ii) The maximum number of Judges of a High Court, including the Chief Justice and additional Judges, shall be twenty
- (3) A Judge of a High Court must be—
 - (a) a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland, of not less than five years standing, or
 - (b) a member of the Indian Civil Service of not less than ten years' standing, and having for at least three years served as, or exercised the powers of, a District Judge, or
 - (c) a person having held judicial office, not inferior to that of a subordinate Judge or a Judge of a Small Cause Court, for a period of not less than five years, or
 - (d) a person having been a pleader of a High Court for a period of not less than ten years

(4) Provided that not less than one-third of the Judges of a High Court, including the Chief Justice but excluding additional Judges, must be such barristers or advocates as aforesaid, and that not less than one third must be members of the Indian Civil Service

(5) The High Court for the North-Western Provinces may be styled the High Court of Judicature at Allahabad, and the High Court at Fort William in Bengal is in this Act referred to as the High Court at Calcutta

Synopsis

	Note No		Note No
Legislative changes	1	Act applies only to Chartered High Courts	3a
Appointment of temporary Judges, Proviso I to Sub S (2)	2	Sub S (4)	3

1 Legislative changes—Clause (d) of Sub S (8) has been substituted by the Indian High Courts Act 1922 (12 and 13 Geo V C 20)

2 Appointment of temporary Judges Proviso I to Sub S (2)—This proviso does not mean that as regards each High Court appointments can only be made for periods not exceeding two years in all however much they may be required subsequently. It should be for such period not as exercised

India are not chartered High Courts and cannot exercise powers under S 107 of this Act¹

3 Sub Section (4)—The expression 'one third of the Judges of the High Court' means one third of the existing number of Judges irrespective of the previous strength and number of the Judges constituting the High Court¹

Tenure of office of Judges of High Courts 102 (Ch. Act, S 4)—(1) Every Judge of a High Court shall hold his office during His Majesty's pleasure

(2) Any such Judge may resign his office, in the case of the High Court at Calcutta, to the Governor-General in Council, and in other cases to the local Government

103 (Ch Act, S 5)—(1) The Chief Justice of a High Court shall have precedence of Judges of rank and precedence before the other Judges of the same Court

(2) All the other Judges of a High Court shall have rank and precedence according to the seniority of their appointments, unless otherwise provided in their patents

104 (Ch Act, S 6)—(1) The Secretary of State in Council may fix the salaries, allowances, furloughs, retiring pensions, and where necessary, expenses for equipment and voyage, for the Chief Justices and other Judges of the several High Courts and may alter them, but any such alteration shall not affect the salary of any Judge appointed before the date thereof

(2) The remuneration fixed for a Judge under this section shall commence on his taking upon himself the execution of his office, and shall be the whole profit or advantage which he shall enjoy from his office during his continuance therein

(3) If a Judge of a High Court dies during his voyage to India, or within six months after his arrival there, for the purpose of taking upon himself the exe-

Govt of India Act Section 101—Note 2

1 (1918) 1918 Mad 263 (263). 43 Ind Cas 800 (850).

Note 3a

1 (1934) 1934 Pesh 97 (33)

Note 3

1 (1919) 1919 All 257 (257) 51 Ind Cas 63 (4).

cution of his office, the Secretary of State shall pay to his legal personal representatives, out of the revenues of India, such sum of money as will, with the amount received by or due to him at the time of his death on account of salary, make up the amount of one year's salary.

(4) If a Judge of a High Court dies while in possession of his office and after the expiration of six months from his arrival in India for the purpose of taking upon himself the execution of his office, the Secretary of State shall pay to his legal personal representatives, out of the revenues of India, over and above the sum due to him at the time of his death, a sum equal to six months salary

105 (Ch Act S 7) — (1) On the occurrence of a vacancy in the office of Chief Justice of a High Court, and during any absence of such a Chief Justice the Governor General in Council in the case of the High Court at Calcutta, and the local Government in other cases, shall appoint one of the

Provision for vacancy in the office of Chief Justice or other Judge

other Judges of the same High Court to perform the duties of Chief Justice of the Court until some person has been appointed by His Majesty to the office of Chief Justice of the Court and has entered on the discharge of the duties of that office, or until the Chief Justice has returned from his absence as the case requires.

(2) On the occurrence of a vacancy in the office of any other Judge of a High Court, and during any absence of any such Judge, or on the appointment of any such Judge to act as Chief Justice, the Governor General in Council in the case of the High Court at Calcutta, and the Local Government in other cases, may appoint a person, with such qualifications as are required in persons to be appointed to the High Court to act as a Judge of the Court and the person so appointed may sit and perform the duties of a Judge of the Court, until some person has been appointed by His Majesty to the office of Judge of the Court and has entered on the discharge of the duties of the office or until the absent Judge has returned from his absence or until the Governor General in Council or the Local Government as the case may be sees cause to cancel the appointment of the acting Judge

Synopsis.

Sub S (2)	Note No 1	Time within which appointment of acting Judge should be made	Note No 2

1 Sub Section (2)—The words upon the happening of a vacancy in the office of Judge mean upon the happening of a vacancy in the office of a Judge appointed to his office by His Majesty. They are not applicable to the case of a vacancy caused by a person appointed to act as a Judge under this sub section¹

2 Time within which appointment of acting Judge should be made—No limit of time is mentioned within which the appointment should be made. That is left to the discretion of the Local Government. Hence the fact that an appointment is made by the Local Government not immediately or within a reasonable time after the occurrence of the vacancy will not have the effect of invalidating the appointment and render the judgment of the Judge so appointed a nullity¹

Section 105—Note 1

1 (1894) 16 All 136 (152)

Note 2

1 (1893) 20 All 267 (293, 294) 25 Ind App

or (P C) This renders the contrary view taken in (1894) 16 All 136 (F B) no longer law.

JURISDICTION

106 (Ch Act, S 9) —(1) The several High Courts are Courts of record and have such jurisdiction, original and appellate in

Jurisdiction of High Courts including admiralty jurisdiction in respect of offences committed on the high seas, and all such powers and authority over or in relation to the administration of justice including power to appoint clerks and other ministerial officers of the Court and power to make rules for regulating the practice of the Court as are vested in them by letters patent, and subject to the provisions of any such letters patent, all such jurisdictions powers and authority as are vested in those Courts respectively at the commencement of this Act

(2) (21 Geo 3, C 70) —The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force

Synopsis

Original revenue jurisdiction Revenue—Meaning of	Note No 1 2.	Power to make rules for regulating the practice of the Court	Not to

1 Original revenue jurisdiction—Sub S (2) re-enacts the prohibition which is

issued thereunder. The High Court has now no original jurisdiction in matters concerning revenue. Thus a suit by an assessee for a declaration that an agreement for composition of

directing the Chief Revenue Officer to do his statutory duty and state a case for the opinion of the Court is not one made in the exercise of Original jurisdiction in any matter concerning the revenue and the High Court is competent to pass such an order.²

2 Revenue—Meaning of—Money derived by a sale of smuggled goods which are seized and confiscated by the customs authorities is revenue within the meaning of the Section. Consequently an action in trover against the Secretary of State for India for the recovery of the value of such goods on the allegation that the action of the customs authorities is illegal cannot be entertained on the original side of the High Court.¹

3 Power to make rules for regulating the practice of the Court—The High Court is empowered under Sub S (1) to make rules for regulating its practice. It is not necessary that the sanction of the Local Government should be obtained for such Rules.¹ Where there is nothing inconsistent in the Rules so framed with the provisions of the Code of Civil Procedure the High Court can apply the provisions of the latter Code. Thus there being no provision in the original side Rules of the Madras High Court similar to that contained in O 31

to apply to the original side also.²

- Section 106—Note 1**
- 1 (1917) 1919 Mad 715 (716) 48 Ind Cas 790 (792)
- 2 (1923) 1923 P C 138 (142) 50 Ind App 227 47 Bom 742 (P C)
- [But see (1921) 1921 Mad 524 (525)
- 44 Mad 718 Not good law in view of

1923 P C 138]

Note 2

- 1 (1927) 1927 Mad 689 (692) 30 Mad 442.

Note 3

- 1 (1928) 1928 Mad 472 (473)
- 2 (1928) 1928 Mad 385 (387).

107 (Ch Act, S 15)—Each of the High Courts has superintendence over all Courts for the time being subject to its appellate jurisdiction and may do any of the following things that is to say —

Powers of High Court with respect to subordinate Courts

- (a) call for returns,
- (b) direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction,
- (c) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts
- (d) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts and
- (e) settle tables of fees to be allowed to the sheriff attorneys, and all clerks and officers by Courts

Provided that such rules forms and tables shall not be inconsistent with the provisions of any law for the time being in force and shall require the previous approval in the case of the High Court at Calcutta of the Governor General in Council and in other cases of the local Government

Synopsis

	Note No		Note No
Legislative changes	1	Criminal proceedings	11
Superintendence	2	Power to expunge from record	12
Over all Courts	3	Difference of opinion among Judges	13
Election Courts	4	Power of superintendence—If can be exercised by Judge sitting in the in solvency or original side of the High Court	14
Rent controller	5	Power to transfer—Cl (b)	15
Land acquisition proceedings	6	Power to punish contempt of Court s authority	16
Subject to its appellate jurisdiction	7	Power to issue writ of certiorari	17
Agency commissioner	8	Appeal	18
Commissioner acting under the Defence of India Act	9		
Proceedings under the Legal Practitioners Act	10		

Other Topics

Interlocutory orders—Whether can be set aside by High Court See Note 2 Pt (19)
 Powers of superintendence and revisional jurisdiction under S 116 See Note 2

1 Legislative changes—This section is practically a reproduction of S 15 of the High Courts Act or the Charter Act 1861 (24 and 25 Vict C 104)

The word law in the proviso to the section was substituted for the word Act by Sch 1 of the Government of India (Amendment) Act 1916 (6 and 7 Geo V C 37)

2 Superintendence—The term Superintendence has a legal force and signification which are perfectly well known to the Legislature¹ The object of superintendence is to keep all inferior Courts and jurisdictions within the bounds of their authority to see that they do what their duty requires them to do and that they do it in a legal manner² In England it is the peculiar business of the Court of the King's Bench to *superintend* all inferior tribunals and therein to enforce the due exercise of those judicial and ministerial powers with which the Crown or Legislature has invested them and this not only by restraining their excesses but also by quickening their negligence and obviating their denial of justice³

Section 107—Note 2

1 (1867) 7 Suth W R 430 (431) Per Norman, J

1a Short and Mellors Crown Practice 2nd

edition page 2
 (1875 76) 1 Cal 180 (182) Case under S 15 of the Charter Act
 (1933) 1933 Cal 132 (134)

2 Blackstone's Commentaries, p 110.

This wide power has been given to the High Courts in India in a limited and modified form by S. 115 of the Civil Procedure Code, by S. 435 of the Criminal Procedure Code, by S. 107 of the Government of India Act, 1915, by Cl. 13 of the Letters Patent (Madras, Bombay and Calcutta) and by other enactments. These however, do not exhaust the powers of superintendence of the Chartered High Courts in India. When the Supreme Courts were established in India they were invested with the same powers of superintendence as were exercised by the Court of the Queen's Bench in England.³ Under S. 9 of the High Courts Act, 1861 (known as the Charter Act) which abolished the Supreme Courts and empowered the establishment of the High Courts, it was provided that the High Court to be established 'shall have and exercise all jurisdiction and every power and authority whatsoever, in any manner vested in any of the Courts in the same Presidency, abolished under this Act'.^{3a} Finally S. 106 of the Government of India Act, 1915 (which has repealed the High Courts Act, 1861) provides that the High Courts have, 'subject to the provisions of any such Letters Patent, all such jurisdiction powers and authority as are vested in those Courts respectively at the commencement of this Act'. It is thus clear that in addition to the powers given by this section and by other statutes the Chartered High Courts have inherited from the Supreme Courts the wide powers of superintendence exercised by the Court of the King's Bench in England.⁴ Thus a Chartered High Court can issue a writ of *certiorari* to persons or bodies acting judicially but which are not Courts subject to the appellate jurisdiction of the High Court, and which cannot be dealt with under S. 107 of this Act.^{4a} (For a fuller discussion of this, see Note 17, *infra*)

The powers of superintendence under this section are not merely administrative but are also judicial^{4b} and are much wider than the powers vested in the High Courts under S. 115. The latter applies only where a case has been decided by any Court subordinate to the High Court in which no appeal lies thereto and the High Court can interfere only in the three cases specified therein. There are no such limitations upon the power of the High Court under this section which can therefore be exercised even in cases not covered by S. 115.⁵ It may be exercised in administrative as well as judicial matters⁶ and in Civil as well as Criminal proceedings.

The exercise of the power is in the discretion of the Court to which the application is made⁷ and the power being one in the nature of extraordinary jurisdiction should be exercised sparingly and with caution and on sound judicial principles.^{7a} The principles guiding the exercise of such discretion have been thus stated by West J. in *Srinanallay v Jona Hashinath*,⁸ as follows:—

- (1) The Court having called up the record or proceedings of a subordinate Court will itself investigate the facts on which a jurisdiction has been assumed or declined, on which it depends whether the subordinate Court could or could not legally deal with the matter in question, either at all, or on the principle to which it has referred the case, or according to which its mode of enquiry or of action may or may not, have been in contradiction, rather than obedience

3 (1883) 7 Bom 341 (359, 360)

3a [See also (1915) 1915 Bom 269 (270) 40 Bom 86]

4 (1927) 1927 Mad 130 (130) 50 Mad 130 (1930) 1930 Mad 896 (899, 900) 53 Mad 979

4a (1912) 16 Ind Cas 755 (765) 36 Mad 72

4b (1933) 1933 Lah 259 (260)

5 (1896) 18 All 4 (7)

(1919) 1919 All 46 (48) 42 All 26 52 Ind Cas 279 (280)

(1914) 1914 Cal 607 (608) 22 Ind Cas 848 (850) 41 Cal 876 High Court's power of superintendence not restricted by Santhal Parganas regulations and rules

(1899) 1900 4 Cal W N 36 (38, 39)

(1933) 1933 Lah 327 (328)

(1917)

7 (1877) 78 3 Cal 243 (243, 244)

7a (1907) 31 Bom 133 (142) (1933) 1933 Bom 409 (411) 57 Bom 631

(1933) 1933 Cal 132 (134)

(1898) 2 Cal W N 727 (728)

(1860) 12 South W R 74 (74)

(1927) 1927 Lah 14 (15)

(1930) 1930 Lah 852 (851)

8. (1883) 7 Bom 341 (371, 372) (F 13)

to the rules of procedure, or the principles implied in them to such a material extent as to defeat the purpose of the law

- (2) If the Court finds that the external conditions of jurisdiction of investigation and of command have been satisfied by the inferior Court it will not substitute its own appreciation of evidence or its own judgment thereon⁹
- (3) Where an appeal is provided the Court will not interfere by an *peremptory* order with the ordinary course of adjudication save in cases wherein a defect of the law and a grave wrong are manifest and are irremediable by the regular procedure
- (4) Where a decree or order of a subordinate Court is declared by the law to be for its own purposes final or conclusive though in its nature provisional as subject to displacement by the decree in another more formal suit the Court will have regard to the intention of the legislature that promptness and certainty should in such cases be in some measure accepted instead of judicial perfection. It will rectify the proceedings of the inferior Court where the extrinsic conditions of its legal activity have plainly been infringed but where the alleged or apparent error consists in a misappreciation of evidence or misconstruction of the law intrinsic to the enquiry and decision it will *respect* the intended finality and will intervene *peremptorily* only when it is manifest that by the ordinary and prescribed method an adequate remedy or the intended remedy cannot be had
- (5) The Court will in all cases regard its exercise of the extraordinary jurisdiction as *discretionary* and subject to considerations of the importance of the particular case or of the principle involved in it of delay on the part of an applicant and of his merits with respect to the case in which the interference is sought
- (6) The Court will sedulously abstain from making any order or refusing to make it on grounds the appreciation of which is exclusively assigned by law to some other authority provided the legal competence be exercised in good faith on matters that may reasonably be understood as within its lawful range

The following are some of the classes of cases in which in accordance with the principles set forth above the High Court will interfere under this Section —

- (1) Where the decision of the lower Court is without jurisdiction or in excess of its jurisdiction¹⁰
- (2) Where the lower Court has failed to do its duty¹¹. Thus where the lower Court has refused to frame a material issue¹² or to add a necessary party¹³ or attach a property¹⁴ or to proceed with an execution sale¹⁵ or to confirm the sale¹⁶ which it is bound to do under law the High Court will interfere. Similarly where the

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|---|---|
| <p>9 (1937) 1937 Mad 612 (620) 55 Mad 883
Per Thiruvengkatachiar J
(1987) 1933 Bom 1 (?) Superintendence is not the same thing as hearing an appeal
(1867) 7 Suth W R 130 (131)
10 (1870) 14 Suth W R 33 (83)
(1934) 10 4 Lah 156 (157) 15 Lah 80</p> | <p>11 (1855) 18 All 4 (8) When in a partnership suit the decree was not passed in accordance with law and form and the decree given could not be executed
(1876) 1 All 296 (297) Lower Court did not consider whether sufficient ground were shown for review
(1870) 14 Suth W R 9 (10)
(1869) 11 Suth W R 191 (19)
(1870) 13 Suth W R 34 (34)
(1870) 10 Suth W R 418 (419)
(1873) 20 Suth W R 16 (17)
(1923) 1923 Pat 518 (519)
12 (1919) 1919 Mad 439 (440) 50 Ind Cas 53 (58)
13 (1918) 1918 Pat 488 (488) 47 Ind Cas 725 (725)
14 (1871) 15 Suth W R 216 (217)
15 (1914) 1914 Cal 607 (609) 22 Ind Cas 848 (850) 41 Cal 876
16 (1876) 26 Suth W R 44 (46) 3 Ind App 230 (P C)</p> |
|---|---|
- Court has power to pass consequential orders after setting aside the order
(1876) 5 Beng L R App 29 (30)
(1930) 1930 Pat 277 (278) Order not shown to be without jurisdiction or in excess of jurisdiction
(1865) 9 Suth W R 386 (387) (Do)
(1870) 13 Suth W R 439 (440) (Do)

order of the lower Court is hopelessly inadequate in not containing any particulars or a discussion of the evidence¹⁷ the High Court will interfere under this section on the ground that there is a failure of duty

- (3) Where the decision of the lower Court is such that *grave and irreparable harm or loss* would result to the applicant¹⁸ The High Court can set aside even *interlocutory orders*¹⁹
- (4) Where the decision of the lower Court amounts to a *denial of the right of fair trial*²⁰ In the case cited below it has interfered even with an order passed under the Court's inherent powers²¹
- (5) Where the decision of the lower Court amounts to a *manifest injustice*²²

The High Court will not generally interfere in the following cases.—

- (1) Where the applicant has *other remedies* open to him as for instance by way of appeal²³ review²⁴ or separate suit²⁵
- (2) Where the effect of interference would be tantamount to giving a right of appeal or revision which the applicant is not entitled to under law and which would amount to an *invasion of the law*²⁶
- (3) Where the error complained of against the lower Court is not one relating to jurisdiction but is a *mere error of law or error of fact or improper appreciation of evidence*²⁷
- (4) Where the applicant is *guilty of laches and delay*²⁸

defendant's evidence manifestly improper and amounting to denial of justice

(710)]

Ind Cas 917

24 (1918) 1918 Cal 415 (416) 44 Ind Cas 763 (767, 769)

25 (1878) 3 Cal 243 (248, 249)
(1897) 1 Cal W N 617 (623)
(1872) 17 Suth W R 80 (80)
(1873) 20 Suth W R 202 (202)
(1872) 17 Suth W R 477 (478)
(1871) 15 Suth W R 170 (170)
(1870) 12 Suth W R 103 (104)
(1869) 6 Bom H C A C 174 (176)

26 (1918) 1918 Cal 415 (417) 44 Ind Cas 763 (767)

(1867) 4 Bom H C A C 87 (90)
(1866) 4 Suth W R 115 (115)

(1867) 7 Suth W R 200 (200)
(1870) 14 Suth W R 212 (213)
(1874) 22 Suth W R 277 (278)
(1879) 3 Cal L Rep 137 (139)
(1879) 4 Cal L Rep 14 (17)

28 (1924) 1924 Pat 37 (38) 2 Pat 600 (604)
to pay process fee for notice to action purchaser in a petition to set aside sale.

(1877) 2 Cal L Rep 545 (547)
(1874) 22 Suth W R 522 (523)
(1872) 12 Suth W R 87 (89)
[See also (1868) 10 Suth W R 6 (6)]

(1920) 1920 Pat 131 (137) 5 Pat L Jour 550

(1924) 1924 Pat 761 (764) Order directing local investigation

20 (1919) 1919 Pat 573 (574) 49 Ind Cas 389 (390)

(1919) 1919 Pat 270 (276) 49 Ind Cas 442 (449) 4 Pat L Jour 57

(1925) 1925 Pat 674 (676)

(1926) 1926 Pat 207 (208) 4 Pat 723 Order refusing to add a party as a co plaintiff

(1920) 1920 Pat 600 (602) 51 Ind Cas 189 (191) 4 Pat L Jour 277 Dismissal of suit on failure to amend plaint—

No opportunity given to continue the suit with the plaint as it is

(1928) 1928 Pat 111 (112)

21 (1918) 1918 Pat 100 (103) 47 Ind Cas 719 (723) 4 Pat L Jour 20 Order refusing leave to sue a receiver without report therefor

22 (1920) 1920 Pat 568 (570) 56 Ind Cas 155 (157)

(1928) 1928 Pat 111 (112) Refusal of temporary injunction — Manifestly wrong

(1923) 1923 Mad 500 (501)

(1918) 1918 Mad 1071 (1071) 38 Ind Cas 133 (134)

(1915) 1915 Cal 29 (31) 24 Ind Cas 313 (316)

(1933) 1933 Lah 259 (260) Shutting out

3 Over all Courts—To attract the operation of this section it must first of all be established that the decision sought to be assailed is that of a Court subject to the appellate jurisdiction of the High Court. This section does not entitle the High Court to rectify executive injustice¹. Thus an order passed by a Magistrate in his *executive* capacity under S 25 of the Police Act or when dealing with the Press Act 1931 cannot be revised under this Section².

4 Election Courts—A Subordinate Judge refusing to try an election petition under the Madras District Municipalities Act is not acting as a Court but as a *persona designata* and the High Court cannot set aside such an order though illegal under this section¹. Similarly the High Court has no jurisdiction to revise an order passed by a Presidency Magistrate in an inquiry held under the rules framed under the Madras City Municipal Act III of 1904 as to the competency or otherwise of a candidate for Municipal election². A Municipal Commissioner sitting as an election Court under the U P Municipalities Act II of 1916 is not also a Court subject to the appellate jurisdiction of the High Court within the meaning of this section³.

5 Rent controller—It has been held by the High Court of Calcutta¹ that the Controller and the President in discharging their duties under Ss 15 and 17 respectively of the Calcutta Rent Act 1920 act as Civil Courts and are subject to the appellate and consequently the superintending jurisdiction of the High Court. The High Court of Rangoon² has on the other hand held that the controller under the Rangoon Rent Act 1920 is not acting as a Court and the High Court has no power of superintendence over him. It has further held that the Chief Judge of the Rangoon Small Cause Court when exercising his powers in references under S 18 of the Rangoon Rent Act does not act as a Court but only as a *persona designata* and is therefore not subject to the appellate or revisional jurisdiction of the High Court under this Section³.

6 Land acquisition proceedings—A Collector refusing to refer a matter to the Court under S 18 of the Land Acquisition Act¹ or making an award under S 11 of that Act² does not act as a Court and is not subject to the appellate jurisdiction of the High Court. The High Court has therefore no power of superintendence in such cases.

It has been held by the High Court of Calcutta in the undermentioned case³ that the Calcutta Improvement Trust Tribunal acting under S 32 of the Land Acquisition Act is a Court subject to the revisional jurisdiction of the High Court under S 115 of the Code of Civil Procedure as also under this Section. The High Court of Bombay⁴ has held that the District Court acting under S 198 of the Bombay City Municipalities Act 1925 and exercising its powers in Land Acquisition proceedings is subject to the appellate and superintending jurisdiction of the High Court.

7 Subject to its appellate jurisdiction—In order that the present section may apply it is essential that the decision sought to be revised should be that of a Court *subject to the appellate jurisdiction of the High Court*¹. The two things necessary to constitute appellate jurisdiction are the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter². It is not however necessary that the particular decision sought to be set aside under this Section should be appealable to the High Court³. The words 'subject to its appellate jurisdiction' do not mean subject to appellate jurisdiction in that particular matter for revision would not be necessary if appeal lay but

Note 3

- 1 (1910) 8 Ind Cas 107 (110) 38 Cal 230
2 (1930) 1930 Lah 539 (543)
(1934) 1934 Pat 344 (345) 13 Pat 547
Press Act 1931

Note 4

- 1 (1923) 1923 Mad 169 (170)
(1933) 1933 All 764 (768)
2 (1915) 1915 Mad 360 (362) 25 Ind Cas 345
(347) 38 Mad 581
3 (1925) 1925 All 380 (382 383) 47 All 513
(F B)

Note 5

- 1 (1923) 1923 Cal 169 (175 176) 43 Cal 931
(1923) 1923 Cal 311 (312)
2 (1906) 1926 Rang 33 (41) 3 Rang 410
(F B)
3 (1924) 1927 Rang 1 (3) 4 Rang 304 (F B)

Note 6

- 1 (1924) 1924 Mad 442 (446) 47 Mad 357
Overruling 1919 Mad 583
(1923) 1923 Bom 220 (292 293) 47 Dom

and not judicial

- 3 (1902) 1932 Cal 660 (661)
4 (1931) 1931 Bom 582 (586) 55 Bom 644

Note 7

- 1 (1914) 1914 Cal 452 (454) 41 Cal 91a
2 (1922) 1922 Mad 837 (838)
3 (1918) 1918 Pat 103 (112 119) 3 Pat L Jour
581
(187a) 15 Beng L R 197 (204 207)

that the Court is normally subject to its appellate jurisdiction or even in certain specific cases only.⁴

The following have been held to be Courts subject to the appellate jurisdiction of the High Court

- (1) The special Court acting under the Emergency Ordinance 2 of 1932⁵ or the special Magistrate acting under the Bengal Emergency Ordinance 1931.⁶
- (2) The special Judge proceeding under S 103 of the Bengal Tenancy Act.⁷
- (3) The Court of the Recorder of Moulmein established under Act XXI of 1863⁸
- (4) Special Courts under the Emergency Powers Ordinance 1932.⁹

The following have been held not to be subject to the appellate jurisdiction of the High Court within the meaning of this Section

- (1) The Board of Revenue acting under S 172 of the Madras Estates Land Act¹⁰ or a Revenue Officer when making a settlement of rents under Chapter 11 of that Act.¹⁰
- (2) A Revenue Divisional Officer acting under S 7 of the Madras Hereditary Village Officers Act III of 1895.¹¹
- (3) The Court of a Revenue Divisional Officer in a proceeding for settlement of land rent under S 85 of the Chota Nagpur Tenancy Act, 1908.¹²
- (4) A Judge of the High Court making an order in the exercise of Original Criminal Jurisdiction.¹³

8 Agency Commissioner—A Commissioner acting under the Ganjam and Vizagapatnam Agency Act¹, and the Mewas Agent in the Bombay Presidency² are Courts subject to the appellate jurisdiction of the High Court

9 Commissioner acting under the Defence of India Act—The special tribunals created under the Defence of India Act, 1915 are by the very Act which created them subject to no appellate jurisdiction whatever and the High Court cannot therefore exercise any superintendence under this Section over such Courts.¹

10 Proceedings under the Legal Practitioners Act—Proceedings under S 36 of the Legal Practitioners Act are judicial proceedings of a Court subject to the appellate jurisdiction of the High Court and can be revised under this section where such proceedings are not in conformity with the requirements of S 36.¹ But the mere fact that the order of the District Judge is against the weight of evidence or is erroneous in law cannot afford a ground for interference under this Section.²

The High Court of Lahore³ has held that it can in the exercise of its general powers of superintendence send for the records of a proceeding under S 14 of the Legal Practitioners Act and direct a transfer of the proceedings to another Court. The High Court of Patna has on the other hand, taken a contrary view in the case cited below⁴ and refused to order a transfer.

(1933) 1933 Bom 1 (1)
(1955) 2 Bom 333 (343) Appellate jurisdiction includes superintending

14

Note 9
1 (1918) 1918 Pat 103 (105 113 121) 46 Ind Cas 977 (983, 984) 3 Pat L Jour 51 (F B)
(1918) 1918 Pat 155 (162 164) 44 Ind Cas 185 (200, 201, 203) 3 Pat L Jour 57 (F B)

Note 10
1 (1932) 1932 Bom 598 (597) 56 Lam 517
(1932) 1932 Nag 50 (51) 23 Nag L R 4
(1899) 4 Cal W N 36 (38)
(1930) 1930 All 641 (642) Following 171 All 69

2 (1924) 1924 All 69 (69) 45 All 670
(1899) 21 All 181 (183)
(1930) 1930 Lah 883 (891)
3 (1926) 1926 Lah 199 (200)
1 (1916) 1916 Pat 115 (116, 117) 37 Ind Cas 484 (486) 1 Pat L Jour 570 He 3
proceedings under S 14 are administrative and disciplinary and not civil

9 (1932) 1932 Mad 612 (639, 640) 55 Mad 883 (F B)
(1925) 1925 Mad 1032 (1039)
10 (1932) 1932 Mad 612 (639, 640) 55 Mad 883 (F B)
11 (1922) 1922 Mad 337 (338, 341)
12 (1914) 1914 Cal 890 (892)
13 (1871) 15 South W R Cr 60 (61).

Note 8

1 (1923) 1923 Mad 604 (604) 46 Mad 726
(1900) 23 Mad 323 (349)
2 (1927) 1927 Bom 272 (274) 51 Bom 416

Where protracted examinations of witnesses were held which were quite irrelevant to the suit it was observed by their Lordships of the Privy Council that it amounted to an abuse which erroneously increased the cost of litigation without any corresponding benefit to the parties and that it was within the powers of the High Court to direct an inquiry with a view to disciplinary action being taken.⁵

11 Criminal proceedings—As has been seen in Note 2, *ante* the power of superintendence under this Section can be exercised in Civil as well as Criminal proceedings. Thus the High Court can direct a Sessions Judge to rehear an appeal after taking additional evidence, on the ground that there is a failure of duty.¹

The High Court has exercised its powers of superintendence in the following cases:—

- (1) Order dismissing a complaint under S 203, Criminal Procedure Code.²
- (2) Order reviving a complaint after discharge.³
- (3) Order refusing⁴ or granting⁵ sanction to prosecute.
- (4) Order under S 435 of the Criminal Procedure Code.⁶
- (5) Order under S 476 of the Criminal Procedure Code.⁷
- (6) Order of a panchayat Court under Madras Panchayat Courts Act II of 1920.⁸
- (7) Conviction by the Union Bench under the Bengal Village Self Government Act, V of 1919.⁹
- (8) Conviction under the Bengal Emergency Ordinance 1931.¹⁰

Prior to the amendment of the Code of Criminal Procedure in 1921 orders under Ss 143 and 144 thereof and proceedings under Chapter VII (i.e. Ss 145 to 148) were excluded from the revisional jurisdiction of the High Court by virtue of S 435 Cl 3. Consequently the High Courts resorted to their powers under this Section whenever such proceedings were in excess of the jurisdiction of the subordinate Magistrates¹¹ or amounted to an abuse of their powers or resulted in something akin to the denial of the right of fair trial.¹² Under the Amending Act XVIII of 1923, Cl 3 has been omitted in S 435 and the bar to the revisional jurisdiction of the High Court has thus been removed. But still the High Court can exercise its extraordinary powers under this Section as for instance where an order under S 144 amounts to an abuse of the process of law.¹³

o (1932) 1932 P O 69 (70)

Note 11

1 (1916) 1918 Pat 272 (273) 47 Ind Cas 274

(275) 3 Pat L Jour 692

2 (1916) 1916 Mad 309 (308) 21 Ind Cas 691

(682) 38 Mad 212

(1900) 27 Cal 126 (130)

[But see (1909) 3 Ind Cas 861 (861)

36 Cal 994 Order of discharge can be

interfered only under S 439 Cr

P C]

(1861) 7 Cal 447 (451 452)

3 (1896) 1 Cal W N 49 (51)

4 (1899) 26 Cal 502 (558)

5 (1906) 28 All 554 (563)

6 (1899) 26 Cal 163 (193)

7 (1920) 1930 Cal 721 (722)

(1921) 1921 All 365 (366) 43 All 180

(1913) 19 Ind Cas 197 (204) 40 Cal 477 (F b)

(1931) 1931 Pat 411 (413 416) Order stay-

ing proceedings under S 476—Can

be revised if made without juris-

diction

(1926) 1926 Pat 25 (25, 26)

8 (1925) 1925 Mad 1144 (1144)

9 (1932) 1932 Cal 867 (867) 53 Cal 1080

10 (1938) 1938 Cal 132 (136) Conviction under

the Bengal Emergency Ordinance

1931 set aside as resting upon no

foundation in evidence

(1933) 1933 Bom 1 (7) Conviction under

Emergency Ordinance II of 1932—

Held High Court has power to revise under S 107—But held conviction not illegal

11 (1920) 1920 Mad 847 (847 851) 53 Ind Cas 483 (484)

(1923) 1923 Mad 60 (62)

(1912) 17 Ind Cas 65 (67) 36 Mad 270

(1923) 1923 Mad 24 (25) Order under S 145

—No finding as to possession—Order

set aside

(1921) 1921 Cal 30 (31 32) 48 Cal 522

(1900) 27 Cal 892 (918)

(1899) 26 Cal 625 (629)

(1876) 2 Cal 238 (295)

(1906) 33 Cal 33 (45),

(1916) 1916 Pat 92 (294) 35 Ind Cas 801

(803, 805) 1 Pat L Jour 336

(1918) 1918 All 180 (187) 44 Ind Cas 673

(673) 40 All 364

(1917) 1917 All 220 (222) 41 Ind Cas 602

(655) 39 All 612

[But see (1919) 1919 All 357 (359, 360) 51 Ind Cas 337 (339) 41 All 302

Held High Court cannot revise under

this section]

(1909) 1 Ind Cas 762 (763) 31 All 150 (Do)

(1917) 1917 All 398 (396) 38 Ind Cas 978

(979) (Do)

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12. Power to expunge from record—The High Court has power under this section to delete irrelevant matter in the judgment of the lower Court.¹ Thus where a Magistrate found on a discussion of the evidence that the case for the prosecution was false, and went on to remark that his own impression was that the case was true, the High Court ordered the remark to be expunged from the judgment.²

prevail.³ As to the effect of the amendment, see Note 12 to S. 93

14. Power of superintendence—It can be exercised by Judge sitting in the Insolvency or Original Side of the High Court—A single Judge of the High Court exercising Insolvency Jurisdiction has no power under this Section to stay insolvency proceedings pending before the District Judge in the mofussil.¹ For such a power see S. 184 of the Presidency Code.²

15. Power to transfer—Cl. (b)—The High Court has power to transfer a case pending on the file of a Court subject to its appellate jurisdiction to any other Court of equal or superior jurisdiction.¹ Thus, the High Court can transfer a case pending on the file of the Agent Commissioner in the Madras Presidency or the Mow agent in the Bombay Presidency, but according to the High Court of Madras² the transfer cannot be made to the District Court as that Court is not of equal or superior jurisdiction but should be made only to the High Court; whereas, according to the High Court of Bombay the transfer can be made to the District Court.³

The High Court can exercise its powers of transfer under this section even where an application has been made to the District Judge under S. 24 of the Code of Civil Procedure and he has refused it.⁴

16. Power to punish contempt of Court's authority.—The Chartered High Courts in India are superior Courts of Record and have the power to punish in a summary manner either

the Court of the King's Bench in England.²

Prior to the passing of the Contempt of Courts Act, XII of 1926, there was a conflicting judicial opinion as to whether the High Court had power to punish a contempt not of itself but of the subordinate Courts.

In *Governor of Bengal v. Moti Lal*, (1 L. R. 41 Cal. 173), the High Court of Calcutta held that the common law jurisdiction of the High Court to punish contempt did not extend to punishing a contempt of the subordinate Court. In *re Venkat Rao*, (21 Mad L. Jour. 227) the

Note 12.

1. (1922) 1922 Pat 97 (100)
- (1919) 1919 Mad 655 (655, 656). 47 Ind Cas 941 (941, 942) Per Abdur Rahim, J., Oldfield, J., dissenting
- (1923) 1923 Mad 402 (402) High Court cannot expunge matter at the instance of third party
2. (1922) 1922 Pat 97 (100)

Note 13

1. (1920) 1920 Cal 417 (419). 51 Ind Cas 103 (171, 172) 47 Cal 494
- (1920) 1920 Cal 624 (829). 51 Ind Cas 403 (411)

Note 14

560 (562) 39 Bom 601

Note 15

- 1 (1901) 24 Cal 709 (711).
- 1a (1924) 1923 Mad 604 (604) 46 Mad 724 Distinguishing 23 Mad 329 which was a case decided under the Agency Rules
- 2 (1927) 1927 Bom 272 (276, 278). 51 Ind 416.
- 3 (1926) 1926 Cal 320 (327) {See also (1883) 9 Cal 205 (206) 1 Ind App 174 (P. C.)}

Note 16

- 1 (1915) 1935 Cal 419 (421).
- 2 (1884) 10 Cal 109 (131, 132) 10 Ind App 171 (P. C.)
- (1921) 1921 Cal 1 (6) 44 Cal 388 {See also (1935) 1935 All 811 (819)}

High Court of Madras on the other hand, held that the High Court had power to punish such a contempt under its common law jurisdiction though not under S 15 of the Charter Act. In *Emperor v. Balkrishna* (1922 Bom 52), the High Court of Bombay held that where a certain publication in connection with the proceedings of a subordinate Court had the effect of impeding the administration of justice it amounted to a contempt of the High Court and that it could punish such contempt under its superintending powers under this section. The High Court of Allahabad has also held that it has, as a Court of Record, jurisdiction to punish acts of contempt committed against Courts subordinate to itself.^{2a} The conflict has now been set at rest by the aforementioned Act XII of 1926 which empowers the High Court specifically to punish a contempt of the subordinate Court where such contempt does not amount to an offence punishable under the Indian Penal Code.³ The Act besides defining and fixing a limit as to the punishment to be imposed in such cases, also empowers the Chief Courts (which do not possess any common law powers of the Court of the King's Bench in England as the High Courts do) to punish a contempt of its authority. The Act does not, however, apply to the Judicial Commissioner's Court of Nagpur and the latter cannot therefore punish a contempt of its subordinate Courts.⁴ See also the cases cited below.⁵

Any act or writing tending to undermine the authority of Courts of justice or to influence the result of pending litigation is a serious contempt of Court.⁶ It is however not necessary that the contempt must be in respect of a case that is pending or which has been heard.⁷

17 Power to issue writ of certiorari—"The writ of *certiorari* is the process by which the King's Bench Division in the exercise of its superintending power over inferior jurisdictions requires the Judge or such officers of such jurisdictions to certify or send proceedings before them into the King's Bench Division whether for the purpose of examining into the legality of such proceedings or for giving fuller or more satisfactory effect to them than could be done by the Court below.¹ The jurisdiction of the High Courts in India to issue such writs, is already noticed in Note 2, *ante*, is derived from the Supreme Courts which had and exercised the jurisdiction and powers of the Court of the King's Bench in England. Being a power derived from the English common law, the High Courts in India should be guided by the principles laid down by the English authorities as regards the scope and limitations of their jurisdiction to issue such writs.² Such jurisdiction is *original* jurisdiction, but extends over all inferior tribunals amenable to its authority.³ It, however, applies to the *judicial* acts and not to the *ministerial* acts of such tribunals.⁴ The term "*judicial*" does not mean only acts of Judges or legal tribunals.

right
ity,
ine questions affecting the
excess of their legal author-
s Bench division exercised

in these writs.⁵ But the High Court has no power to issue the writ against the Governor acting with the minister of public health, for the latter can claim exemption from the jurisdiction of the High Court for any act counselled or ordered by them in their public capacity under S 110 of this Act.⁶

The issue of the writ of *certiorari* is in the exercise of the discretion of the High Court and the High Court will decline to exercise it in favour of an applicant who "armed with a point either of law or of fact which would oust the jurisdiction of the lower Court has elected to argue a case on its merits before that Court."⁷

18 Appeal—In order of a single Judge of the High Court in the exercise of its powers of superintendence under this section is not appealable to the Privy Council by

also

(1935) 1935 Lah 212 (213) 16 Lah
266

7 (1935) 1935 Cal 411 (421)

Note 17

1. Short and Mollors Crown Practice
cited in (1900) 1930 Mad 896 (897)
53 Mad 973

C P C 388 & 389

5 (1929) 1 B B 171, *Rex v. Electricity
Commissioners* cited in 1930 Mad
896 (897) Per Atkin L.J.

6 (1900) 1930 Mad 896 (902, 911) 53 Mad 979

7 (1927) 1927 Mad 180 (181) 50 Mad 180

virtue of S 111 of the Code of Civil Procedure¹ Nor is the order appealable under Cl 15 of the Letters Patent (See commentaries under Cl 15 of the Letters Patent)

108 (Ch Act, Ss 13, 14) —(1) Each High Court, may by its own rules provide as it thinks fit for the exercise, by one or more Judges, or by division Courts constituted by two or more Judges of the High Court of the original and appellate jurisdiction vested in the Court

Exercise of jurisdiction by single Judges or division Courts

(2) The Chief Justice of each High Court shall determine what Judge in each case is to sit alone, and what Judges of the Court, whether with or without the Chief Justice, are to constitute the several division Courts

Synopsis

Division Court	Note No	Rules	Note No
Original jurisdiction	1	Powers of the Chief Justice	3
See S 115	2		4

1 Division Court —The Division Court must consist of at least two Judges of the High Court¹

2 Original jurisdiction —See S 115

3 Rules —This section empowers the High Court to make rules for the exercise of original and appellate jurisdiction by the High Court through its Judges. But this does not enable the High Court to make a rule which is in contravention of the provisions contained in the Letters Patent. Such a rule if made is *ultra vires*¹. Where rules are made delegating powers to the various Judges, the jurisdiction of the latter is fixed and limited by such rules and any order made by a Judge or Judges in excess of this authority would be void as being without jurisdiction².

4 Powers of the Chief Justice —It is the province and duty of the Chief Justice to determine what Judge or Judges shall decide each case. If two Judges are appointed by him to hear an appeal no single Judge has jurisdiction to hear it¹. When a Judge of the High Court chosen to sit in the sessions if taken ill as soon as the case is begun the Chief Justice has power to direct another Judge to preside over the sessions².

109 (28 & 29 Vict, C 15, Ss 3, 4, 6) —(1) The Governor General in Council may, by order, transfer any territory or place

Power of Governor General in Council to alter local limits of jurisdiction of High Courts

from the jurisdiction of any other of the High Courts, and authorize any High Court to exercise all or any portion of its jurisdiction in any part of British India not included within the limits for which the High Court

was established, and also to exercise any such jurisdiction in respect of any British subject for the time being within any part of India outside British India

Note 18

sions of the High Courts Act)

1 (1921) 1921 Mid 399 (399) 46 Mid 903

Section 108—Note 1

1 (1922) 1922 Pit 13 (13) 1 Pit 334

Note 3

1 (1926) 1926 Rang 1 (2) (F B) 3 Rang 540
R 23 of the appellate rules is *ultra vires* as being inconsistent with Cl 13 Letters Patent

2 (1915) 1915 Bom 146 (147 148) 30 Ind Cas 560 (562) 30 Bom 604 (F B)
[See also (1911) 9 Ind Cas 509 (511) (Cal)] The powers of the Judges of the Indian High Court are governed by the Letters Patent the Rules of the Court and the orders issued by the Chief Justice under the provisions

1 (1921) 1921 Mid 399 (71)

Note 4

1 (1927) 1927 Bom 161 (162) Dist. J. 162
2 Cal W N 481
[See however (1930) 2 Cal W N 451 (437)]

(2) The Governor General in Council shall transmit to the Secretary of State an authentic copy of every order made under this section

(3) His Majesty may signify through the Secretary of State in Council, his disallowance of any such order and such disallowance shall make void and annul the order as from the day on which the Governor General notifies that he has received intimation of the disallowance but no act done by any High Court before such notification shall be deemed invalid by reason only of such disallowance

1 Legislative changes—The words Any British subject for the time being within in Sub S (1) have been substituted for the words Christian subjects of His Majesty resident in by S 1 of the Government of India (Amendment) Act 1916 (6 & 7 Geo V C 3)

110 (13 Geo III C 63 Ss 15 17 21 Geo III C 70 s 1 37 Geo III C 142 s 11 39 and 40 Geo III, C 79, s 3, 4 Geo IV, C 41 s 7) —

Exemption from jurisdiction of High Court

(1) The Governor General, each Governor Lieutenant Governor and Chief Commissioner and each of the members of the Executive Council of the Governor General or of a Governor or Lieutenant Governor and a minister appointed under this Act shall not—

- (a) be subject to the original jurisdiction of any High Court by reason of anything counselled ordered or done by any of them in his public capacity only nor
- (b) be liable to be arrested or imprisoned in any suit or proceeding in any High Court acting in the exercise of its original jurisdiction nor
- (c) be subject to the original criminal jurisdiction of any High Court in respect of any offence not being treason or felony

(2) The exemption under this section from liability to arrest and imprisonment shall extend also to the Chief Justices and other Judges of the several High Courts

1 Legislative Changes—The following changes have been effected in Sub S (1) of the present section by Sch I of the Government of India (Amendment) Act 1916 —

- (1) The words Lieutenant Governor and Chief Commissioner have been newly added
- (2) The words The Executive Council of the Governor General or of a Governor or Lieutenant Governor have been substituted for the words the respective Executive Councils

By the Government of India (Amendment) Act 1919 (9 & 10 Geo V C 101) the words and a minister appointed under this Act in Sub S (1) have been newly inserted

111 (21 Geo III C 70 Ss 2 3 4)—The order in writing of the Governor General in Council for any act shall in any

Written order by Governor General Justification for act in any Court in India

proceeding civil or criminal, in any High Court acting in the exercise of its original jurisdiction be a full justification of the Act except so far as the order Extends to any European British subject but nothing in this section shall exempt the Governor General, or any member of his Executive Council or any person acting under their orders from any proceedings in respect of any such act before any competent Court in England

LAW TO BE ADMINISTERED

- 112 (21 Geo III, C 70, S 17, 37 Geo III, C 142, S 13)—The High Courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta Madras or Bombay, as the case may be shall in matters of inheritance and succession to lands rents and goods and in matters of contract and dealing between party and party when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law to decide according to the law or custom to which the defendant is subject

ADDITIONAL HIGH COURTS

- 113 His Majesty may, if he sees fit, by letters patent, establish a High Court of judicature in any territory in British India whether or not included within the limits of the local jurisdiction of another High Court and confer on any High Court so established any such jurisdiction, powers and authority as are vested in or may be conferred on any High Court existing at the commencement of this Act and where a High Court is so established in any area included within the limits of the local jurisdiction of another High Court, His Majesty may by letters patent alter those limits and make such incidental consequential and supplemental provisions as may appear to be necessary by reason of the alteration

ADVOCATE GENERAL

- 114 (53 Geo III, C 255, S 111, 21 and 22 Vic C 106, S 29)—(1) His Majesty may, by warrant under His Royal Sign Manual appoint an Advocate General for each of the presidencies of Bengal, Madras and Bombay

(2) The Advocate General for each of those presidencies may take on behalf of His Majesty such proceedings as may be taken by His Majesty's Attorney General in England

(3) On the occurrence of a vacancy in the office of Advocate General or during any absence or deputation of an Advocate General the Governor General in Council in the case of Bengal and the local Government in other cases may appoint a person to act as Advocate General and the person so appointed may exercise powers of an Advocate General until some person has been appointed by His Majesty to the office and has entered on the discharge of his duties or until the Advocate General has returned from his absence or deputation as the case may be or until the Governor General in Council or the Local Government as the case may be, cancels the acting appointment

1 Acting Advocate General—Sub S (3) has been newly added by Part III of the Government of India Act 1919 (9 and 10 Geo V C 101) The acting Advocate General is entitled to a right of pre audience over all other Advocates in respect of all business whether of a private nature or on behalf of the Crown¹

SAVINGS

131. (1)

* * * *

(2)

(3) Nothing in this Act shall affect the power of the Indian Legislature to repeal or alter any of the provisions mentioned in the Fifth Schedule to this Act or the validity of any previous exercise of this power

Saving as to certain
rights and powers

1 **Legislative changes**—The words Indian Legislature were substituted for the words Governor General in Legislative Council by Part II of Sch. II of the Government of India Act 1915 (J & 10 Geo V C 101)

2 **Power of Superintendence if subject to the Indian Legislative Acts**—This section provides that nothing in this Act shall affect the power of the Indian Legislature to repeal or alter any of the provisions mentioned in the fifth Schedule to this Act. The fifth Schedule refers to S 106 but not to S 10. It has however been held that a measure affecting the appellate jurisdiction under S 106 will affect the powers of superintendence under S 107 and that therefore the Local Legislature has power to pass laws affecting the powers and jurisdiction of the High Court under S 10.¹

* * * *

Section 131 Note 2

1 (1933) 1933 All 764 (775) [Special Tribunal created by Act of Legislature to

determine rights created by that Act—Decision of such tribunal stated to be final under such Act—High Court cannot interfere]

THE FIFTH SCHEDULE¹

Section 131 (3)

PROVISIONS OF THIS ACT WHICH MAY BE REPEALED OR
ALTERED BY THE (INDIAN LEGISLATURE)²

	Section	Subject
	*	*
106	.	Jurisdiction Powers and Authority of High Courts
108 (1)		<i>Exercise of jurisdiction of High Court by single Judges or division Courts</i>
109		Power of Governor General in Council to alter local limits of jurisdiction of High Courts etc
110		Exemption from jurisdiction of High Courts
111		Written order by Governor General in Council justification for act in High Court
112		Law to be administered in cases of inheritance succession contract and dealing between party and party
114 (2)		Powers of Advocate General

¹ This schedule was substituted by Sch 1 of the Government of India (Amendment) Act 1916 (6 & 7 Geo V C 3)

² These words were substituted for the words Governor General in Legislative Council by Part II of Sec II of the Government of India Act 1915 (5 & 16 Geo V C 101)

APPENDIX III.

DESPATCH FROM THE SECRETARY OF STATE.

SIR CHARLES WOODS DESPATCH ACCOMPANYING FIRST
LETTERS PATENT OR CHARTER

Judicial No 74

INDIA OFFICE
London 14th May 1862

To
HIS EXCELLENCY THE RIGHT HONOURABLE
THE GOVERNOR GENERAL OF INDIA IN COUNCIL

MY LORD

I Herewith transmit to you the Letters Patent or Charter¹ under the Royal Sign Manual for the High Court of Judicature to be established in Bengal in accordance with the provision of the Act 24 and 25 Victoria Chapter 104 for establishing High Court of Judicature in India and request that you will take immediate measure for instituting the Court the first Judges of which including those appointed under the 3rd section of the Act are designated in the second clause of the Charter. Those appointed by the Crown will be severally informed by me of their appointments to the Court.

2 This Charter will accomplish the great object which has so long been contemplated of substituting for the Supreme and Sudder Courts abolished by the Act of High Court of Judicature possessing the combined powers and authorities of the abolished Courts and exercising jurisdiction both over the Provinces under the Sudder Court and over the Presidency Town which forms the local jurisdiction of the Supreme Court.

3 Before I review the provisions in detail it is necessary that I should direct your attention to the general scope and main provisions of the Act in question.

4 It abolishes in the first place (as soon as the Charter shall issue) the Supreme Court and the Court of Sudder Dewany Adawlut. It vests in the High Court (by the last provision of Section 2) the powers and authorities of those Courts respectively except so far as the Crown may by such Charter otherwise direct. And (by the first part of the same section) it invests the High Court with such Civil Criminal Admiralty Vice Admiralty, Testamentary, Interstate and Matrimonial Jurisdiction and all such powers and authority in relation to the administration of justice in the Presidency as the same Charter may confer. With respect, therefore to the fusion of the Supreme and Sudder Courts it appears obvious that the Act itself seeks and that to assume and effect the same purpose by affirmative declaration in the Charter would be superfluous. It has been consequently deemed unnecessary that the Charter should exhibit on the face of it an explicit statement of the powers and jurisdiction to be possessed by the new Court in consequence of the fusion as would have been the proper course if these powers and jurisdiction had been entirely new. Recourse has been had in some places in lieu of such explicit statement to reference to statutory provisions and in others to the Charter of the Supreme Court when the object of clearness appeared to require it. But wherever the Charter does not otherwise specify the High Court will use the powers and administer the jurisdiction appertaining to those Courts respectively to whose authority it now succeeds.

5 But the Charter is intended positively to declare all such Civil, Criminal and other jurisdictions above specified as the Crown thinks proper by this Charter to confer on it supplementary or additional to its main purpose namely, the fusion of the aforesaid Courts.

6 Moreover the words giving authority to confer on the Court such jurisdiction and such powers and authorities for the administration of justice as the Crown may direct appear

¹ This Letters Patent dated the 14th May 1862 was revoked by further Letters Patent dated 25th December 1865

very large and such as, in point of fact invest the Crown with extensive legislative powers, so far as "the administration of justice," within the meaning of the sections, may require. It has been, however, thought best to use this power very sparingly and simply as ancillary to the real purpose of the Act, namely, the establishment of new Courts.

7 Another reason for the form which the present Letters Patent assume is to be found in the provisions of S 17 of the Act of last Sessions. By that section power is given to the Crown to recall the Letters Patent establishing the Court at any time within three years after its establishment, and to grant other Letters Patent in their stead. This provision was inserted in the Act mainly with the view of enabling Her Majesty's Government to avail themselves of the advice and assistance of the Judges of the Court in framing the more perfect Charter by which the jurisdiction and authority of the Court is to be permanently fixed. On this point, I request you will put yourselves in communication with the Judges of the Court, and, at any time previous to the expiration of two years from the date of establishment of the Court, furnish me with any suggestions they make or any amendments they may propose in the Letters Patent now transmitted, and I shall be glad if in proposing alterations the Judges will put their recommendations as nearly as possible in the form in which they wish them to appear in the future Letters Patent.

8 I proceed to notice, in order, such of the provisions of the Charter as appear to me to call for special remark.

9 By clause 6, power is given to the Chief Justice to appoint the officers of the Court and to fix their salaries subject however, in both cases to the

Clause 6

approval and confirmation of the Governor General in Council.

This provision does not refer to the setting of tables of fees where fees are allowed, which under S 15 of the Act, is required to be done by the Court.

10 The Supreme Court exercises an authority entirely independent of the Government in regard to its ministerial officers. The Government, however, has always considered itelf at liberty to receive representations from any of the officers of the Sudder or Subordinate Courts who felt themselves aggrieved by the orders of the Judicial Authorities, and to express its opinion on the propriety or otherwise of the proceedings of the Courts in such cases. It will be expedient for you to take the question into your consideration, and, after communication with the Court, to adopt some rule in regard to it which of course must be uniformly applicable to all the officers of the Court. Constitute all the confidence you can repose in it, but as a q

h
proceedings alleged by the applicants to be unjust and oppressive.

11 In regard to the admission of Advocates, Vakeels, and Attorneys the recommendations of the Law Commissioners have been followed. Under the existing practice, the Advocate pleads, and the Attorney acts, for the suitors of the Supreme Court and the Vakeel both pleads and acts for the suitors of the Sudder Court, of which Court the Advocate and Attorney of the Supreme Court are *ex officio* Vakeels. These terms are employed in the Charter simply to express the functions of these several classes of practitioners. The Advocate and Attorney will respectively plead and act in the High Court and the Vakeel will both plead and act in the High Court as he did in the Sudder Court. Any person may apply to be admitted either as an Advocate, or Vakeel or Attorney under the Rules which the Court is authorized by the Charter to make and there is nothing in the Charter to prevent the admission of Advocates and Attorneys to be also Vakeels of the High Court, should the Judges consider such a course to be expedient.

12 The provisions in the Act S 2 Cl 4, which declares that Pleader of the Sudder Court, "who shall have been admitted as Pleaders of the High Court," shall be eligible under certain conditions, to the Bench of the Court, implies that a discretionary power may be exercised as to the admission of the present Pleaders of the Sudder Court to the Bar of the High Court. This enactment will account to you for the omission from the Charter of any provision appointing all the present practitioners of the Supreme and Sudder Courts to the High Court. I conclude, however, that unless in any special cases, there are strong reasons to the contrary, the Court will admit the whole of the practitioners in the abolished Courts at the date of their abolition, to be the first Advocates, Vakeels, and Attorneys of the High Court.

13 With reference to the concluding sentence of Clause 10 it is to be observed that the Letters Patent contain no provision reserving to the Attorneys of the present Supreme Court the right of pleading after the issue of this Charter in the Insolvent Court as newly regulated by Clause 17. No such provision, however is necessary as the Insolvent Court is a separate tribunal not affected by the Act authorising the Letters Patent and will continue a separate Court though for the future presided over by a Judge of the High Court. The Attorneys therefore will as heretofore practise in accordance with the rules of the Insolvent Court itself.

14 As to the important provisions contained in the clauses of the Charter 11 to 33 inclusive it is given to the 9th section of the Act respecting the jurisdictions and powers to be exercised by the High Court.

15 The civil and criminal jurisdiction now exercised by the Supreme Court within the limits of the Presidency Town will henceforth be exercised under the Charter by the High Court including in that term (Clause 36 of the Charter) a Judge or Division Court of the High Court appointed or constituted under the provisions of the 13th section of the Act.

16 As it is very desirable that every suit should be instituted in the Court of the district in which the property forming the subject of dispute is situated or in which the cause of action has its origin or in which the defendant resides or carries on business the jurisdiction hitherto exercised by the Supreme Court (on the ground of constructive inhabitation or otherwise) over persons and property beyond the local limits of the Presidency Town but within the limits of the Presidency or Division subject to the authority of the High Court has not been vested in the High Court. The concluding provision of Cl. 11 provides that the exercise of the ordinary original civil jurisdiction of the Court shall be confined to the local limits of the Presidency Town with power however to the Court under Clause 13 to call for and try any suit instituted in any Court subject to its superintendence when for reasons to be recorded it shall think proper to do so.

17 The terms of Clause 12 defining the original jurisdiction of the High Court as to suits are nearly similar to those employed in S. 5 of the Code of Civil Procedure (Act VIII of 1859) and are intended to include every description of case over which the Mofussil Courts have jurisdiction. By the 5th section of the 21st George III C. 70 the Supreme Court is precluded from exercising any jurisdiction in any matter concerning the revenue. Further a decision of the Judicial Committee of the Privy Council pronounced in April 1856 ruled against the exercise of the Ecclesiastical jurisdiction of the Supreme Court in matters matrimonial between others than Christians and even expressed some hesitation as to whether that Court should administer a remedy in such cases on the Civil side. It is one object of the present Charter to do away with all such restrictions and limitations as far as this can be done without trenching on the proper province of legislation. It has therefore been sought to invest the High Court in the exercise of its original civil jurisdiction with as ample powers in receiving and determining cases of every description and in applying a remedy to every wrong as are exercised by the Courts not established by Royal Charter and thus to place the Courts of first instance in the Presidency Towns and in the interior of the country in this respect as nearly as may be on the same footing.

18 I shall be glad to be furnished with your opinion after consultation with the Judges of the Courts as to the concluding portion of Clause 12 excluding the jurisdiction of the Court in regard to cases falling within the jurisdiction of the Small Cause Court of Calcutta in which the debt or damage or value of the property sued for does not exceed 100 Rupees. Hitherto I believe there has been no tendency to bring into the Supreme Court cases cognizable by the Small Cause Court but should it appear that under the new system the time of the High Court is unnecessarily taken up with trying cases which might be instituted in the Small Cause Court it may become a question for consideration whether the sum excluding the jurisdiction of the High Court might not be raised to say 300 or 500 Rupees.

It will be placed on the same
Court of appeal and general
the Act of Parliament of

last Session that the Crown, in framing a Charter under it for the High Court, should interfere with the present position and jurisdiction of other and independent Courts. This subject, if desirable is properly to be attained on that the Small Cause Court ought to be placed as any other Court subject to its appellate jurisdiction and carried into effect by an Act of the Governor General in Council.

20 As already observed the effect of Clause 12 will be to confine the ordinary original civil jurisdiction of the High Court within narrower limits than the Civil jurisdiction exercised by the Supreme Court. By Clause 13, however, the High Court is empowered to call for and to try as a Court of first instance any suit which the law requires to be instituted before some other tribunal. By the exercise of the power thus conferred on it the High Court will be enabled to obviate all reasonable grounds of complaint, when it shall deem that any hardship or injustice is likely to result from the compulsory institution in a Zillah Court of a suit which but for the change in the system might have been instituted in the Supreme Court.

21 The introduction of the words whether within or without the Bengal Division of the Presidency of Fort William in this and in several other clauses, may appear to require explanation. The Court about to be established is called in S 2 of the Act 21 and 25 Victoria C 101 a Court for the Bengal Division of the Presidency of Fort William. That title is of course preserved in the Charter. By S 8 the Supreme and Sudder Courts are abolished and by S 9 all their jurisdiction power, and authority except when otherwise provided are vested in the High Court. But the Supreme Court has various original jurisdictions extending over the whole of the Presidency of Fort William, and also over some of the Non Regulation Provinces under the Government of India and the Sudder Court has various appellate jurisdictions extending over the Bengal Division of the Presidency and also over the Province of Assam and others which are not properly parts of the Presidency. The result is that the High Court for the Bengal Division succeeding to the powers of both the Supreme and the Sudder Courts has in several respects jurisdictions in territories not within the Bengal Division. As this is the result of the Act it might not have been necessary to notice it in the Charter. But for the sake of clearness and in order to show distinctly that the Charter is meant to apply to these extra local jurisdictions as well as to the strictly local jurisdiction within the Bengal Division it has been deemed advisable to introduce these words.

22 Clauses 14 and 15 give effect to the recommendation of the Law Commissioners that the High Court shall have all the appellate jurisdiction which is now exercised by the Sudder Dewany Adawlut, and a new appellate jurisdiction in civil cases from the Courts of original jurisdiction constituted by one or more of its own Judges, except that in the case of a decision which has been passed by a majority of the full number of the Judges of the Court, the appeal shall lie to Her Majesty in Council.

23 It will appear from a subsequent clause on the Letters Patent that the proceedings in the High Court in civil cases are to be regulated by the Code of Civil Procedure enacted by the Legislature of India of which Act XXII of 1861 forms a part. By S 23 of the last mentioned Indian Act provision has been made for a difference of opinion on the hearing of an appeal, constituting a Division Court for judges, to differ as to the judgment to be given adapted to Courts of first instance. To call in a third Judge and to re-try may be an appeal to the High Court and expense to the parties, and I am of opinion that the Court should make provision for such a contingency, by a rule made under the 13th section of the Act of Parliament, providing either that the judgment shall be in accordance with the opinion of the senior of the Judges constituting the Division Court, or that the final judgment shall be entered *pro forma*, according to such opinion such judgment being a judgment for the purpose of an appeal against the same, but not for any other purpose.

24 The substantive civil law to be administered by the High Court within the jurisdiction of the Supreme and Sudder Courts, respectively, will, until otherwise provided, continue as at present. This, as I have said, it was no part of the purpose of the Act of Parliament or Charter to effect. And the clauses on which I am now commenting are probably superfluous. But they

have been introduced to obviate any apprehension which might have been entertained that in fusing the two Courts together it was intended to fuse also the law which they have respectively hitherto administered, and thus to make a substantial innovation not only in the tribunals for administration of the law but in the law itself. I trust however that measures may be taken ere long for effecting great improvements in this respect by enacting for the British possessions in India a body of substantive law by which all classes shall be governed and all transactions shall be regulated except in cases to which our Judicatures are required to apply the personal laws of any classes of our Indian subjects.

25 Under Clauses 21, 22 and 23 no change will be effected by the Charter in the administration of criminal justice in the Presidency Town or in respect of persons subject to its criminal jurisdiction residing in the interior of the country. It appears however to Her Majesty's Government that a modification of the existing practice both at the capital and in the provinces is necessary and on these points I shall address you in a separate despatch.

26 The Sudder Court exercises no original jurisdiction but by Clause 23 its authority has been enlarged so as to enable it to try cases out of the Presidency Town at which from their importance or for other specific cause it may be expedient that a Judge or Judges of the High Court should preside.

27 The remaining clauses of the Letters Patent on the subject of the criminal jurisdiction of the High Court do not call for any particular notice. They contain no special provisions respecting the transfer to that Court of the criminal jurisdiction exercised by the Supreme Court over inhabitants of such parts of India as are not comprised within the local limits of the Letters Patent that having been fully provided for by Section 10 of the Act under the authority of which the High Court is established.

28 As in the case of the Small Cause Court you will consult the Judges in regard to the relation in which the High Court is to stand to the Magistrates of Calcutta.

29 Clause 30 respecting the exercise of the jurisdiction by the High Court elsewhere than at its ordinary place of sitting is a very important provision and one which I have no doubt if judiciously carried into effect will materially tend to the greater efficiency of all the judicatures subject to the superintendence and authority of the High Court. Circumstances may frequently arise when the deputation of a Judge or Judges of the High Court would be a measure of the highest expediency. For such cases the Clause under consideration will enable the Government to provide by deputing one or more Judges from the High Court who would avail themselves of the opportunity thus afforded them of making a searching inquiry into the manner in which the local Courts were performing their duties.

30 With reference to this clause it has been considered whether the precedence of Section 14 of the Act of Parliament should not be followed and the authority to make the necessary arrangements for exercise of the Courts jurisdiction out of the usual place of sitting vested in the Chief Justice. On the whole it was thought that acts partaking so much of an administrative character might be more perfectly performed by the Governor-General in Council. But it is scarcely necessary for me to add that Her Majesty's Government entertain full confidence that the Chief Justice will be the authority habitually consulted in the matter.

31 The Supreme Court exercises at present Admiralty Jurisdiction under its Charter. The Chief Justice has Vice Admiralty Jurisdiction under the commission of the 19th July 1822 and all or any of the Judges of the Supreme Court may be appointed Commissioners under the provisions of 39 and 40 George III. C. 79 S. 25 for the trial and adjudication of prize causes and other maritime questions arising in India. By the present Charter the whole of these jurisdictions and power will be vested in the High Court and as in the Act above cited by the expression 'other maritime questions' in general mention is made of all the jurisdictions conferred as above mentioned in the clauses of the Charter, providing both for the civil and criminal maritime jurisdiction of the High Court.

Clauses 33 and 34

32 The clauses respecting testamentary and intestate jurisdiction do not call for any remark

33 Her Majesty's Government are desirous of placing the Christian subjects of the Crown within the Presidency in the same position under the High Court as to matters matrimonial in general as they

Clause 30 now are under the Supreme Court, and thus they believe to be effected by Cl 35 of the Charter. But they consider it expedient that the High Court should possess in addition the power of decreeing divorce which the Supreme Court does not possess, in other words that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England, established in virtue of 20 and 21 Vic, C 85, and in regard to which further provisions were made by 22 and 23 Vic, C 61, and 23 and 24 Vic C 144. The Act of Parliament for establishing the High Court however does not purport to give to the Crown the power of importing into the Charter all the provisions of the Divorce Court Act and some of them the Crown clearly could not so import such for instance as those which prescribe the period of re marriage or those which exempt from punishment clergymen refusing to re marry adulterers. All these are, in truth, matters for Indian legislation and I request that you will immediately take the subject into your consideration and introduce into your Council a Bill for conferring upon the High Court the jurisdiction and powers of the Divorce Court in England one of the provisions of which should be to give an appeal to the Privy Council in those cases in which the Divorce Court Act gives an appeal to the House of Lords

34 The object of the proviso at the end of Cl 35 is to obviate any doubt that may possibly arise as to whether, by vesting the High Court with the powers of the Court for Divorce and Matrimonial Causes in England it was intended to take away from the Courts within the divisions of the Presidency not established by Royal Charter any jurisdiction which they might have in matters Matrimonial as for instance in a suit for alimony between Armenians or Native Christians. With any such jurisdiction it is not intended to interfere

35 Clause 36 refers to the powers of single Judges and Division Courts appointed or constituted under the provisions of the 13th section of the Act

Clause 36 By S 14 of the Act the power of determining from time to time what Judge in each case shall sit alone and what Judges shall constitute Division Courts is placed in the hands of the Chief Justice. It will be observed that the law does not require that a Judge selected from the Bar shall necessarily form a part of every Division Court, and it will be for the Chief Justice to consider whether in cases exclusively between Natives, it will not be desirable to follow, as far as possible, the course which has already been resolved upon in regard to the cases under appeal to the Sudder Court at the time of its abolition, and to constitute the Division Court of Judges trained in the country, whose knowledge of the Native language will obviate the expense and delay of translating the proceedings

36 Clause 37 is a very important one and there is little doubt, will prove a very salutary provision. It has therefore, been inserted although the change introduced is somewhat greater and more substantial than is generally aimed at in this Charter. It extends to the High Court the Code of Civil Procedure enacted by the Legislature of India for the Court not

since the date of its establishment

37 In regard to the rules respecting appeals to the Privy Council the object has been to avoid unnecessary innovation where so much of change, with its necessary inconvenience is unavoidable. The existing rules which regulate these appeals are, therefore left in force with one or two additions only, which experience in the Court of the Judicial Committee has found advisable. For instance Cl 40 is introduced, as it had been commonly introduced, of late years in the appeal rules of other dependencies of Great Britain in order to remove all doubts as to the power of the High Court to allow an appeal to the Council from interlocutory judgments.

38 It will, however be obvious to you that the Rules, as now framed, will be liable to the reproach of confusion and perhaps of uncertainty. They will be compounded of those contained in the Charter and those already in force which will necessitate reference to several

documents. You will agree with me that a simple and intelligible Code of Rules, to regulate appeals to the Privy Council from the new High Courts or rather from the High Courts in general which may be constituted under the Act of Parliament will be of great advantage to the Courts and the public. I should wish therefore that one of the first objects of the Judges, as soon as the amount of labour thrown on them by their new position may allow it might be to prepare suggestions for such a Code of Rule which might then be reduced into a complete shape by the authority of the Privy Council at Home.

39 In forwarding the Letters Patent to the Judges of the High Court you are requested to furnish them with a copy of this despatch. I trust that the Letters Patent taken in connection with the Act for establishing the Court will be found to contain everything requisite for enabling the Court to proceed at once to the discharge of its important duties. It is possible that omissions may be discovered by the legal authorities in India which may impede the proper action of the Courts and should the Judges represent to you that such is the case you will take immediate steps for supplying what is wanting by such legislative measures as you may consider most expedient for remedying the defect brought under your consideration.

40 I cannot conclude this despatch without expressing the deep interest felt by Her Majesty's Government in the success of this important measure. The Crown by its Letters Patent has sanctioned the establishment of a tribunal as the Chief Court of Justice in India, which in the trained learning of the Judges selected from the Bar and in the knowledge of the language, feelings, and habits of the Natives of that country possessed by the other members of the Court combine the most material elements of success. And Her Majesty's Government look with confidence to the zealous exertion and cordial co-operation of the Judges to place the administration of Justice in India under the controlling authority of the Court in such a state of efficiency as will render it in every respect adequate to its end and satisfaction to the people and to the Government.

I have the honour to be

My Lord

Your Lordship's most obedient humble Servant,

(Signed) C. WOOD

LETTERS PATENT [CALCUTTA, MADRAS AND BOMBAY]

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LETTERS PATENT [CALCUTTA, MADRAS AND BOMBAY.]

[NB—As the Letters Patent for Calcutta, Madras and Bombay are all in very similar terms, the Letters Patent Calcutta, is given as the main one and the differences in the wording of the other two Letters Patents are indicated within square brackets]

For the High Court of Judicature for the Presidency of Calcutta

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith To all to whom these presents shall come, Greeting Whereas by an Act of Parliament passed in the twenty fourth and twenty fifth years of Our Reign, entitled "An Act for establishing High Courts of Judicature in India" It was, amongst other things, enacted that it should be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature [at Madras, for the presidency of Madras aforesaid] at Fort William in Bengal, for the Bengal division of the Presidency of Fort William aforesaid [at Bombay for the Presidency of Bombay aforesaid] and that such High Court should consist of a Chief Justice and as many Judges, not exceeding Fifteen, as Her Majesty might, from time to time think fit to appoint, who shall be selected from among persons qualified as in the said Act is declared Provided always that the persons who at the time of the establishment of such High Court were Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Presidency, should be and become Judges of such High Court, without further appointment for that purpose, and the Chief Justice of such Supreme Court should become the Chief Justice of such High Court, and that upon the establishment of such High Court as aforesaid, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Nizamat Adawlut at [Madras], Calcutta [Bombay] in the said Presidency should be abolished

And that the High Court of Judicature so to be established should have and exercise all such civil, criminal, admiralty and vice admiralty, testamentary intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for, and in relation to the administration of justice in the said Presidency as Her Majesty might, by such Letters Patent as aforesaid, grant and, direct, subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdictions beyond the limits of the Presidency town, as might be prescribed thereby, and, save as by such Letters Patent, might be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever, in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last mentioned Courts

And whereas We did, upon full consideration of the premises, think fit to erect and establish, and by Our Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland bearing date at Westminster, the twenty sixth day of June in the Twenty-fifth Year of Our Reign, in the Year of Our Lord, One thousand eight hundred and sixty-two, did accordingly, for Us, Our heirs and successors, erect and establish [at Madras, for the Presidency of Madras aforesaid, a High Court of Judicature, which should be called the High Court of Judicature at Madras] at Fort William in Bengal for the

Bengal Division of the Presidency of Fort William aforesaid, a High Court of Judicature which should be called the High Court of Judicature at Fort William in Bengal [at Bombay, for the Presidency of Bombay aforesaid, a High Court of Judicature which should be called the High Court of Judicature at Bombay] and did thereby constitute the said Court to be a Court of Record: and whereas We did thereby appoint and ordain that the said High Court of Judicature at [Madras] Fort William in Bengal [Bombay] should, until further or other provision should be made by Us, or Our heirs and successors on that behalf, in accordance with the recited Act, consist of a Chief Justice and five Judges, and did thereby constitute and appoint certain persons, being respectively qualified as in the said Act is declared, to be Judges of the said High Court:

And whereas by the said recited Act it is declared lawful for Her Majesty, at any time within three years after the establishment of the said High Court, by Her Letters Patent, to revoke all of such parts or provisions as Her Majesty might think fit of the Letters Patent by which such Court was established, and to grant and make such other powers and provisions as Her Majesty might think fit, and as might have been granted or made by such first Letters Patent:

And whereas by the Act of the twenty-eighth year of Our Reign, chapter fifteen, entitled 'An Act to extend the term for granting fresh Letters Patent for the High Courts in India, and to make further provision respecting the territorial jurisdiction of the said Courts,' the time for issuing fresh Letters Patent has been extended to the first of January, One thousand eight hundred and sixty-six

And whereas, in order to make further provision respecting the constitution of the said High Court, and the administration of justice thereby, it is expedient that the said Letters Patent, dated the twenty-sixth of June, One thousand eight hundred and sixty-two, should be revoked, and that some of the powers and provisions thereby granted and made should be granted and made with amendments and additional powers and provisions by fresh Letters Patent

1. Now know ye that We, upon full consideration of the premises and of Our special grace, certain knowledge, and mere motion
Revocation of Letters Patent of 1862
 have thought fit to revoke, and do by these presents (from and after the date of the publication thereof, as hereinafter provided, and subject to the provisions thereof) revoke Our said Letters Patent of the Fourteenth of May, [Twenty-sixth of June] One thousand eight hundred and sixty-two, except so far as the Letters Patent of the Fourteenth year [Forty-first year] of His Majesty King George the Third, dated the Twenty-sixth of March, One thousand seven hundred and seventy-four [Twenty-sixth of December, One thousand eight hundred], establishing a Supreme Court of Judicature at Fort William in Bengal [Madras] [Bombay] were revoked or determined thereby

2 And We do by these presents grant, direct and ordain that, notwithstanding the revocation of the said Letters Patent of the Fourteenth May [Twenty-sixth of June,] One thousand eight hundred and sixty-two, the High Court of Judicature called the High Court of Judicature at Fort William in Bengal [Madras,] shall be and continue, as from the time of the original erection and establishment thereof, the High Court of Judicature at [Madras] Fort William in Bengal [Bombay] for the Presidency of [Madras aforesaid] Bengal division of Fort William aforesaid [Bombay aforesaid], and that the said Court shall be

High Court at Calcutta
 to be continued

and continue a Court of Record, and that all proceedings commenced in the said High Court prior to the date of the publication of these Letters Patent shall be continued and depend in the said High Court as if they had commenced in the said High Court after the date of such publication and that all rules and orders in force in the said High Court immediately before the date of the publication of these Letters Patent shall continue in force except so far as the same are altered hereby until the same are altered by competent authority

3 And We do hereby appoint and ordain that the person and persons who shall immediately before the date of the publication of those Letters Patent be the Chief Justice or Judges or Acting Chief Justice or Judges if any of the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal shall continue to be the Chief Justice and Judges or Acting Chief Justice or Judges of the said High Court until further or other provision shall be made by Us or Our heirs and successors in that behalf in accordance with the said recited Act for establishing High Courts of Judicature in India

4 And We do hereby appoint and ordain that every clerk and ministerial officer of the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal appointed by virtue of the said Letters Patent of the Fourteenth of May [Twenty sixth June] one thousand eight hundred and sixty two shall continue to hold and enjoy his office and employment with the salary thereunto annexed until he be removed from such office and employment and he shall be subject to the like power of removal regulations and provisions as if he were appointed by virtue of these Letters Patent

5 And We do hereby ordain that the Chief Justice and every Judge who shall be from time to time appointed to the said High Court of Judicature at [Madras] Fort William in Bengal [Bombay] previously to entering upon the execution of the duties of his office shall make and subscribe the following declaration before such authority or person as the Governor General in Council may commission to receive it —

I A B, appointed Chief Justice (or a Judge) of the High Court of Judicature at Fort William in Bengal [Madras] do solemnly declare that I will faithfully perform the duties of my office to the best of my ability I know ledge and judgment

6 And We do hereby grant, ordain and appoint that the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal shall have and use as occasion may require a seal bearing a device and impression of our Royal Arms with an over-arc or label surrounding the same with this inscription The Seal of the High Court at [Madras] [Bombay] Fort William in Bengal And We do further grant, ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice and in case of the vacancy of the office of Chief Justice or during any absence of the Chief Justice the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of Section 7 of the recited Act And We do further grant, ordain and appoint that whenever it shall happen that the office of Chief Justice or of the Judge

whom the custody of the said seal be committed shall be vacant, the said High Court shall be and is hereby authorized and empowered to demand, seize and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his her or their possession

7. And We do hereby further grant ordain and appoint that all writs, summons, precepts rules, orders and other mandatory process to be used issued or awarded by the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal shall run and be in the name and style of Us or of Our heirs and successors and shall be sealed with the seal of the said High Court

8. And We do hereby authorize and empower the Chief Justice of the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal from time to time, as occasion may require and subject to any rules and restrictions which may be prescribed by the Governor General in Council to appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent

And it is our further will and pleasure and We do hereby for Us Our heirs and successors give grant direct and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall, from time to time appoint for each office and place respectively, and as the Governor General in Council shall approve of. Provided always and it is Our will and pleasure that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they shall hold their respective offices but this proviso shall not interfere with or prejudice the right of any other officer or clerk to avail himself of leave of absence under any rules prescribed by the Governor General in Council and to absent himself from the said limits during the term of such leave in accordance with the said rules

Admission of Advocates Vakils and Attorneys

9. And We do hereby authorize and empower the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal to approve admit and enrol such and so many Advocates Vakils and Attorneys as to the said High Court shall seem meet and such Advocates Vakils and attorneys shall be and are hereby authorized to appear for the suitors of the said High Court and to plead or to act or to plead and act for the said suitors according as the said High Court may by its rules and directions determine and subject to such rules and directions

10. And We do hereby ordain that the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal shall have power to make rules for the qualifications and admission of proper persons to be Advocates Vakils and Attorneys at Law of the said High Court and shall be empowered to remove or to suspend from practice on reasonable cause, the said Advocates Vakils or Attorneys at Law and no person whatsoever but such Advocates Vakils or Attorneys shall be allowed to act or to plead for or on

behalf of any suitor in the said High Court, except that any suitor shall be allowed to appear plead or act on his own behalf or on behalf of a co suitor

Synopsis

	Note No		Note No
Bar Councils Act	1	over Advocates Attorneys and Vakils	3
Authority of Advocates Vakils and Attorneys	2	Reasonable cause meaning of	4
Disciplinary jurisdiction of High Court		Recognised agents	5

1 Bar Councils Act—Clauses 9 and 10 and the rules made thereunder should be read as subject to the provisions of the Indian Bar Councils Act XXV III of 1926 to the extent to which such provisions have come into force with reference to any High Court. See S 19 (2) of the Act. Thus it has been held that Rr 128 and 129 of the Insolvency Rules of the Madras High Court made under the Letters Patent which precluded advocates from acting as distinguished from pleading on the Insolvency side of the High Court are no longer in force as they are repugnant to the provisions of the Bar Councils Act¹. Similarly a complaint of misconduct against an advocate must first be referred to the Bar Council for inquiry².

2 Authority of advocates vakils and attorneys—The authorities of advocates vakils and attorneys to practise in the High Court is subject to the rules and directions made by the High Court under Cl 9 in so far as such rules and directions are not repugnant to the provisions of the Bar Councils Act of 1926¹. The following cases² are illustrative of the rules which the High Court is empowered to make under Cl 9.

3 Disciplinary jurisdiction of High Court over advocates attorneys and vakils—The High Court has power under Cl 10 to remove or suspend from practice on reasonable cause any advocate vakil or attorney practising before it. Under the provisions of the Bar Councils Act of 1926 a complaint of misconduct against an advocate must first be referred to the Bar Council for inquiry¹. It is not necessary under Cl 10 that cases of professional misconduct must be dealt with only by the full Court consisting of all the Judges of the High Court for the time being and it is competent to a Bench of Three Judges to dispose of such cases². In proceedings under Cl 10 the High Court exercises a special jurisdiction and that inherent power to apply such rules of procedure as may ensure a fair trial³. The proceedings are not of a criminal nature and the rules of procedure applicable to a criminal trial such as the filing of a written statement by the accused are not applicable to them⁴. Nor are such proceedings in the nature of civil suits and the provisions of the Civil Procedure Code do not apply to them⁵.

Though it is not incompetent for the High Court to deal under Cl 10 with charges of a criminal nature against a practitioner unless and until they have been investigated by a criminal Court it is eminently fitting that in such cases the criminal prosecution should precede any disciplinary action under Cl 10⁶.

An order of disbarment is not necessarily final or conclusive for all time and it is open to the Court to readmit a practitioner after a lapse of time if it is satisfied that he has in the interval conducted himself honourably and that the sentence of exclusion has had the salutary effect of awakening in him a higher sense of honour and duty⁷.

Clauses 9 and 10—Note 1

1 (1928) 1923 Mad 1182 (118J) 52 Mad 92

2 (1928) 1923 All 430 (432) (F B)

Note 2

Insolvency Court before Bar Council Act

Note 3

1 (1925) 1923 All 430 (432) (I B)

2 (1932) 1932 Mad 131 (133) 54 Mad 857

3 (1924) 1924 Lah 123 (121) 4 Lah 271

4 (1924) 1924 Lah 123 (121) 4 Lah 271

5 (1930) 1930 Rang 150 (151) 8 Rang 40.

Order of disbarment—Provisions of Code relating to granting of certificate of fitness for appeal to Privy

Calcutta High Court

(1876-78) 1 Mad 24 (36) (F B) Vakils of Madras High Court can practise on Original Side before Bar Councils Act

(1917) 1917 Mad 49 (54 56) (Do)

(1925) 1925 Mad 385 (387 395 397) 48 Mad 331 Vakils of Madras High Court have no right of audience in the

An attorney is an officer of the Court and any person aggrieved by his misconduct can bring it to the notice of the Court⁵

4 'Reasonable Cause' meaning of—What is 'reasonable cause' for the removal or suspension of a legal practitioner depends on the facts of each case¹ It is not restricted to misconduct in the strict course of a practitioner's duties or to cases of moral turpitude but embraces all causes which may afford reasonable ground for his removal or suspension² Nor is it necessary for invoking the disciplinary jurisdiction of the High Court that any offence should have been committed by the legal practitioner or that his act should have been such as to subject him to anything like general infamy or imputation of bad character³

Disciplinary action against a practitioner under the Letters Patent rests on the principle that the Court deems him an unfit person to act as a legal practitioner and is not by way of

8. (1914) 1914 Cal 192 (193) 41 Cal 113

Note 4

1 (1906) 29 All 95 (10-) Confirming 3 All L J 592 (593)

See the following cases for instances of misconduct—

(1914) 1914 Mad 635 (636) Suggesting that he is in a position to influence a Judge in his favour by indirect and improper means

(192-) 123 Bom 35 (186) 52 Bom 559 Insolvency

(1909) 41 C 1072 (1075 10 6) (Mad) Issuing false notice with a fraudulent object

(1909) 2 Ind Cas 264 (265) 33 Bom 252 Issuing resolutions condemning judgment passed by a Court

(1923) 1923 Pat 165 (167) Conviction under Criminal Law Amendment Act

(1932) 1932 Lah 584 (585) Allowing clerk to enter into agreement for sharing fees

(1910) 6 Ind Cas 313 (316 317) 34 Mad 29 Accepting directorships of fraudulent companies

(1918) 19 Ind Cas 529 (529) 37 Bom 354

—
paying it

(1910) 6 Ind Cas 310 (313) (Mad) Receiving money on client's behalf and using it for his own use

(1911) 21 Mad L Jour 76 (72) Filing petition containing unfounded allegations

(1918) 1318 All 136 (149) Intimidating and trying to prevent witness from giving evidence

(1925) 1325 Bom 1 (6) Disclosing confidential information

(1922) 1922 Bom 361 (364) 47 Bom 117 Criticism of pending trial

(1918) 1918 Mad 788 (791) 40 Mad 69 Taking advantage of the ignorance and needy position of his clients and obtaining conveyance from them of an equity of redemption for much less than its value

(1914) 1914 Mad 635 (636) Suggesting to client that he was in a position to influence Judge by improper means

(1920) 1920 All 1 (6) 42 All 450 Putting

in statement of his own but purporting to issue from the clients and drafted on their instructions

(1933) 1933 Lah 547 (549 550) 14 Lah 532 (S B) Lawyer assisting in celebration of independence day by Congress Committee—in unlawful association—No evidence of acts done—No ground for punishing under this clause

(1908) 8 Cal L Jour 163 (167) (F B) Attorney, sole partner of a firm appearing in the firm's name for the plaintiff and in his own name for the defendant

(1925) 1928 Cal 820 (823 824) (F B) Pleader accepting client's vakalatnama and papers but not filing the appeal

(1925) 1925 Cal 1084 (1085) 52 Cal 793 Detaching client from another solicitor—Reprehensible but not sufficient cause

(1931) 1931 Oudh 161 (166) (F B) Conviction for criminal offence

(1895) 17 All 498 (510 511) 22 Ind App 193 (P C) Writing to another vakil asking for briefs to be sent and offering to share the fees

(1907) 29 All Jo (103) 34 Ind App 41 (P C) Confirming (1906) 3 All L J 592 (593) Publication of libel on judges

(1907) 34 Cal 129 (141) 34 Ind App 55 4 L B R 27 (P C) Advising client to bribe witnesses

(1907) 34 Cal 729 (733 744) Having settled plaintiff and afterwards saying to his client that he would take the case against him unless he is paid five times the ordinary fee

(1906) 4 Cal L Jour 229 (262) Accepting share of property sued for

(1926) 1526 Mad 568 (56-) 49 Mad 523 Negligence by itself not professional misconduct

2 (1920) 1920 Bom 168 (169 170) 44 Bom 418 Signing pledge to disobey an Act

(1934) 1934 Lah 251 (261) Conduct need not be connected with professional activity

(1900) 27 Cal 1023 (1037 1038)

(1902) 29 Cal 890 (894 902 903)

(1924) 1924 Lah 123 (124, 126) 4 Lah 271

3 (1920) 1920 Bom 168 (169, 170 172, 174) 44 Bom 418

(1914) 1914 Cal 192 (193) 41 Cal 113

punishment ⁴

Where proceedings are taken against a practitioner under Cl 10 on the ground of his having been convicted of a criminal offence the propriety of the conviction cannot be questioned in such proceedings but the practitioner can show that the degree of his culpability was not such as to make him an unfit person to be a member of the profession ⁵

An offence committed by an advocate prior to his enrolment may be reasonable cause for his removal or suspension from practice if the offence implies a permanent defect of character of a disqualifying kind ⁶

5 Recognised agent—The last portion of Cl 10 provides that no person other than an advocate, vakil or attorney can act or plead on behalf of a suitor excepting that a suitor can plead or act on behalf of himself or co-sutor. Thus a recognised agent of a party cannot present an appeal to the High Court ¹. It has however been held in the case cited below that an application by a *purdanashin* lady for leave to appear *in forma pauperis* can in view of Ss 182 and 183 of the Code be presented by her recognised agent ²

Civil jurisdiction of the High Court

11 And We do hereby ordain that the said High Court of Judicature at [Madras] [Bombay], Fort William in Bengal shall have and exercise ordinary original civil jurisdiction within such local limits as may from time to time be declared and prescribed by any law made by competent legislative authority for India and until some local limits shall be so declared and prescribed within the limit declared and prescribed by the proclamation fixing the limits of Calcutta issued by the Governor General in Council on the 10th day of September in the year of Our Lord One thousand seven hundred and ninety four and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction

Synopsis

	Note No		Note No
Local limits	1	Power to transfer or stay suit in the	3
Issue of process outside jurisdiction	2	moffussil	

Other Topics

Power of High Court to issue warrant See note 2 Pt (1)

1 Local Limits—The local limits of the original civil jurisdiction of the High Courts of Bombay and Madras are to be declared and prescribed by the Governor in Council of the respective provinces whereas in regard to the Calcutta High Court the power is in the competent Legislative Authority for India. A High Court cannot exercise its ordinary original civil jurisdiction beyond the local limits so prescribed except in so far as provided in Cl 44 of the Letters Patent read with S 100 of the Government of India Act 1915. Thus the Indian Legislature can confer on a High Court jurisdiction in any particular suit or class of suits arising outside the local limits prescribed under this clause ¹

The limits of the ordinary original civil jurisdiction of the High Courts of Bombay, Calcutta and Madras have been declared and prescribed by the following Acts respectively:
Act 15 of 1919 (For Calcutta)

(993) 41 Cal 113
5 (1921) 1124 Mad 265 (266 267 268) 46 Mad 903
7 (1924) 1124 Lab 123 (121 122) 1 Lab 271 (S B)
(1900) 22 All 49 (2 53) 26 Ind App 242 (PC)
(1896) 16 All 174 (176)

Note 5
1 (1900) 22 All 331 (332)
2 (1902) 24 All 172 (173)

Clause II—Note 1
(1) Such extended jurisdiction cannot follow by implication but by express enactment
(1910) 5 Ind Cas 723 (31) (Mad)

2 Issue of process outside jurisdiction—A warrant of arrest issued by a High Court on the Original Civil side authorising the bailiff to execute it against the judgment debtor wherever he may be found in the Presidency is according to the High Court of Madras without jurisdiction¹. Similarly a writ of *fiats facias* issued outside the local limits of the original jurisdiction of a High Court is illegal². According to the High Court of Bombay in order for execution of a decree passed by it anywhere within the Presidency is not *ultra vires*³. High Court has power to issue any process against a person guilty of contempt of Court to be executed outside such local limits⁴ as proceedings in contempt do not fall within the Civil jurisdiction of the High Court⁵.

3 Power to transfer or stay suit in the moffussil—It has been held by the High Court of Bombay that a single Judge sitting on the original side cannot stay a suit pending before a subordinate Judge in the moffussil except under rules so enabling¹.

12 And We do further ordain that the said High Court of Judicature at Fort William in Bengal [Madras] in the exercise of its ordinary original civil jurisdiction shall be empowered to receive try and determine suits of every description if in the case of suits for land or other immovable property such land or property shall be situated or in all other cases if the cause of action shall have arisen either wholly or in part within the local limits of the ordinary original jurisdiction of the said High Court or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain within such limits except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at [Madras,] [Bombay, Calcutta, in which the debt or damage or value of the property sued for does not exceed one hundred rupees]

Synopsis

	Note No		Note No
I Scope of the Clause	1	VI Leave of Court	9
II Ordinary jurisdiction	2	(a) Waiver of want of leave	10
III Suit for land or other immovable property	3	(b) Recision of leave	11
(a) All other cases—Suit for partition of property consisting of moveable and immovables the latter being situated wholly outside jurisdiction	4	VII Meaning of the word defendant	12
(b) Suit for land partly within and partly without jurisdiction	5	VIII Dwell	13
IV Suits of every description	6	IX Carry on business	14
V Cause of action	7	(a) Suit against companies—See Note 31 to S. 20	15
(a) If the cause of action shall have arisen in part	8	(b) Suit against non resident foreigner—See Note 32 to S. 20	16
		X Personally works for gain—See Note 11 to S. 20	17
		XI Suit against the Secretary of State—See Note 10 to S. 20	18
		XII Appeal	19

1 Scope of the Clause—Clause 11 defines the territorial limits of the ordinary civil jurisdiction of the High Court while this Clause prescribes the classes of suits and conditions under which they are triable by the High Courts.

Classes of Suits—Suits of every description may be instituted on the original side of the High Court except suits of the value of one hundred rupees falling within the jurisdiction of the Small Cause Court.

- | | |
|--|--|
| (1317) 11 Ind C. 342 (343) (Mad) | 3 (1570) 11 Bom H. C. R. (O. C.) 1 |
| Note 2 | 4 (1893) 7 Bom 5 (12) Such suits triable under Cl. 11 and not under O. 1 |
| 1 (1903) 26 Mad 120 (121) | Note 3 |
| 2 (1875) 24 Suth. W. R. 366 (363) The Old Supreme Court had such power | 1 (1915) 1310 Bom 146 (147) |
| 21 (1934) 1934 Bom 225 (228) | |

Conditions—In suits for land or other immovable property the property should be situated within the ordinary original civil jurisdiction of the High Court. See Notes 3 to 5 below. Suits not being for land or other immovable property may be instituted in the High Court if the cause of action wholly arises within the local limits of the original jurisdiction or on business within such limits¹. But if it is for land or other immovable property and the cause of action wholly arises within the local limits, the leave of the Court is necessary.

A proceeding commenced by taking out an originating summons in the High Court is a "Suit" within the meaning of this Clause^{1a}.

The restrictive provisions of this Clause do not control Cl 18 below². Nor do they apply to a defendant where, therefore, in a suit on a mortgage, a subsequent mortgagee of immovable property part of which is outside jurisdiction is impleaded as a defendant and he claims to have such property brought to sale, the Court held that he could do so on the ground that the restrictions in Clause 12 apply only to a plaintiff³.

2 Ordinary jurisdiction—The expression 'ordinary jurisdiction' embraces all such as is exercised in the ordinary course of law and without any special step being necessary to assume it, and it is opposed to 'extraordinary jurisdiction,' which the Court may assume at its discretion upon special occasions and by special orders¹. A judgment entered up by the High Court under S 86 of the old Indian Insolvency Act (11 & 12 Vict., O 21) is "not by way of special or discretionary action, but in the ordinary course of the duty cast upon it by law, according to which every other case of the same kind would be dealt with"². Matters falling under Clauses 12, 17 and 18 would thus appear to be within the ordinary jurisdiction of the High Court.

3 Suit for land or other immovable property—On a review of the judicial decisions in India under this Clause, it cannot be said that the term 'Suit for land or other immovable property' has been satisfactorily defined. The only possible definition is that given in *Vallappa Chetty v. Saha Goind Doss*¹. It is a reference to the various classes or to be suits for land or other immovable property or not.

THE CALCUTTA HIGH COURT

The effect of the decisions of the Calcutta High Court bearing on the construction of the term 'suit for land' may be stated as follows—

Suits for the establishment of title to land² or for possession of land³ or claiming any interest in land, such as a mortgage interest⁴ are suits for land.

Clause 12—Note 1

- 1 (1906) 30 Bom 364 (390) Defendant carrying on business within jurisdiction—Question of cause of action does not arise.
- 1a (1901) 24 Mad 31 (33)
(1930) 1930 Cal 258 (260) 56 Cal 979
(1931) 1931 Cal 651 (653) 58 Cal 763
(1935) 1935 Cal 511 (513)
(1935) 1935 Rang 267 (269)
- 2 (1917) 1917 Mad 832 (836) 40 Mad 810
(1926) 1926 Mad 732 (734) 51 Mad 540 (F L)
- 3 (1897) 21 Cal 190 (192)
[But see (1910) 8 Ind Cas 1142 (1144) 37 Cal 507 (Obiter)]

Note 2

- 1 (1859) 13 Bom 520 (533) 16 Ind App 156 (P C)
2. (1859) 13 Bom 520 (532, 533) 16 Ind App 156 (P C) Such judgment fall within ordinary original civil jurisdiction.
[See also (1930) 1930 Mad 779 (780) 53 Mad 237 Ordinary original civil jurisdiction confined to suits and matters under Cls 12 to 21—Per

Amaraswamy Sastri, J., in Referring Judgment]

Note 3

- 1 (1929) 1929 Mad 721 (721) 52 Mad 800 (F B)
- 2 (1876) 1 Cal 249 (253, 254)
(1875) 76) 1 Cal 95 (100)
(1931) 1931 Cal 651 (653) 58 Cal 763.
- 3 (1892) 23 Cal 315 (322)
(1892) 1 Ind Cas 472 (473) 36 Cal 53
- 4 (1923) 1923 Cal 373 (374) Suit for declaration of equitable mortgage and for usual mortgage decree
(1929) 1929 Cal 227 (227) 56 Cal 221 Suit for declaration of mortgage right
(1892) 13 Cal 351n (362) Suit for releasing mortgage right
Suit for foreclosure—Boyrke O O 319
(1877) 1 Ind Jur N S 40
(1877) 1 Ind Jur N S 319 Suit for redemption
[See also (1914) 1914 P U 67 (69) 41 Cal 372 41 Ind App 110 (P C) Suit for sale on mortgage]
[See (1931) 1931 Cal 763 (767) 53 Cal 598 Suit for sale on mortgage]
(1872) 18 South W R 263 (271) Suit for sale

In suits for reliefs *other* than those enumerated above it has been fairly uniformly held that a suit is for land or other immovable property if the title to or possession of immovable property is directly and substantially affected. The guiding principle has been stated by Page, J., in *Goculdas v Chajmal*⁵ and in *Provas Chandra v Ashutosh*⁶ to be to see whether, having regard to directly the proprietary or to fact that land has something, falling under this group the question therefore mainly turns on the view of the Court in each case as to whether title or possession is *directly and substantially affected* by the suit.

These cases may be divided into the following classes —

- (a) *Suit for a share in the sale proceeds of immovable property*—In *Goculdas v Chajmal* referred to above the plaintiffs claimed their share of the sale proceeds of a joint family house wrongfully sold by the defendants. The defence was inter alia that the plaintiffs had no title to the house. Page J held that no issue arose in the case that could affect the title to the premises sold as the title of the purchaser was not challenged nor the sale sought to be set aside. Both the plaintiffs and defendants approbated the sale and only claimed their share in the proceeds. The dispute did not therefore affect the title to the house but the real question was whether the plaintiffs were members of a Joint Hindu Family at material times.
- (b) *Suits relating to trust property*—Where the suit is only for the enforcement of a trust in accordance with the terms of the trust deed and no beneficial interest is claimed for the plaintiff the suit will not be a suit for land merely by reason of the trust property being land or other immovable property.⁷ But where the title to the trust property is in dispute it will be a suit for land.⁸
- (c) *Suits for the administration of the estate of a deceased person*—In a suit by a legatee for the administration of an estate and to set aside various deeds of trust leases of land and an award brought about by the fraud of the executor the Privy Council held that the suit was one primarily for administration and as such not a suit for lands.⁹ In *Hara Lal v Nithambra*¹⁰ where the suit was for the construction of a will for the administration of the estate and for the present possession of immovable property it was held that the suit was primarily for possession of immovable property the other reliefs being only ancillary. Similarly a suit for a declaration of the plaintiffs' title to the whole of the residuary estate of the testator and to avoid certain dedications and for the construction of a will was held to be one for land the other reliefs being merely incidental to the above reliefs.¹¹
- (d) *Suits for damages in respect of immovable property*—In a suit by one colliery owner against another for damages for cutting the barrier area in the plaintiffs' colliery the substantial question was held to be one of title to the said barrier area and the suit a suit for land.¹² But a suit for the damages caused by the erection of certain workshops by the defendant and for an injunction restraining the nuisance caused thereby was held not to be a suit for land.¹³ Where in a suit for an injunction and damages for obstruction to the plaintiffs lawfully removing certain buildings the defendants disputed the plaintiffs' right to the buildings, the Rangoon High Court held that the real dispute in the suit was with reference to immovable property.¹⁴
- (e) *A suit for the recovery of title deeds*—Where the defendant denied the plaintiffs

on mortgage. Decision under S 5 of Code of 1859

- 5 (1927) 1927 Cal 768 (771-773) In appeal in 1928 Cal 887 (889-890) the suit was however taken to be one for tort
- 5a (1930) 1930 Cal 258 (261) 56 Cal 919
- 5b (1892) 19 Cal 358 (367) Per *Trevelyan J*
- 6 (1875) 15 Eng L R 318 (322) Suit by a trustee to enforce joint management with co trustee of debuttar lands
- 7 (1875) 76 J 1 Cal 214 (263-264)
- {See (1927) 1927 Cal 768 (771) Right

to possession of trust property}

- 8 (1906) 33 Cal 180 (191) 32 Ind App 193 (P C)
- 9 (1902) 20 Cal 815 (322)
- 10 (1930) 1930 Cal 258 (261) 56 Cal 979
- 11 (1912) 17 Ind Cas 500 (502-503) 39 Cal 739
- (1916) 1916 Cal 557 (558) 42 Cal 942 (1875) 76 J 1 Cal 35 (100)
- 12 (1873) 10 Eng L R 241 (248)
- 13 (1931) 1931 Rang 109 (111) 9 Rang 13

title to the property was nevertheless held to be not a suit for land as no relief such as possession in respect of land was involved therein¹⁴

- (f) *Suit for specific performance*—A suit by a vendor for the specific performance of a contract of sale is not a suit for land as neither title nor possession or any other interest in land is substantially affected¹⁵ but a suit by a vendee for specific performance of the contract of sale is a suit for land¹⁶. Similarly a suit for the specific performance of an agreement to mortgage has been held to be one for land^{16a}.
- (g) *Suits for dissolution of partnership*—On an application to file an award by an arbitrator dissolving a partnership providing for the sale of immovable property of the partnership and for the execution of a mortgage by one partner to another for the amount found due by the former it was held that the proceeding was not a suit for land but only for the dissolution of a partnership and for the adjustment of the mutual claims between the partners out of the partnership property¹⁷.
- (h) *Suits for rent*—A suit for rent is not a suit for land though in determining the rate of rent an issue as to the nature of the tenancy has to be raised¹⁸ but if a lessee sues the lessor for rents and profits on account of wrongful dispossession by the lessor the claim is one for possession by way of receiving rents and profits and the suit is one for land¹⁹.

THE BOMBAY HIGH COURT

Except in the case of suits for declaration of title and for possession of immovable property^{19a} which were held to be suits for land the High Court of Bombay till recently ap-

peared to regard a particular suit as a suit for land within its jurisdiction if it was cognizable by an English Court of Equity or the specific performance of a contract to execute a mortgage of property outside Bombay and for the recovery of the mortgage debt was within the original jurisdiction of the Bombay High Court. The reasoning was that such a suit was one of the kind in which a Court of Equity in England could exercise jurisdiction *in personam* with respect to immovable property lying outside jurisdiction and that the High Court in India had all the jurisdiction of the Equity Courts in England. Clause 12 of the Letters Patent was held not to have taken away such jurisdiction from the High Courts in India. The *ratio decidendi* of the decision in *Holkar's case* was adopted in a number of subsequent cases and suits for foreclosure²¹ or for the specific performance of a contract to sell²² were held to lie in the Bombay High Court notwithstanding that the immovable property referred to in the mortgage or contract was outside jurisdiction. In 1924, in *Venkatrao v. Khimji*²³ a suit on a mortgage of immovable property outside Bombay was held to lie in the High Court. But the Court in this case went further and laid down that such a suit was not a suit for land but only for a debt. The question was decided with reference to the term 'suit for land' in Clause 12 of the Letters Patent rather than on the analogy of the English Equity jurisdiction. The authority of *Holkar's case* was not accepted by Lawrence J. in *Jeshubhai v. Janardhan*²⁴ where he held that a suit for a declaration of a charge for maintenance on immovable property was a 'suit for land'. But in a later case²⁵ the same Judge feeling himself bound by *Venkatrao v. Khimji*²³ held that such a suit though a suit for land would lie in the High Court in the exercise of the equity jurisdiction *in personam* even if the land was outside Bombay. *Venkatrao v. Khimji*²³ was followed in *Jasraj v. Akhubai*²⁶ but was dissented from in *In the Spinning and Weaving Company v. Climax Syndicate*²⁷ by a Bench of three Judges who held

But ultimately on a ref

14 (1873) 4 Cal 372 (375)

15 (1892) 13 Cal 358 (360, 367)

(1922) 1922 Cal 443 (446) 49 Cal 670

16 Bourke 218

16a (1924) 1922 Cal 323 (328) 49 Cal 582

[See (1896) 5 Cal 52 (55) (Oster)]

17 (1877) 2 Cal 115 (113, 160)

18 (1895) 26 Cal 201 (218)

19 (1909) 1 Ind Cas 472 (473) 36 Cal 59

19a (1905) 3 Bom 219 258 (259)

(1912) 17 Ind Cas 138 (201) 37 Bom 491

Suit in reality for declaration of title and for possession though

20 (1924) 1924 Bom 419 (413, 420) But with considerable reluctance in the light of (1914) 14 ILR 67 43 LC 637 (14)

27 (1926) 126 Bom 1 (3, 11, 13) 50 Bom 1 (F B)

28 (1927) 127 Bom 278 (280, 331, 344, 345, 354, 356) 51 Bom 516 (F B) The view

properties alone are concerned ³

5 Suit for land partly within and partly without jurisdiction—The words "either wholly, or, in case the leave of the Court shall have been first obtained in part" must be taken to apply not only to the words "if the cause of action shall have arisen" but also to the words "property shall be situated". The operative words of this Clause in so far as they relate to suits for land or other immoveable property should therefore be reproduced as follows—"If, in case of suits for land or other immoveable property, such land or property shall be situated, . . . either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits, etc." It follows that in suits for land only *partly* within the local limits, the Court has jurisdiction to try the *whole* suit provided the *leave* of the Court is first obtained ¹. But if no leave is obtained, the Court may entertain the suit only in so far as the property within the local limits is concerned ².

The provision for leave contained in this Clause with regard to suits for land will not however, sanction the institution of a suit which would offend the rules as to *misjoinder* of parties and causes of action. Thus where a mortgagee sub mortgaged his mortgage interest to the plaintiff over the mortgagors' property situated in the mofussil and included in the sub mortgage some of his own property situated in Calcutta, a suit in the Calcutta High Court, by the sub mortgagee against the original mortgagor and the mortgagee to enforce the sub mortgage cannot lie and no leave can be granted though one of the properties in the sub mortgage is within the local limits of the original jurisdiction of the Calcutta High Court ³.

6 "Suits of every description"—The High Court has jurisdiction under this Clause in suits concerning matrimonial matters among the Jews, ¹ or among the Parsis except in matters coming within the jurisdiction of a special Court constituted under the Parsi Marriage Act ².

7 Cause of action—See Note to S 20 and also the following cases ¹

- | | |
|---|---|
| (1905) 28 Mad 216 (221) | foreclosure |
| [See (1887) 14 Cal 835 (838) A suit for partition of land is a suit for land] | (1909) 1 Ind Cas 514 (516) 36 Cal 28 Suit by an executor for declaration and injunction in respect of the estate of the testator |
| 3 (1906) 28 Mad 216 (224) | [See also (1868) 3 Beng L R O C 85 (87)] |
| Note 5 | (1896) 19 Mad 448 (450) (<i>Obiter</i>) |
| 1 (1933) 1933 Cal 295 (300) 60 Cal 54 In such cases each defendant need not be interested in land within jurisdiction | [See (1862 G5) 1 Bom If O R App 76 (192 G11)] |
| (1921) 1921 Bom 228 (330, 332) 16 Bom 249 Suit for partition—Other property outside British India | 23] |
| (1871) 6 Beng L R 686 (688) | 102 |
| [See also (1871) 6 Beng L R 134 (141) Suit for partition of only the property within local limits—Partial partition deemed unjust—Plaintiff directed to include outside properties also and to apply for leave] | Suit |
| (1931) 1931 Cal 763 (764) 58 Cal 298 Suit on mortgage | in respect of trust property |
| (1912) 13 Ind Cas 429 (430) 38 Cal 824 Different debtors mortgaging for joint debt part of mortgaged property within local limits of the High Courts—Suit lies though one of the joint debtors had no interest in that property | 3 (1920) 1920 Cal 181 (184) |
| [See also (1897) 24 Cal 348 (349) Suit on mortgage by deposit of title deeds—Property partly outside jurisdiction—Suit entertained by High Court with leave] | Note 6 |
| (1921) 1921 Mad 701 (703) Suit on mortgage (<i>Obiter</i>) | 1 (1926) 1926 Bom 163 (174) 50 Bom 369 |
| (1910) 8 Ind Cas 1142 (1144) 37 Cal 907 | [See also (1930) 1930 Cal 558 (556) . 57 Cal 108J] |
| (1873) 11 Beng L R 301 (303) Suit for | 2 (1883) 13 Bom 302 (310) Suit lies to declare an infant marriage amongst the Parsees to be null and void |
| | Note 7 |
| | 1 (1932) 1932 Bom 42 (43) Cause of action confined to plaint allegations and not the defence |
| | (1934) 1934 Cal 175 (176) Suit by an assignee of a debt—The assignment is a part of the cause of action and upon that leave is invariably |
| | (1879) |
| | aside in High Court—No leave |

8 "If the cause of action shall have arisen in part —Leave of the Court is necessary for the institution of a suit for which a part alone of the cause of action arises within the local limits of the jurisdiction of the High Court¹

See also Notes 12 to 15 to S 20 Civil Procedure Code *supra* and undermentioned cases²

9 Leave of Court —Leave to sue is not a formal matter of procedure but is the foundation for the exercise of jurisdiction by the Court³ It must therefore, be obtained *before* the Court becomes empowered to receive try or determine the suit⁴ Such leave will enure only for the suit⁵ or the cause of action⁶ for which or against the defendant⁷ in respect of whom it was granted Leave must be distinctly applied for and granted and cannot be implied⁸ It is a judicial act of a Court and cannot be delegated to a ministerial officer⁹

The grant of leave is a matter within the discretion of the Court¹⁰ In the exercise of their discretion the Courts can take into consideration the convenience of parties¹¹

Where leave has been at first granted but it is found that the plaintiff does not obviously disclose a ground justifying leave the plaintiff may be permitted at the trial to allege and

note essay

- (1871) 2 Hurl & C 201 33 L J Exch (N S)
179 St hel v Lerch—Followed in 3
Mad H C R 344 and 15 Com 33
Referred in 12 Bom H C R 113 9 Cal
105 and 21 Com 106
(1855) 7 Fich 723 21 L J Exch R 206 Nor
man v Marchant—Referred in 3
Mad H C R 344
(1852) 21 L J Q B 2 1 Paul C C 56
Wile v Sheridan—Referred in 1
Mad H C R 302 and 3 Mad H C R
381

Note 8

- 1 (1920) 1920 Cal 718 (719) 47 Cal 583
(1874) 21 South W R 503 (306)
(1871) 8 Bom H C R 102 (105)
(1881) 11 Bom 257 (257) Material part of
cause of action held to be neces
sary
[See also (1899) 13 Bom 404 (415)]
(1815 77) 1 Bom 23 (35)
[See also (1904) 27 Mad 491 (495
496)]
2 (1932) 1932 Com 42 (42)
(192) 1927 Mad 653 (649 692) 50 Mad 449
(1850 81) 5 Bom 42 (4)
(1903) 31 Cal 71 (71 283)
(1921) 46 Mad 1 Jour 89n
(1898) 3 Cal W N 103n

Note 9

- 1 (1937) 1932 Bom 291 (294 300) 56 Bom
874
(1935) 1935 Cal 511 (513)
(1874) 21 South W R 303 (301)
(1831) 15 Bom 93 (97 99)
(1913) 20 Ind Cas 590 (531 532) 37 Bom
503 Hence issues tried without
necessary leave will not be *res juda*
ca
2 (1932) 1932 Bom 291 (294 300) 56 Bom 324
Court has no jurisdiction even to
receive plaint unless leave shall
have been first obtained
(1930) 1930 Cal 468 (470)
(1891) 15 Bom 93 (96 97)
(1877) 1 Ind Jur (N S) 218
3 (1901) 21 Mad 293 (295) Suit filed with
leave — Then withdrawn — Again
fresh suit—Fresh grant of leave
necessary

- 4 (1900) 15 Com 93 (96 98)
5 (1932) 1932 Bom 201 (208) 56 Bom 324
Application to add new defendant—
Leave to be taken at the time of
(1896) 20 Bom 767 (776)
(1921) 1921 Bom 195 (197 198) 45 Bom 24
(On appeal from 1920 Bom 363)
Third party notice at the instance
of a defendant—Leave must be
applied for and obtained
(1924) 1924 Bom 109 (112) Original defen
dant dead before suit—Leave neces
sary to implead proper party—
Defendant
(1929) 1929 Bom 468 (471)
[See (1906) 30 Bom 364 (391)]
[See also (1893) 17 Bom 466 (468)]
6 (1880) 4 Com 482 (485) Plaintiff allowed to
sue in *forma pauperis*—No leave to
sue implied
(1896) 20 Bom 767 (7 4)
(1921) 1921 Bom 195 (194) 45 Bom 24 Issue
of third party notice ordered No
leave under Cl 12—Implied leave—
Must appear on the notice
7 (1907) 34 Cal 619 (625) Rule of Calcutta
ver to
399))
8 (1933) 1933 Cal 295 (300) 60 Cal 51
(1924) 1927 Bom 660 (651 652) Where very
substantial part of cause of action
arose in London
9 (1923) 1923 Mad 212 (274) Nearly whole
cause of action in Malabar—Leave
rejected
(1907) 30 Mad 438 (440) Discretion to be
exercised with caution— Defendant
and witnesses residence and acts
forming cause of action in Hydera
bad—Leave refused
(1921) 1921 Bom 328 (331 333) 46 Bom 249
Inclusion of Hyderabad properties
calculated to delay partition pro
ceedings—Leave refused
(1874) 21 South W R 204 (205) Parties and
witnesses far away from Calcutta—
Decree could be satisfied from pro

- 13 'Dwell'—See Notes 3 to 7 to S 20 C P C and the undermentioned cases 1
 14 Carry on business—See Notes to S 20 C P C, and the cases cited below 1
 15 Suit against companies—See Note 31 to S 20 C P C
 16 Suit against non resident foreigners—See Note 32 to S 20 C P C
 17 Personally works for gain—See Note 11 to S 20 C P C
 18 Suit against the Secretary of State—See Note 10 to S 20 C P C

19 Appeal—An order by one Judge of the High Court granting or refusing leave cannot be interfered with by another Judge of the High Court except on appeal from the order.¹ The proper remedy by way of an appeal from the order granting² or refusing³ leave is the exercise of an appeal lies also from an order dismissing an application by the defendant to have the plaint taken off the file.⁴

13 And We do further ordain that the said High Court of Judicature at Madras (Bombay Fort William in Bengal shall have power to remove and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court whether within or without the Presidency of Madras Bombay Bengal Division of the Presidency of Fort William subject to its superintendence, when the said High Court shall think proper to do so either on the agreement of the parties to that effect or for purposes of justice the reasons for so doing being recorded on the proceedings of the said High Court

Synopsis

	Note No		Note No
Withdrawal of suits by High Court to its own file	1	Transfer of suit from Presidency Small Cause Court	5
Suit—Meaning of	2	Powers of High Court in suits transferred under this Clause	6
Transfer of petition from Provincial Insolvency Court	3	High Court's power to receive plaint	7
Subject to its superintendence	4	Appeal	8

Other Topics

Application—Before whom to file—See Note 1 Pt (3) When the High Court shall think proper to do so—See Note 1

1 Withdrawal of suits by High Court to its own file—The High Court has power under this Clause to remove to itself cases from any Court subject to its superintendence for trial, whenever it thinks fit to do so for purposes of justice. That purpose is to be determined by reference to the circumstances of each case. The desirability or necessity to exercise the jurisdiction may arise in consequence of the importance or difficulty of the questions involved

Note 13

1. (1927) 1927 Mad 690 (690 C92) O Mad 413
 Dwell cannot apply to corporations
 (1924) 50 Ind Cas 442 (444) (Dom) Person
 entitled to appear on summons—
 Court has jurisdiction though not
 permanent resident
 (1860) 16 Cl D 484 Ex parte Breull—
 referred in 29 Mad 233

sonally working for gain

- (1920) 1920 Cal 474 (475)
 (1964 65) 17 C B N S 415 Mushy Conquest
 —referred in 14 Bom 541
 (1857) 11 C B 755 Macdougall v Paterson—
 referred in Corryon 41 12 Cal 317
 14 Bom 541 16 Bom 16 7 Al 79
 (k i)
 (1860) 23 L J Q B 40 Kerr v Haynes—
 referred in 6 Jur 169, 2 Mid H C R
 301 referred in 13 Bom 511

1.

Note 19.

tract—Suit lies in Calcutta High
 Court
 Bourle O G 127 Running race horses
 is not carrying on business or per

- 1 (1875) 9 Mid H C R 21 (25)
 2 [See (1307) 31 Cal 619 (624)]
 3 (1866 67) 9 Mid H C R 384 (385)
 4 (1873) 21 South W R 303 (307)
 (1900) 23 Bom 249 (253)

or in consequence of the balance of convenience or the cheapness of the trial¹

The power of removal is not limited to any particular *period or stage* of the suit and so long as the proceedings in the original Court are in such a *condition* that one party is entitled to ask that Court to determine any question material to the final result of the suit the suit is in existence in the original Court and is capable of being removed to the High Court under this Clause². In the undermentioned case it was held that the High Court can transfer a case pending in a moffussil Court to itself and pass *interim* orders thereon, but has no power to do so in cases not so pending³.

It has been held by the High Courts of Calcutta, Madras and Rangoon that the application on the *original side* of the High Court in the undermentioned Bombay case⁴ is a High Court.

2 Suit—Meaning of—Proceedings for the grant of probate which are contested come within the meaning of the word suit as used in this clause¹

3 Transfer of petition from Provincial Insolvency Court—An application under this Clause to remove an insolvency petition pending in a moffussil Court and to transfer it for trial and disposal to the original side of the High Court is not maintainable¹. The reason is that the powers conferred by S 5 of the Provincial Insolvency Act (V of 1920) which are made subject to the other provisions of the Act cannot be exercised in such a way as to give the original side of the High Court a jurisdiction from which it is expressly excluded by the terms of that section read with this Clause.

4 Subject to its superintendence—The civil Court of the Political Resident at Aden as constituted by the Aden Courts Act (II of 1861) is subject to the superintendence of the High Court at Bombay within the meaning of this Clause even though *no appeal lies* to the High Court from decrees or orders of the Resident and therefore the High Court has power to remove under this Clause a suit from that Court to itself for trial and determination¹.

5 Transfer of suit from Presidency Small Cause Court—The Presidency Small Cause Court is a Court subject to the superintendence of the High Court. The latter can therefore remove to itself under this Clause a suit pending before such Small Cause Court¹.

6 Powers of High Court in suits transferred under this Clause—In dealing with suits transferred under this Clause the High Court has no more powers than those of the Court from which the suit is transferred¹. Thus the High Court cannot allow an amendment of a plaint in a suit transferred from the Madras City Civil Court so as to convert it into one which such City Civil Court would have no jurisdiction to try². Under S 14 of the Madras City Civil Court Act (VI of 1892) it is specifically provided that the Court fee payable on a suit so transferred from the Madras City Civil Court must be calculated according to the Rules in force in the High Court in relation to suits filed on the original side of the High Court³.

7 High Court's power to receive plaints—This Clause provides only that the High Court may remove to itself a suit pending in a Court subject to its superintendence. It does

CL. 17—Note 1

- 1 (1890) 5 Cal 766 (767-768) Cheapness of trial
(1889) 16 Cal 771 (776)
(1873) 10 Beng L R 168 (177-179) The conduct of a Judge may be taken into consideration in directing a transfer [See also Bourke Part II F & O C 1 No transfer unless prejudice is

(1923) 1923 Rang 180 (186) 1 Rang 226.

4 (1903) 27 Bom 575 (575)
[See also (1901) 23 Bom 202 (203)]

Note 2

1 (1927) 1927 Cal 231 (233) 51 Cal 126.
" " " "

1

(192) 1925 and 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 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2754, 2755, 2756, 2757, 2758, 2759, 2760, 2761, 2762, 2763, 2764, 2765, 2766, 2767, 2768, 2769, 2770, 2771, 2772, 2773, 2774, 2775, 2776, 2777, 2778, 2779, 2780, 2781, 2782, 2783, 2784, 2785, 2786, 2787, 2788, 2789, 2790, 2791, 2792, 2793, 2794, 2795, 2796, 2797, 2798, 2799, 2800, 2801, 2802, 2803, 2804, 2805, 2806, 2807, 2808, 2809, 2810, 2811, 2812, 2813, 2814, 2815, 2816, 2817, 2818, 2819, 2820, 2821, 2822, 2823, 2824, 2825, 2826, 2827, 2828, 2829, 2830, 2831, 2832, 2833, 2834, 2835, 2836, 2837, 2838, 2839, 2840, 2841, 2842, 2843, 2844, 2845, 2846, 2847, 2848, 2849, 2850, 2851, 2852, 2853, 2854, 2855, 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2869, 2870, 2871, 2872, 2873, 2874, 2875, 2876, 2877, 2878, 2879, 2880, 2881, 2882, 2883, 2884, 2885, 2886, 2887, 2888, 2889, 2890, 2891, 2892, 2893, 2894, 2895, 2896, 2897, 2898, 2899, 2900, 2901, 2902, 2903, 2904, 2905, 2906, 2907, 2908, 2909, 2910, 2911, 2912, 2913, 2914, 2915, 2916, 2917, 2918, 2919, 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3252, 3253, 3254, 3255, 3256, 3257, 3258, 3259, 3260, 3261, 3262, 3263, 3264, 3265, 3266, 3267, 3268, 3269, 3270, 3271, 3272, 3273, 3274, 3275, 3276, 3277, 3278, 3279, 3280, 3281, 3282, 3283, 3284, 3285, 3286, 3287, 3288, 3289, 3290, 3291, 3292, 3293, 3294, 3295, 3296, 3297, 3298, 3299, 3300, 3301, 3302, 3303, 3304, 3305, 3306, 3307, 3308, 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317, 3318, 3319, 3320, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329, 3330, 3331, 3332, 3333, 3334, 3335, 3336, 3337, 3338, 3339, 3340, 3341, 3342, 3343, 3344, 3345, 3346, 3347, 3348, 3349, 3350, 3351, 3352, 3353, 3354, 3355, 3356, 3357, 3358, 3359, 3360, 3361, 3362, 3363, 3364, 3365, 3366, 3367, 3368, 3369, 3370, 3371, 3372, 3373, 3374, 3375, 3376, 3377, 3378, 3379, 3380, 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3389, 3390, 3391, 3392, 3393, 3394, 3395, 3396, 3397, 3398, 3399, 3400, 3401, 3402, 3403, 3404, 3405, 3406, 3407, 3408, 3409, 3410, 3411, 3412, 3413, 3414, 3415, 3416, 3417, 3418, 3419, 3420, 3421, 3422, 3423, 3424, 3425, 3426, 3427, 3428, 3429, 3430, 3431, 3432, 3433, 3434, 3435, 3436, 3437, 3438, 3439, 3440, 3441, 3442, 3443, 3444, 3445, 3446, 3447, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3471, 3472, 3473, 3474, 3475, 3476, 3477, 3478, 3479, 3480, 3481, 3482, 3483, 3484, 3485, 3486, 3487, 3488, 3489, 3490, 3491, 3492, 3493, 3494, 3495, 3496, 3497, 3498, 3499, 3500, 3501, 3502, 3503, 3504, 3505, 3506, 3507, 3508, 3509, 3510, 3511, 3512, 3513, 3514, 3515, 3516, 3517, 3518, 3519, 3520, 3521, 3522, 3523, 3524, 3525, 3526, 3527, 3528, 3529, 3530, 3531, 3532, 3533, 3534, 3535, 3536, 3537, 3538, 3539, 3540, 3541, 3542, 3543, 3544, 3545, 3546, 3547, 3548, 3549, 3550, 3551, 3552, 3553, 3554, 3555, 3556, 3557, 3558, 3559, 3560, 3561, 3562, 3563, 3564, 3565, 3566, 3567, 3568, 3569, 3570, 3571, 3572, 3573, 3574, 3575, 3576, 3577, 3578, 3579, 3580, 3581, 3582, 3583, 3584, 3585, 3586, 3587, 3588, 3589, 3590, 3591, 3592, 3593, 3594, 3595, 3596, 3597, 3598, 3599, 3600, 3601, 3602, 3603, 3604, 3605, 3606, 3607, 3608, 3609, 3610, 3611, 3612, 3613, 3614, 3615, 3616, 3617, 3618, 3619, 3620, 3621, 3622, 3623, 3624, 3625, 3626, 3627, 3628, 3629, 3630, 3631, 3632, 3633, 3634, 3635, 3636, 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644, 3645, 3646, 3647, 3648, 3649, 3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658, 3659, 3660, 3661, 3662, 3663, 3664, 3665, 3666, 3667, 3668, 3669, 3670, 3671, 3672, 3673, 3674, 3675, 3676, 3677, 3678, 3679, 3680, 3681, 3682, 3683, 3684, 3685, 3686, 3687, 3688, 3689, 3690, 3691, 3692, 3693, 3694, 3695, 3696, 3697, 3698, 3699, 3700,

not enable the High Court to receive a plaint in a suit cognisable by a mofussil Court and pass orders thereon¹

8 Appeal—The High Court of Madras has held that an order of a Judge of the High Court on the original side transferring to the High Court a suit under this clause is a 'judgment' within the meaning of Cl. 13 *infra* and is therefore appealable². But the Calcutta High Court has taken a contrary view³. See also notes to Cl. 15 of the Letters Patent *infra*.

Where an application under this clause was heard and granted by a Bench sitting on the appellate side of the Bombay High Court leave was granted to appeal to the Privy Council⁴.

14 And We do further ordain that where plaintiff has several causes of action against defendant such causes of action not being for land or other immovable property and the said High Court shall have original jurisdiction in respect of one of such causes of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit, and to make such order for trial of the same as to the said High Court shall seem fit.

Synopsis.

Joinder of several causes of action	1 to No 1	Such causes of action not being for land	Note No 2
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1 Joinder of several causes of action—The word 'several' in the expression 'several causes of action' means separate¹. This clause applies only where some causes of action arise within and some without the ordinary original jurisdiction of the High Court. It does not apply to cases where all the several causes of action arise within such jurisdiction². It is not necessary that the causes of action outside the ordinary original jurisdiction, should have arisen within the extraordinary original jurisdiction contemplated by Cl. 13 *ante*. They may arise even outside the Presidency³.

An application under this clause for leave to join several causes of action can be made also in a case in which leave has to be or has been obtained under Cl. 12 *ante*⁴.

To bring a case within this clause it is not necessary that the defendant should admit that any cause of action has arisen within the original jurisdiction of the High Court⁵.

2 Such causes of action not being for land—The expression 'such causes of action not being for land' qualifies the words 'several causes of action' and refers to cases where plaintiff has several causes of action other than causes of action for land or other immovable property. That is to say in considering this clause any cause of action which is for land or other immovable property must be excluded and if the sole cause of action within jurisdiction is one for land or if the sole cause of action outside the jurisdiction is one for land then this clause will have no operation¹.

15 And We do further ordain that an appeal shall lie to the said High Court of Judicature at [Madras] [Bombay] [Fort William] in Bengal from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the

Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction

Note 7

1 (1929) 1929 Mad 29 (90) 52 Mad 52

Note 8

1 (1924) 1924 Mad 90 (91) 47 Mad 136

2 (1920) 1920 Cal 797 (798) 47 Cal 1104

(1927) 1927 Cal 281 (282) 54 Cal 126

3 (1904) 28 Bom 252 (293)

Clause 14—Note 1

1 (1929) 1929 Bom 100 (102) 53 Bom 251

2 (1929) 1929 Bom 100 (103 106) 53 Bom 251

3 (1929) 1929 Bom 100 (104) 53 Bom 251

[See also (1910) 8 Ind Cas 648 (649) 34 Bom 564]

4 (1910) 8 Ind Cas 648 (649) 34 Bom 564

Application under this clause may be made at any time before hearing but it is advisable to make it at the earliest opportunity.

5 (1923) 1929 Bom 100 (101) 53 Bom 251

Note 2

1 (1929) 1929 Bom 100 (102) 53 Bom 251

said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of S 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, made (on or after the first day of February 1929) in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or successors in Our or Their Privy Council, as herein after provided

Synopsis

	Note No		Note No
Amendment	1	Judges of a Division Bench	9
Judgment, meaning of	2	Section 175 of Agra Tenancy Act if	
Orders which are not 'judgments'	3	precludes appeal	10
Orders in proceedings other than suits and appeals	4	Declares that the case is a fit one for appeal	11
Orders made in the exercise of revisional jurisdiction	5	Cross objections	12
Orders made in the exercise of powers of superintendence	6	Security for costs	13
Orders passed in the exercise of criminal jurisdiction	7	Points on which appeal may be heard	14
Appeal to Privy Council	8	Limitation	15
Appeal in cases of disagreement among		Court fee	16
		Review	17
		Practice	18

Other Topics

Point not ruled before single Judge—If may be urged in L P Appeal See Note 11 (1)

1 Amendment—Under the old clause it stood before the amendment thereof in 1929 in appeal by from

(1) the decision of a single Judge in all cases other than

(a) orders passed in the exercise of revisional jurisdiction

(b) sentences or orders passed in the exercise of the power of superintendence under S 107 of the Government of India Act 1919,

Clause 15—Note 1

1 The old clause runs as follows—

And we do further ordain that in appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment (not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of S 107 of the Government of India Act 1919 or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court pursuant to section 13 of the said recited Act and that an appeal shall also lie to the said High Court from the judgment (not being a sentence or order as aforesaid) of two or more Judges of

the said High Court or of such Division Court whenever such Judges are equally divided in opinion and do not amount in number

section 11—1—1923 in Bombay and 1—1923 in Madras and 1—1—1923 in Allahabad

and

- (c) sentences or orders passed in the exercise of criminal jurisdiction,
 (2) the decision of the Senior Judge where the Judges constituting a bench of two Judges differed

The effect of section 36 of the Letters Patent Act is that no right of appeal against a decision of a single Judge is conferred. The Senior Judge where the Judges constituting a bench differ has been taken away in view of the newly amended Cl 36 and there is no power to grant a certificate in such a case.²

After the amendment came into force there arose a conflict of opinion as to whether it had retrospective effect. According to the High Court of Bombay³ it had such effect so that no appeal lay against a judgment of a single Judge in second appeal filed after the amendment in the absence of the requisite certificate. The High Courts of Calcutta⁴ and Madras⁵ held on the other hand that the amendment did not operate retrospectively so as to affect the right of appeal which had accrued in respect of suits instituted prior to the amendment. According to the High Court of Allahabad⁶ all judgments delivered after the amendment were governed by the amended clause. In order to settle this conflict at rest the clause was again amended and the provisions on or after the first day of February 1929 have been added.

2 Judgment meaning of. The definition of the word judgment given in S 2 of the Civil Procedure Code is not followed in the construction of the term as used in the Code and is not applicable to the Letters Patent Act. There is no definition of the word in the Letters Patent. On the other hand it must have been used in different senses in the various clauses. Thus this clause uses the word judgment while Cl 3 uses the words judgment, decree or order and Cl 40 the words preliminary or interlocutory judgment decree or order.⁷ There has been a considerable conflict of opinion as to the true interpretation of the word judgment as used in the clause. In *Hurish Chandra Choudhury v. Kalisundery Debi* 11 R. (Cal 482) where a single Judge of the High Court had passed an order refusing to transmit an order of Her Majesty in Council for execution their Lordships of the Privy Council said 'Mr Justice Pontifex had in fact exercised a judicial discretion and had come to a decision of fact at majority which if it remained, would entirely conclude any rights of Kalisundery to an execution in this suit' and they held that the order was a judgment.⁸ This however was not a complete definition of the term. In *Bhoja Lal v. The Dakore Temple Committee*⁹ their Lordships of the Privy Council observed that the term judgment in the Letters Patent meant in civil cases a decree and not a judgment in the ordinary sense. The High Court of Allahabad has distinguished this case on the ground that their Lordships must be deemed to have made this observation referred to with reference to Cl 3 of the Letters Patent and not with reference to the clause.¹⁰

We now proceed to discuss the view of the various High Courts on the question.

According to the High Court of Allahabad the provisions of this clause are controlled by the Code of Civil Procedure and the right of appeal under this clause is restricted to cases which are appealable under the Code.¹¹ But in a later case of the same High Court,¹² the view in 25 M. L. J. 1 (discussed below) has been adopted. This view has been dissented from by the other High Courts. See Note C to S 104 ante and the cases cited below.

The leading case in what may be called the Calcutta view is to the meaning of the word judgment in *The Justices of the Peace for Calcutta v. The Oriental Gas Co.*¹³ in which Couch C. J. defined it as meaning a decision which affects the merits of the question between the parties by determining some right or liability. It may be either preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit and a preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined.¹⁴ The right or liability must mean some right or liability which is the subject matter of controversy in the suit or proceeding. It has however been held by the same High Court purporting to follow the case of *The Justices of the Peace for Calcutta*

2 (1928) 1928 Cal 819 (820) (F B)

3 (1924) 1924 Bom 371 (374) 52 Bom 753

4 (1928) 1928 Cal 610 (611)

5 (1923) 1923 Mad 381 (382) 52 Mad 361 (S B)

6 (1928) 1928 All 704 (704) 50 All 863

Note 2

1 (1924) 1924 Mad 597 (597 598) 47 Mad 316

1a (1933) 1933 All 262 (263)

2 (1925) 1925 P. C 155 (156) (P C)

1 (1933) 1933 All 262 (263) (F B)

4 (1893) 15 All 303 (302 303)

(1894) 16 All 443 (449)

(1892) 14 All 361 (361)

4a (1923) 1923 All 44 (45) 45 All 60

5 (1916) 1916 Mad 883 (884) 33 Mad 1196

(1922) 1922 Lah 390 (393) 3 Lah 183

6 (1873) 17 South W. R. 34 (370 372)

that an order granting leave to sue under Cl 12 of the Letters Patent⁷ or an order setting aside an abatement⁸ or an order rejecting an application for a judgment on admissions under O 12 R 6 of the Civil Procedure Code⁹ is a judgment, on the ground that they must be taken to determine some right. These decisions, it is submitted cannot be supported even on the basis of the definition which they purport to adopt. In none of these cases are the merits affected and there is no determination of any right or liability which is the matter in controversy in the suit or proceeding. In *Ebrahim v. Faizunisa Begam*¹⁰ Garth, C J expressed the view that the word 'judgment' means a judgment or decree which decides the case one way or the other in its entirety and that it does not mean a decision or order of an interlocutory nature which merely decides some isolated point not affecting the merits or the results of the whole suit. A similar view was adopted in the cases cited below.¹¹ In *Mt. Brihlmani v. Ramrick Dass*¹² Maclean C J was of opinion that the definition of Couch C J was becoming classical but that it was not exhaustive.¹³ In *Brojogopal Roy Burman v. Anir chandra Bhattacharya* I L R 56 Cal 135 F B it was held that the mere fact that an order puts in peril the finality of a decision given in a person's favour does, not of itself, make the order a judgment within the meaning of this clause. It was doubted whether such orders as an order setting aside an abatement or an order giving leave to appeal could be considered a judgment.

The definition of Couch C J given above has been accepted generally in the Bombay High Court.¹⁴

The earliest attempt to define the word judgment as used in this clause was made by the High Court of Madras in *DeSouza v. Coles*¹⁵ and it was held that it meant any decision or determination affecting the rights or interests of the suitor or applicant. It was also pointed out that it was not possible to preclude any limit to the right of appeal conferred by this clause. This definition has however been considered to be very wide and has not been followed. The leading case on the point at present in the High Court of Madras is that of *Tularam Rao v. Alagappa* I L R 35 Mad 1 (F B). In that case Sir Arnold White C J laid down the view that an order is a judgment within the meaning of this clause —

- (i) if its effect is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned or
- (ii) if the non compliance therewith will have the effect of putting in end to such suit or proceeding or
- (iii) if it is passed on an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment but with a view to rendering the judgment effective when obtained) e.g. an order on an application for temporary injunction or for the appointment of a receiver.

In *Gokalechan v. Sanwal Das*,¹⁶ the High Court of Lahore was of opinion that the term judgment included any interlocutory judgment which decided so far as the Court pronouncing it was concerned, whether finally or temporarily any question materially in issue between the parties and directly affecting the subject matter of the suit. In *Rullu Singh v. Sanwal*,¹⁷ the same High Court adopted the view of White C J, of the Madras High Court.

In *Arumugham Chetty v. Kanappa Chetty*,¹⁸ the High Court of Rangoon held that where an appeal lies from an order under O 43 R. 1 of the Civil Procedure Code the order must be taken to be a judgment within the meaning of this clause. In *Diyabhai Jaganlal v. Murugappa Chetty*¹⁹ Full Bench of the same High Court has held dissenting from the view of White C J, that the word 'judgment' means and is a decree in a suit in which the rights of the parties at issue in the suit are determined. A final judgment is a decree in a suit.

7 (1874) 21 Sat W R 303 (307)
 8 (1922) 1222 Cal 335 (336, 337) 49 Cal 62
 9 (1920) 1920 Cal 163 (164)
 10 (1878) 4 Cal 531 (531)
 11 (1881) 8 Cal 147 (148)
 12 (1930) 1930 Cal 23 (62), 57 Cal 73
 13 (1913) 1919 Cal 667 (668) The test laid down in 35 Mad 1 was applied in this case.
 14 (1901) 5 Cal W N 781 (794)
 15 [See also (1922) 1022 Cal 172 (174)]
 16 (1926) 1926 Cal 842 (843) 53 Cal 776
 17 (1926) 1223 Cal 214 (214) 56 Cal 135 (F 1)
 18 (1909) 2 Ind Cas 157 (158) This is the leading case in Bombay.
 19 (1903) 2 Ind Cas 150 (151) (Bomb.)
 (1880) 14 Bom 555 (555)
 (1932) 1932 Bom 134 (131, 132) 6 Bom 23
 15 (1866) 67 3 Mad H C R 344 (347)
 16 (1920) 1920 Cal 842 (842) 1 Cal 314
 17
 18
 19

by which all the matters at issue therein are decided. A preliminary or interlocutory judgment is a decision in a suit by which the right to the relief claimed in the suit is decided but under which further proceedings are necessary before the suit in its entirety, can be determined. See other question and orders and are not judgments."

The High Court of Patna²¹ has adopted the view of the Calcutta High Court as expressed in the case of *Brigadier Roy Burman* referred to above.

An examination of all the cases on the subject goes to show that the test applied by White, C. J. in *Tuljaram Rao's* case affords the best solution of the conflict of decisions on the point. An examination of the orders specified in the Civil Procedure Code as being appealable also shows that the Legislature in making those provisions has followed principles which are analogous to those laid down by White, C. J. Thus the orders referred to in Cls (p) to (i) of R 1 of C. 43 C. P. C. are really orders in *ancillary proceedings* instituted with a view to make the judgment that may be ultimately obtained effective. The other clauses specify orders which so far as the Court is concerned, will have the effect of putting an end to the suit or proceeding. It is therefore submitted that the test applied by White, C. J. is correct in principle. The cases in which the orders have been held to be judgments have all been grouped below so as to show that they can all be supported on the principles laid down in *Tuljaram Rao's* case though the reasons for the decisions in the various cases differ considerably.

Orders which have been held to be judgments and which can be supported on the ground that they have the effect of putting an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned —

- (1) Order refusing to entertain a suit as being bad for multifariousness.²¹
- (2) Order refusing to add necessary parties in a suit under S. 92 of the Civil Procedure Code.²²
- (3) Order refusing to allow a plaint to be amended and dismissing suit.²³
- (4) Order refusing to restore suit dismissed for default. See Note 12 to O 9 R 9, Civil Procedure Code.
- (5) Finding on a preliminary issue which has the effect of disposing of the suit.²⁴
- (6) Order varying or amending a decree.²⁵
- (7) Order dismissing a claim petition under O 21 R 54 of the Civil Procedure Code. The High Court of Rangoon has, however, held that such an order does not prevent the determination of the rights of the parties in a separate suit and that therefore it is not a judgment.²⁶ It is submitted that this view is not correct. So far as the Court in which the claim proceeding is pending is concerned, the order clearly puts an end to the proceeding.
- (8) Order rejecting an application to set aside in whole or in part a judgment or refusing the application of the assignee of the plaintiff to be allowed to continue the proceeding.²⁷ See Note 14 to O 22 R 9 and Note 21 to O 22 R 10.
- (9) Order allowing the withdrawal of a suit with liberty to bring a fresh suit or otherwise.²⁸ See Note 40 to O 23, R 1.
- (10) Order refusing leave to sue *in forma pauperis*. See Note 5 to O 33, R 5. The decision in the case cited below²⁹ that an order allowing an application for leave to sue *in forma pauperis* is a judgment is against the principle of *Tuljaram Rao's* case and cannot be accepted as correct.
- (11) Order dismissing application praying that the Court may receive a sum of money as security for the costs of an appeal. See Note 14 to O 41 R 10.

20 (1933) 1333 Pat 175 (142) 14 Pat 202

21 (1918) 1918 Cal 549 (561) 45 Cal 111. The test laid down in 33 Mad 1 was applied in this case.

22 (1927) 1927 Rang 180 (180) 5 Rang 263

23 (1927) 1927 Rang 154 (155) 5 Rang 115

24 (1930) 1930 Bom 262 (263) 265

(1923) 1923 Mad 44 (44)

(1928) 1928 Rang 20 (21) 5 Rang 762. Order deciding question of jurisdiction on

a preliminary issue

25 (1923) 1929 Pat 261 (263)

(1909) 2 Ind Cas 294 (295) 33 Bom 216

[See also (1875) 12 Bom H C R 129 (137). An order by a single Judge of the High Court reversing a decision of Commissioner for taking accounts is appealable.]

26 See Note 24 to O 21, R 58

27 (1925) 1925 Mad 167 (168) 48 Mad 700. Reasons not clearly given.

- (12) Order refusing to set aside a dismissal of an appeal for default²⁸
- (13) Order rejecting an application for leave to file a memorandum of cross objections *in forma pauperis*²⁹
- (14) Order remanding the whole case to the lower Court for disposal³⁰
- (15) Order refusing leave to appeal *in forma pauperis*³¹
- (16) Order transmitting³² or refusing to transmit³³ a decree of the Privy Council for execution
- (17) Order refusing to extend time to furnish security under O 45 R 7 See Note 10 to that Rule
- (18) Order dismissing a suit for want of prosecution³⁴
- (19) Order of transfer under Clause 19 of the Letters Patent³⁵ According to the High Court of Calcutta such an order is not a judgment inasmuch as it does not affect the merits of the case which is necessary according to the definition of judgment as accepted by that Court³⁶
- (20) Order refusing to set aside an award³⁷

Orders which have been held to be judgments and which can be supported on the ground that the non compliance therewith will have the effect of putting an end to the suit or proceeding —

- (1) Order asking plaintiff to elect to proceed against some only of the defendants See Note 14 to O 1, R 3
- (2) Order asking plaintiff to furnish security for the costs of the suit See Note 14 to O 2, R 1
- (3) Order imposing conditions for granting leave to defend a suit in which a summons is issued under Ch XIII A of the Rules of the High Court³⁸

Orders which have been held to be judgments and which can be supported on the ground that they are passed on ancillary proceeding instituted with a view to rendering the judgment in the suit or proceeding effective when obtained —

- (1) Order appointing a receiver See Note 52 to O 40 R 1

Court of
Bombay an order refusing to grant a temporary injunction is not a judgment
See Note 20 to O 39 R 1

- (4) Order directing payment of a certain sum as maintenance to a party pending suit⁴¹
- (5) Order under S 10 of the Code refusing to stay a suit⁴²
- (6) Order granting or refusing stay of execution of a decree⁴³ See also Note 20 to O 41 R 5

35 (1921) 1924 Mad 90 (J1) 47 Mad 136
(1923) 1923 Mad 44 (J1)
(1921) 1921 Mad 687 (G87)
(1900) 23 Mad 32J (311)

decision on the question of limitation

(18J1) 14 Mad 406 (407)

(1921) 1924 Pat 736 (359)

[See also Note 23 to O 41, R 23]

31 See Note 11 to O 44, R 1

[See also (1931) 1931 Mad 198 (193)

73 Mad 215 Right of appeal is same]

2 (1920) 1920 Lah 674 (177) 11 Lah 365
Order transmitting order in council for execution

73 See Note 16 to O 45 R 15

74 (1921) 1924 Cal 1025 (1026) 71 Cal 905

37 (1931) 1931 Bom 125 (127, 128) 55 Bom 421
(1918) 1918 Cal 171 (192) 45 Cal 702

39 (1926) 1926 Cal 668 (670)

32a (1933) 1933 Cal 55 (37)

3J (1930) 1930 Cal 507 (501)

40 (1925) 1925 Mad 566 (567)

41 (1925) 1925 Mad 443 (443)

42 (1933) 1933 Bom 85 (87)

(1935) 1935 Cal 1 (9)

43 (1922) 1922 Lah 146 (146) Order refusing stay

An order which amounts to a decree in effect or which forms part of a judgment will of course be a 'judgment' within the meaning of the clause and appealable is such ⁴¹

3 Orders which are not "judgments"—The following are among the orders which have been held not appealable as a 'judgment' under this clause—

- (1) An order granting leave to sue as a pauper ¹
- (1 A) Order staying suit under S. 10 of the Code ^{1A}
- (2) An order granting leave to defend a summary suit under O. 37 ²
- (3) But the The High Court of Bombay has taken a contrary view ³
- (4) An order refusing to revoke leave to sue which has been granted ⁴
- (5) An order refusing to direct the Receiver in insolvency to give security for the continuance of suit filed by the debtor ⁵
- (6) An order refusing to frame an issue ⁶ or to try an issue as a preliminary issue ⁶
- (6A) An order refusing leave to file written statement after expiry of the time allowed ⁷
- (7) An order allowing or refusing amendment of a plaint ⁸
- (8) An order trying joint defendant as plaintiff ⁹
- (9) An order adding a party ¹⁰
- (10) An order refusing to ratify default by injunction from prosecuting a suit in a foreign Court ¹¹
- (11) An order directing a party to produce and allow inspection of documents ¹²
- (12) An order refusing to allow inspection ¹³
- (12A) An order refusing to set aside allegations in pleadings as scandalous ¹⁴
- (13) An order refusing to direct a party to produce documents under Rr. 130 and 131 of the High Court Rules, Bombay ¹⁵
- (15) An order directing security under O. 38 R. 516 This would be a judgment according to the test applied by White, C. J., in *Tularam Rao's* case inasmuch as it is an order in an ancillary proceeding instituted with a view to render the judgment effective. In view of the Full Bench decision in A. I. R. 1929 Rang. 41 adopting the Madras view the correctness of this decision is open to question
- (16) An order directing ¹⁷ or refusing ¹⁸ the issue of a commission for the examination of witnesses

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| <p>an order of <i>ad interim</i> stay</p> <p>(1929) 1929 Trib. 428 (424) Order granting stay</p> <p>1916 Mad 745 (745)</p> <p>(1929) 1929 Mad 197 (197) Appeal against preliminary decree—Further proceedings in suit on certain terms—Judgment debtor dissatisfied by terms imposed appealing—<i>Appeal is not maintainable</i></p> <p>44 (1928) 1928 Rang. 701 (701) Order construed as being in effect a decree</p> <p>(1914) 1914 Mad 418 (419) Order as to costs incidental to a judgment</p> <p>(1919) 1919 Mad 678 (678) 42 Mad 302 (F. B.) Order passed on a review of taxation by the taxing officer</p> <p>(1914) 1914 Mad 218 (218 219) An order awarding costs</p> <p>Note 3</p> <p>1 (1925) 1925 Mad 167 (168) 48 Mad 700</p> <p>(1926) 1926 Rang. 110 (111) 4 Rang. 20</p> <p>(1930) 1930 Rang. 20 (1930) 20 Rang. 20 (1930) 20 Rang. 20 (1930) 20 Rang. 20</p> <p>1A (1935) 1935 Rang. 73 (1) (73)</p> | <p>2 (1915) 1915 Cal 771 (771) 42 Cal 79</p> <p>(1915) 1915 Rang. 245 (246)</p> <p>2A (1932) 1932 Bom 163 (163) 56 Bom 268</p> <p>3 (1927) 1927 Mad 816 (816) 50 Mad 770</p> <p>4 (1931) 1931 Rang. 286 (286) 9 Rang. 478</p> <p>5 (1910) 8 Ind Cas 340 (342) 35 Mad 1</p> <p>(1878) 4 Cal 531 (534)</p> <p>6 (1909) 2 Ind Cas 150 (152) (Bom)</p> <p>7 (1919) 1919 Cal 97 (99) 45 Cal 818</p> <p>8 (1919) 1919 Cal 904 (906) 45 Cal 305</p> <p>(1917) 1917 Mad 300 (350) Refusing leave to amend</p> <p>(1925) 1925 Bom 150 (160) Amending title of plaint—Relates only to procedure</p> <p>9 (1926) 1926 Mad 551 (555) 49 Mad 539</p> <p>10 (1930) 1930 Mad 387 (387) 54 Mad 491</p> <p>11 (1920) 1920 Bom 709 (311) 44 Bom 272</p> <p>12 (1872) 3 Bom 163 (163) 4 Bom 272</p> <p>(1909) 2 Ind Cas 167 (167) (Bom)</p> <p>13 (1927) 1927 Mad 409 (410)</p> <p>14 (1926) 1926 Mad 64 (64)</p> <p>15 (1921) 1921 Bom 320 (321) 45 Bom 423</p> <p>16 (1925) 1925 Rang. 267 (268) 3 Rang. 707</p> <p>17 (1909) 2 Ind Cas 157 (158) (Bom)</p> <p>[But see (1905) 28 Mad 28 (31) Dissented from in 30 Mad 1 (F. B.)]</p> <p>18 (1920) 1920 Cal 894 (895)</p> <p>(1934) 1934 Bom 163 (163)</p> <p>(1925) 1925 Rang. 200 (201) 3 Rang. 293</p> |
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- (12) Order refusing to set aside & dismissal of an appeal for default ²³
- (13) Order rejecting an application for leave to file a memorandum of cross objections in *forma pauperis* ²⁹
- (14) Order remanding the whole case to the lower Court for disposal ³⁰
- (15) Order refusing leave to appeal in *forma pauperis* ³¹
- (16) Order transmitting³² or refusing to transmit³³ a decree of the Privy Council for execution
- (17) Order refusing to extend time to furnish security under O 45 R 7 See Note 10 to that Rule
- (18) Order dismissing a suit for want of prosecution ³⁴
- (19) Order of transfer under Clause 13 of the Letters Patent ³⁵ According to the High Court of Calcutta such an order is not a judgment inasmuch as it does not affect the merits of the case which is necessary according to the definition of judgment as accepted by that Court ³⁶
- (20) Order refusing to set aside an award ³⁷

Orders which have been held to be 'judgments' and which can be supported on the ground that the non compliance therewith will have the effect of putting an end to the suit or proceeding —

- (1) Order asking plaintiff to elect to proceed against some only of the defendants See Note 14 to O 1, R 3
- (2) Order asking plaintiff to furnish security for the costs of the suit See Note 14 to O 25, R 1
- (3) Order imposing conditions for granting leave to defend a suit in which a summons is issued under Ch VIII A of the Rules of the High Court ³⁸

Orders which have been held to be 'judgments' and which can be supported on the ground that the non compliance therewith will have the effect of putting an end to the suit or proceeding —

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Bombay an order refusing to grant a temporary injunction is not a judgment See Note 20 to O 39 R 1

- (4) Order directing payment of a certain sum as maintenance to a party pending suit ⁴¹
- (5) Order under S 10 of the Code refusing to stay a suit ⁴²
- (6) Order granting or refusing stay of execution of a decree ⁴³ See also Note 20 to O 41 R 5

23 (1924) 1924 Lah 412 (412)	35 (1924) 1924 Mad 90 (91)	47 Mad 186
(1925) 1925 Lah 617 (617) Order rejecting an application under O 41 R 19	(1923) 1923 Mad 44 (44)	
24 (1926) 1926 Mad 656 (656) Right of appeal	(1921) 1921 Mad 697 (697)	
	(1900) 23 Mad 323 (341)	

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decision on the question of limitation

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| (1891) 14 Mad 406 (407) | (1918) 1918 Cal 191 (192) | 45 Cal 502 |
| (1924) 1924 Pat 336 (339) | 39 (1926) 1926 Cal 668 (670) | |
| [See also Note 23 to O 41, R 23] | 39a (1925) 1925 Cal 75 (37) | |
| 31 See Note 11 to O 41, R 1 | 39 (1930) 1930 Cal 803 (804) | |
| [See also (1931) 1931 Cal 193 (193)] | 40 (1925) 1925 Mad 556 (557) | |
| 73 Mad 245 Right of appeal as assumed] | 41 (1925) 1925 Mad 443 (443) | |
| 72 (1920) 1920 Lah 674 (675) 11 Lah 765 | 42 (1933) 1933 Bom 85 (87) | |
| Order transmitting order in council for execution | (1935) 1935 Cal 1 (7) | |
| 73 See Note 16 to O 45 R 15 | 43 (1922) 1922 Lah 185 (186) Order refusing stay | |
| 74 (1924) 1924 Cal 1025 (1026) 51 Cal 605 | | |

An order which amounts to a decree in the form of a judgment will of course be a judgment within the meaning of the clause and appealable as such.

3 Orders which are not judgments.—The following are among the orders which have been held not appealable as judgments under the clause—

(1) An order granting leave to sue as a pauper¹

(1 A) Order granting under S. 10 of the C. P. A.

(2) An order granting leave to defend a summary suit under O. 2.

But (1) The High Court of Bombay took a contrary view.

(2) An order refusing to make leave to sue a pauper a condition.

(3) An order refusing to direct the Receiver in insolvency to give security for the satisfaction of the debt of the debtor.

(4) An order refusing to set aside a decree or to transfer a suit to a preliminary suit.

(5) An order refusing to set aside a decree after expiry of the time for appeal.

(6) An order refusing to set aside a decree after expiry of the time for appeal.

(7) An order refusing to set aside a decree after expiry of the time for appeal.

(8) An order refusing to set aside a decree after expiry of the time for appeal.

(9) An order refusing to set aside a decree after expiry of the time for appeal.

(10) An order refusing to set aside a decree after expiry of the time for appeal.

(11) An order refusing to set aside a decree after expiry of the time for appeal.

(12) An order refusing to set aside a decree after expiry of the time for appeal.

(13) An order refusing to set aside a decree after expiry of the time for appeal.

Bombay.

(14) An order directing security under O. 34 R. 16. This could be a judgment according to the test applied by White & Carter *Hyatt v. Joshi* as much as it is an order in an auxiliary proceeding instituted with a view to render the judgment effective. In view of the Full Bench decision in A. I. R. 1929 Raj 41 adopting the Malabar view the correctness of this decision is open to question.

(15) An order directing or refusing to set aside a decree after expiry of the time for appeal.

(192) 1923 Cal 428 (42) (C. P. A.)

stay

[But see (1921) 1921 Jour 34 (3)]

Ind C. 503 (809) (Mad)]

12 1 R. 22 (226) 3 Rang 2 No

all

(1916) 1916 Mad 45 (4)

(192) 1929 Mad 13 (18) Appeal granted

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(1915) 1915 Cal 71 (1) 43 C. 13

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(1915) 1915 Cal 71 (1) 43 C. 13

(1915) 1915 Cal 71 (1) 43 C. 13

(1915) 1915 Cal 71 (1) 43 C. 13

(1915) 1915 Cal 71 (1) 43 C. 13

- (17) An order directing the Official Referee to ascertain the share of the plaintiff and take accounts¹⁹ or referring back the report to the Official Referee for a further consideration²⁰
- (18) An order giving directions to the Commissioner²¹
- (19) An order directing a receiver to advance money to the guardian *ad litem* of a minor defendant²²
- (20) An order directing the suit to proceed dismissing an application to take the plaintiff off the file of the Court²³
- (21) A finding on a preliminary issue *allowing the suit to proceed* after disallowing an objection as to stamp²⁴ or as to the maintainability of the suit²⁵
- (22) An order admitting evidence²⁶
- (23)

failure to give security in time²⁷

- (24) An order refusing to exercise inherent powers under S 151, C P C²⁸
- (25) An order setting aside an *ex parte* decree²⁹
- (26) An order restoring a suit dismissed for default³⁰
- (27) An order granting or refusing a certificate for leave to appeal to the Privy Council³¹
- (28) An order refusing stay of execution under O 40 R 13³²
- (29) An order postponing sale³³
- (30) An order refusing to alter the terms of a sale proclamation³⁴
- (31) An order transferring^{34a} or refusing to transfer a case³⁵
- (32) An order directing the issue of notice to respondents in Europe³⁶
- (33) An order of remand in appeal directing the trial of a particular issue keeping the case in file³⁷

NOTE — An order of remand of the whole case is a 'judgment' — See Note 2 above

- (34) An order made at the settlement of issues fixing a distant date for the hearing of the suit was held to be appealable in the undermentioned case by the High Court of Madras³⁸ But this decision has been dissented from in the later Full Bench in I L R 30 Mad 1 and is not good law. Such an order would not be appealable as it merely relates to procedure.

4 Orders in proceedings other than suits and appeals — The following are among the orders in miscellaneous proceedings which have been held to be appealable as judgments under this clause. As to whether and how far these decisions can be regarded as correct on principle, see the discussion as to the meaning of the word 'judgment' in Note 2 above —

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| (1926) 1926 Rang 64 (64) 3 Rang 60; | (1876) 25 Suth W R 523 (531) |
| [But see (1907) 30 Mal 143 (144) | (1875) 24 Suth W R 150 (151), Refusing certificate — Submitted not correct |
| Disentitled from in 35 Mad 1 (E L)] | (1876) 24 Suth W R 148 (149) |
| 13 (1924) 1924 Mad 400 (407) | (1891) 7 Cal 330 (342) |
| 20 (1924) 1924 Mal 470 (471, 472) 51 Mal | 32 (1894) 21 Cal 473 (475) |
| 235 | 33 (1924) 1924 Mad 234 (235) |
| 21 (192) 1923 Rang 43 (45) 2 Rang 16) | (1932) 1932 Bom 134 (135 136) 56 Ind 7 |
| 22 (1901) 21 Mal 511 (511) | |
| 23 (1922) 1922 Cal 172 (174) | |
| 24 (1929) 1929 Rang 41 (53, 54) 6 Rang 703 | |
| (H I) | |
| 25 (1900) 1900 Mal 126 (128) | |
| (1937) 1937 Rang 15 (15, 16) 11 Rang 11 | |
| 26 (1927) 1927 Mal 1021 (1021) | (1924) 1924 Mal 232 (231) |
| 27 (1924) 1924 Mal 151 (151) | (1927) 1927 Lah 70 (540) 4 Lah 151 |
| 28 (1903) 1903 Pat 132 (142) 12 Pat 202 | 30 (1924) 1924 Lah 171 (171) |
| 29 (192) 1926 Cal 327 (328 331) | 37 (1927) 1927 Mad 317 (318) |
| 30 (1922) 1922 Cal 107 (107) 13 Cal 116 | (1909) 2 Ind 1 Cas 66 (637) (Cal) |
| 31 (1890) 17 Cal 475 (475 478) | (1918) 1918 Pat 180 (182) 41 Ind Cas 507 |
| (1875 70) 1 Cal 102 (103) | (310) 2 Pat 1 Jour 663 |
| | 33 (1891) 11 Mad 85 (83) |

- (1) An order passed by a single Judge of a Chartered High Court in the exercise of Admiralty or the Admiralty jurisdiction¹
- (2) An order refusing leave² or refusing to set aside an order granting leave³ to sue under *Cl 12 of the Letters Patent*
- (3) An order granting⁴ or refusing⁵ an application to commit for contempt not being an order passed in the exercise of criminal jurisdiction⁶
- (4) An order deciding the claim of relatives to the custody of a minor on a *visitation*⁷
- (5) An order refusing to excuse the delay in filing an appeal under S 5 of the *Limitation Act*⁸ but a contrary view has been taken by the Calcutta High Court⁹
- (6) An order allowing the Administrator General commission at a certain rate under S 27 of *Act II of 1874*¹⁰
- (7) An order under S 90 of the *Probate and Administration Act 1881*¹¹ (corresponding of S 307 of the Succession Act XXXI of 1925) is also an order granting probate¹²
- (8) An order refusing to set aside an order for the examination of witnesses passed by the Registrar in insolvency under S 36 of the *Presidency Towns Insolvency Act*¹³ or an order dismissing an application by a judgment creditor praying for payment of a certain sum of money by the Official Assignee¹⁴
- (9) An order under S 215 of the *Companies Act* depriving creditor of all rights to take advantage of winding up proceedings¹⁵ or an order directing a fresh meeting to be held rejecting the proxy forms used under S 153 of the same Act¹⁶ S 163 of the (old) Act does not contravene the right of appeal conferred by the provisions of this clause¹⁷
- (10) An order refusing to enlarge the time for the submission of an award on an application under S 13 of the *Arbitration Act (1899)*¹⁸ or an order refusing to set aside an award,¹⁹ or an order dismissing an application to revoke a submission to arbitration,¹⁹ or an order remitting the award to arbitrators to make a fresh award²⁰ An order under S 19 of the Act refusing to stay proceedings is appealable according to the High Court of Calcutta²¹ but not appealable according to the High Court of Rangoon²²
- (11) In the undermentioned case²³ it has been held by the High Court of Bombay that in proceedings under the *Guardian and Wards Act 1890* it has inherent jurisdiction to hear an appeal apart from the provision of this clause

The following orders have been held not appealable —

- (1) An order directing the issue of a *Mandamus*²⁴ A contrary opinion has been however expressed in the Madras Full Bench case cited below²⁵
- (2) An order admitting an appeal under S 5 of the *Limitation Act*²⁶

Note 4

- 1 (1870) 17 Cal 66 (83)
- 2 (1867) 3 Mad H C R 384 (37 38s)
- 3 (1874) 13 Beng L R 91 (101)
- 4 (1883) 7 Bom 5 (12)
- 5 (1837) 25 Cal 236 (239)
- 6 (1833) 1323 Bom 104 (104) 1 Appaling 7
- 7 Bom 5
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- 11 (1876) 1 Mad 148 (151)
- 12 (1896) 23 Cal 500 (500)
- 13 (1895) 17 All 475 (477 478)
- 14 (1921) 121 Cal 58 (62) 48 Cal 1039
- 15 (1902) 25 Mad 406 (409)
- 16 (1927) 127 Cal 669 (690, 691)

- 15 (1932) 1932 Rang 96 (97) 10 Rang 189
- 16 (1911) 11 Ind C 567 (564) (Bom)
- 17 (1978) 128 Mad 63 (70 71) 31 Mad 103 (F B)
- 18 (1914) 1318 Cal 131 (131) 45 Cal 502
- 19 (1899) 26 Cal 361 (368)
- 20 (1879) 4 Cal 231 (235) Order refusing to file an award in a pending suit is appealable
- 21 (1909) 1 Ind Cas 14 (13) 31 Bom 1
- 22 (1924) 1924 Rang 47 (48) 1 Rang 661
- 23 (1920) 1920 Cal 906 (908) 47 Cal 111
- 24 (1929) 1929 Rang 287 (289) 7 Rang 481
- 25 (1931) 1931 Bom 193 (194 195) 55 Bom 145 For a criticism of the soundness of this decision
- 26 [See 60 Mad L Jour (N I C) 31]
- 27 (1872) 8 Beng L R 433 (434)
- 28 (1910) 8 Ind C 5 340 (343) 35 Mad 1 (F B)
- 29 (1929) 1929 Cal 214 (216) 56 Cal 133 (F B)
- 30 [See however (1924) 1924 Rang 148

(See also (1919) 1919 Cal 908 (909) Question left open)

- (3) The decision of the High Court in a *Land Acquisition* appeal is not appealable under this clause according to the High Court of Madras²⁷. But the High Court of Lahore²⁸ has taken a contrary view.
- (4) An order returning an award for complying with the formalities prescribed by S 11 (2) of the *Arbitration Act*²⁹
- (5) An order refusing an application under S 169 of the *Indian Companies Act*³⁰ or an order under S 195 of that Act directing the directors of a company to appear in Court for examination as to their dealings³¹
- (6) A decision of the single Judge of the High Court on a point of law referred to it by the Commissioner of Income tax under S 66 of the *Income tax Act*³²
- (7) An order dismissing an application to adjudge a person as a lunatic under the *Lunacy Act*³³

5 Orders made in the exercise of Revisional Jurisdiction—Orders made by a single Judge in the exercise of revisional jurisdiction are not appealable under this clause. A right of appeal is expressly excluded in such cases¹. Where it is doubtful whether the decision appealed from is in revision or in second appeal, but the party aggrieved has a right of second appeal it must be deemed to be one passed in the exercise of appellate jurisdiction².

6 Orders made in the exercise of powers of superintendence—This clause excludes a right of appeal in the case of orders passed in the exercise of the powers of superintendence under S 101 of the Government of India Act, such orders are, therefore not appealable under this clause¹.

7 Orders passed in the exercise of criminal jurisdiction—No appeal lies under this clause against an order passed by a single Judge of the High Court in the exercise of its criminal jurisdiction¹. An order of sanction to prosecute under S 195 Cr P Code is an order made in the exercise of criminal jurisdiction and not appealable under this clause². Similarly

- (152) 1 Rang 584, 11 All 176 Foll)
 27 (1919) 1919 Mad 626 (628) 41 Mad 943
 28 (1923) 1923 Lah 275 (277) 3 Lah 420
 29 (1928) 1928 Rang 110 (111) 6 Rang 25
 30 (1895) 17 All 433 (446)
 31 (1924) 1928 Cal 295 (296) 55 Cal 262
 32 (1925) 1925 Lah 336 (336) 6 Lah 30 Foll
 following 1923 P C 148
 (1925) 1925 Cal 598 (599) 52 Cal 546
 73 (1933) 1931 Bom 112 (113)

Note 5

- 1 (1924) 1924 Bom 324 (325)
 (1898) 22 Bom 891 (892 893)
 (1921) 1921 Cal 217 (218)

- (1914) 1914 Cal 388 (389) 41 Cal 323
 2 (1930) 1930 Mad 489 (489)

Note 6

- 1 [See (1913) 20 Ind Cas 633 (634) (Mad) Cases before the amendment of 1919—Not good law under the present clause]
 (1930) 1935 All 750 (1) (750)

Note 7

- 1 (1916) 1916 Mad 1223 (1224)
 (1930) 1930 All 55 (58)
 (1934) 1934 All 600 (609) No appeal from order on application under S 491 Cr P C
 (1918) 1919 Mad 731 (732)
 (1916) 1916 Mad 970 (970) 39 Mad 537
 (1916) 1916 Mad 632 (632) 39 Mad 472
 Order under S 458 Cr P Code
 (1920) 1920 Mad 144 (145) 43 All 501
 Question left open
 (1918) 1918 Mad 418 (418 419) Order under S 200 Cr P Code
 (1915) 1915 Mad 831 (832) 39 Mad 533
 Order in revision against order of Magistrate under S 118 Cr P Code
 (1901) 27 Mad 510 (512) Order under S 101, Cr P Code
 (1909) 4 Ind Cas 571 (571) (Mad)
 (1911) 12 Ind Cas 153 (153) (Mad)
 (1905) 32 Cal 373 (384) Order granting

- (1915) 1915 Mad 450 (451)
 (191) 1916 Mad 1220 (1221) 39 Mad 235

(1911)

- (1907) 30 Mad 711 (712)
 (1897) 22 Mad 63 (63, 64, 65) (1911)
 (1907) 22 Mad 102 (103)
 (1891) 1 Mad 103 (103)
 (1904) 1 Mad 406 (407)

- 2 (1907) 30 Mad 711 (712)
 such an order can be revoked by the authority to which the Judge granting sanction is subordinate.

an order of a Judge of the High Court staying a criminal trial is not a 'judgment' appealable under this clause.²

8 Appeal to Privy Council—A decision of the High Court in an appeal under this clause is appealable to the Privy Council.¹

9 Appeal in cases of disagreement among Judges of a Division Bench—See also S 98—Prior to the amendment of the Act, a decision of the High Court in an appeal under this clause was appealable to the Privy Council. As noticed in the cases cited below¹ which were decided before the amendment, the law was that a decision of the High Court in an appeal under this clause was appealable to the Privy Council. The law is now that a decision of the High Court in an appeal under this clause is appealable to the Privy Council.

10 S 175 of the Agra Tenancy Act if precludes appeal—Section 175 of the Agra Tenancy Act is not a bar to the right of appeal conferred by this clause.¹

11 Declares that the case is a fit one for appeal—Under the present clause an appeal lies from the decision of a single Judge of the High Court in a second appeal only where the Judge of the High Court declares that the case is a fit one for appeal.¹ No hard and fast rule can be laid down as to when a Judge should grant or refuse leave to appeal. The mere fact that the decision of the lower appellate Court is reversed by the High Court or the fact that the value of the appeal is beyond a particular figure does not by itself entitle the petitioner to a grant of leave to appeal. The jurisdiction to grant leave should not, however, be exercised arbitrarily or capriciously but in a judicial manner having regard to all the circumstances of the case.² The High Court of Bombay in a recent decision³ has held that in the matter of granting leave under this clause the Court should be guided by the same principles as the Government leave to appeal to the Privy Council. It has accordingly refused to grant leave holding that the case is not one of great public or private importance or involving questions which may be important precedents governing numerous other cases. In *Faris*

(1904) 17 Mad 103 (105)
(1917) 1917 Mad 62 (43) 99 Mad 763 Question doubted
(1917) 1917 All 474 (470) 99 All 147
(1922) 1922 Bom 455 (456) 47 Bom 270 Question left open

(See however (1916) 1918 Cal 650 (652) 44 Cal 504 Order remanding a case to the Small Cause Judge who refused to grant a sanction under S 135, Cr P Code, to make a further investigation and pass orders thereon in a "judgment")

3 (1916) 1918 Pat 128 (133) 3 Pat L Jour 509
Note 8

1 (1872) 21 Suth W R 203 (254)
Note 9

1 (1924) 1924 Cal 855 (856) 51 Cal 669

(1918) 1918 Cal 415 (417)

(1916) 1916 Cal 811 (811)

(1913) 18 Ind Cas 253 (254) (Cal)

(1890) 17 Cal 2 (11)

(1894) 10 Cal 814 (816) (F B)

(1884) 10 Cal 108 (109)

(1872) 18 Suth W R 209 (210)

(1870) 13 Suth W R 310 (311)

(1867) 7 Suth W R 512 (512) (F B)

(1863) 13 Suth W R 209 (212 215)

(1870) 12 Suth W R 498 (499)

(1926) 1926 Lah 65 (67, 68) 7 Lah 179
Right of appeal given by Cl 10 is not destroyed merely because the Judges, though differing on merits, made a joint order regarding decrees to be passed

(1910) 6 Ind Cas 307 (358) 41 Mad 121.

(1902) 25 Mad 518 (550)

(1920) 1920 Mad 1032 (1033)

(1887) 9 All 615 (617)

(1875 73) 1 All 31 (33) *Hall* that in order

case is open to appeal —

(1876) 1 All 181 (190, 191)

(1920) 1925 Bom 118 (120) 45 Bom 611

(1895) 17 All 470 (477, 478)

(1920) 1920 Cal 316 (317)

(1916) 1916 Cal 843 (848 853)

(1926) 1926 Lah 65 (68 69) 7 Lah 173

(1909) 1 Ind Cas 977 (984) 32 Mad 95

Note 10

1 (1904) 26 All 376 (379)

Note 11

1 (1920) 1926 Rang 1 (2) 3 Rang 546 (F B)

(1931) 1931 Rang 147 (148) 9 Rang 31 (F B)

(1930) 1930 Bom 367 (367)

(1929) 1929 Bom 241 (241)

(1923) 1928 Bom 71 (874) 72 Bom 757

Application for leave can be made orally

(1930) 1930 Mad 427 (428) 53 Mad 158

2 (1931) 1931 Mad 202 (203 204) 53 Mad 403

[See also (1922) 1929 All 429 (430)]

Leave to appeal refused in a suit for malicious prosecution.

3 (1932) 1932 Bom 218 (221)

- (9) The decision of the High Court in a *Land Acquisition* appeal is not appealable under this clause according to the High Court of Madras²⁷ But the High Court of Lahore²⁸ has taken a contrary view
- (4) An order returning an award for complying with the formalities prescribed by S 11 (2) of the *Arbitration Act*²⁹
- (5) An order refusing an application under S 169 of the *Indian Companies Act*³⁰ or an order under S 195 of that Act directing the directors of a company to appear in Court for examination as to their dealings³¹
- (6) A decision of the single Judge of the High Court on a point of law referred to it by the Commissioner of Income tax under S 66 of the *Income tax Act*³²
- (7) An order dismissing an application to adjudge a person as a lunatic under the *Lunacy Act*³³

5 Orders made in the exercise of Revisional Jurisdiction—Orders made by a single Judge in the exercise of revisional jurisdiction are not appealable under this clause. A right of appeal is expressly excluded in such cases¹. Where it is doubtful whether the decision appealed from is in revision or in second appeal but the party aggrieved has a right of second appeal it must be deemed to be one passed in the exercise of appellate jurisdiction².

6 Orders made in the exercise of powers of superintendence—This clause excludes a right of appeal in the case of orders passed in the exercise of the powers of superintendence under S 107 of the Government of India Act such orders are therefore not appealable under this clause¹.

7 Orders passed in the exercise of criminal jurisdiction—No appeal lies under this clause against an order passed by a single Judge of the High Court in the exercise of its criminal jurisdiction¹. An order of sanction to prosecute under S 135 Cr P Code is an order made in the exercise of criminal jurisdiction and not appealable under this clause². Similarly

(152) 1 Rang 584 11 All 176 Foll]
27 (1919) 1919 Mad 626 (628) 41 Mad 948
28 (1923) 1923 Lah 275 (277) 3 Lah 420

(1914) 1914 Cal 388 (389) 41 Cal 329
2 (1930) 1930 Mad 489 (489)

Note 6

- 1 [See (1913) 20 Ind Cas 633 (634) (Mad) Case before the amendment of 1919—Not good law under the present clause]
(1935) 1935 All 750 (1) (750)

Note 7

33 (1933) 1933 Bom 112 (113)

Note 5

- 1 (1924) 1924 Bom 324 (325)
(1899) 22 Bom 891 (892 893)
(1921) 1921 Cal 217 (218)
(1915) 1915 Cal 695 (2) (695)

- 1 (1916) 1916 Mad 1223 (1224)
(1935) 1935 All 35 (35)
(1934) 1934 All 606 (606) No appeal from order on application under S 491 Cr P C
(1918) 1918 Mad 791 (792)
(1916) 1916 Mad 970 (970) 39 Mad 537
(1910) 1910 Mad 632 (632) 39 Mad 472
Order under S 488 Cr P Code
(1920) 1920 Mad 144 (145) 43 Mad 361
Question left open
(1918) 1918 Mad 418 (418 419) Order under

Cr P Code

- (1909) 4 Ind Cas 871 (871) (Mad)
(1911) 12 Ind Cas 653 (653) (Mad)
(1905) 32 Cal 379 (381) Order granting

(F B)

- (1907) 30 Mad 311 (312)
(1890) 22 Mad 63 (80 84 99) (F B)
(1899) 22 Mad 100 (100)
(1894) 17 Mad 100 (102)
(1891) 14 Mad 406 (407)

an order of a Judge of the High Court staying a criminal trial is not a judgment appealable under this clause.³

8 Appeal to Privy Council—A decision of the High Court in an appeal under this clause is appealable to the Privy Council.¹

9 Appeal in cases of disagreement among Judges of a Division Bench—See also S 95—Prior to the amendment of this clause in 1928 there was a right of appeal from the decision of the senior Judge where the Judges of a Division Bench were equally divided in opinion. As noticed in Note 1 *ante* such a right of appeal has now been taken away. The cases cited below¹ which were decided under the old clause prior to the amendment in 1928 are now no longer law and are only of academic interest.

10 S 175 of the Agra Tenancy Act *is precludes appeal*—Section 175 of the A. W. P. Tenancy Act does not *seem* to preclude the right of appeal conferred by this clause.¹

11 Declares that the case is a fit one for appeal—Under the present clause an appeal lies from the decision of a single Judge of the High Court *passed in second appeal only* where the Judge *in passing the judgment* declares that the case is a fit one for appeal.¹ No hard and fast rule can be laid down as to when a Judge should grant or refuse leave to appeal. The mere fact that the decision of the lower appellate Court is reversed by the High Court or the fact that the valuation of the appeal is beyond a particular figure does not by itself entitle the petitioner to a grant of leave to appeal. The jurisdiction to grant leave should not, however, be exercised arbitrarily or capriciously but in a judicial manner having regard to all the circumstances of the case.² The High Court of Bombay in a recent decision³ has held that in the matter of granting leave under this clause the Court should be guided by the same principles as those governing leave to appeal to the Privy Council. It has accordingly refused to grant leave holding that the case is not one of great public or private importance or involving questions which may be important precedents governing numerous other cases. In *Barfi*

(1894) 17 Mad 105 (105)
(1917) 1917 Mad 82 (83) 39 Mad 769 Question doubted
(1917) 1917 All 474 (475) 39 All 147
(1922) 1922 Bom 455 (456) 47 Bom 270
Question left open
(See however (1916) 1918 Cal 850
(852) 44 Cal 804 Order remanding
a case to the Small Cause Judge
who refused to grant a sanction

(1925) 1925 Mad 1032 (1033)
(1867) 9 All 615 (617)
(1875) 78 1 All 31 (33) *Held* that in order

3 (191-)

Note 8
1. (1872) 21 South W R 203 (264)
N. v. O.

case is open to appeal—
(1876) 1 All 181 (180, 191)
(1925) 1925 Bom 118 (120) 46 Bom 611
(1895) 17 All 475 (477, 478)
(1920) 1920 Cal 316 (317)
(1916) 1916 Cal 848 (848, 854)
(1926) 1926 Lih 65 (63, 69) 7 Lih 173
(1903) 1 Ind Civ 577 (584) 22 Mad 35

Note 10
1 (1904) 20 All 375 (379)
N. v. J.

(1929) 1929 Bom 241 (241)
(1924) 1928 Bom 771 (374) 52 Bom 751
Application for leave can be made

though differing on merits, made a
joint order regarding decrees to be
passed

(1910) 6 Ind Civ 357 (359) 24 Mad 121.
(1902) 25 Mad 548 (550)

Leave to appeal refused in a suit for
malicious prosecution]

3 (1932) 1932 Bom 218 (221)

Mandar v Karu Mandar^{3a} Courtney Terrell, C J observed as follows — 'I venture to think that leave to appeal is given somewhat too lightly and without reference to the pre-
 o is a fit one for ap
 . int of law arises in
 I venture to
 suggest that learned Judges in exercising the responsibility given to them by the Letters Patent to hear appeals, singly, might remember that it is only when a case presents some difficulty and in which the Judge really feels that the matter before him requires further consideration by a larger Court that leave should be granted. If a Judge decides the case with confidence that should be an indication that it is not a fit case for appeal and if he accepts the responsibility which is cast upon him by the Letters Patent his decision will be final.

An order refusing leave to appeal under this clause is not appealable⁴

In the case cited below the High Court of Rangoon⁵ rejected an application for leave to appeal which was filed four months after the judgment in second appeal.

12 Cross objections—It has been held that the provisions of the Code of Civil Procedure relating to cross objections do not apply to appeals under this clause¹

13 Security for costs—In an appeal under this clause the High Court has power to direct the appellant to furnish security for costs and on his failure to comply therewith it can reject the appeal under the provisions of O 41, R 10 (2) of the Code¹

14 Points on which appeal may be heard—It is not ordinarily open to the parties to raise in an appeal under this clause a contention which has not been urged before the Court from the judgment of which the appeal is preferred¹ unless the point is one relating to jurisdiction or raises a pure question of law². But the Court is not however, confined to facts and circumstances as disclosed on the judgment appealed against: it is entitled to look into the judgment of the lower appellate Court³.

Wrong exercise of discretion—Whether may be a ground of appeal—The High Court of Allahabad⁴ has held that an order passed in the exercise of judicial discretion vested in a single Judge of the High Court is not appealable as a judgment under this clause. The High Court of Madras⁵ has, on the other hand, held that the fact of a matter being within the discretion of the original Judge is not a ground for refusing to entertain the appeal but a sufficient reason for declining to interfere with that discretion.

- 31 (1934) 1934 Pat 466 (466)
 4 (1930) 1930 Bom 224 (225) 51 Bom 331
 (1931) 1931 Cal 571 (571 572) 58 Cal 342
 (1930) 1930 Mad 75 (78) 52 Mad 932.
 5 (1924) 1924 Rang 45 (45)

Note 12.

- 1 (1920) 1920 Cal 776 (777)
 (1920) 21 All 237 (300)
 (1922) 1922 All 55 (55) Followings 21 All 237

Note 13

- 1 (1921) 1921 P C 40 (82) 48 Cal 481 48 Ind 11 p 76 (P C)
 (1923) 1923 Bom 399 (399)
 [But see (1904) 27 Mad 121 (123) Not approved in 1921 P C 40]

Note 14

- 1 (1920) 1920 Lih 324 (325) 55 Ind Cas 353 (354)
 (1930) 1930 Lih 632 (633) 11 Lih 535
 (1923) 1923 Lih 536 (537)
 (1925) 1925 Lih 281 (281)
 (1924) 1924 Lih 464 (463)
 (1924) 1924 Lih 251 (252)
 (1923) 1923 Lih 657 (657)
 (1923) 1923 Lih 151 (152 153)
 (1922) 1922 Lih 185 (188 189)
 (1921) 1921 Lih 320 (327)
 (1923) 1923 Mad 617 (620)

- (1916) 1916 Pat 317 (319) 1 Pat L Jour 455
 (1869) 12 Suth W R 438 (499 500)
 (1898) 20 All 258 (261)
 2 (1899) 21 All 341 (345) (P B)
 (1935) 1935 All 760 (762)
 (1934) 1934 All 893 (894)
 (1935) 1935 Pat 56 (53) Question of fact

- not raised in the pleading or if the trial Court cannot be raised in Letters Patent appeal
 (1931) 1931 Lih 144 (144) Decision of a single Judge in second appeal interfering with the findings of fact Set aside in Letters Patent appeal as being without jurisdiction
 [See also (1922) 1922 Pat 341 (341) 1 Pat 246]

(2 F)

11 r 11

11 r 11

11 r 11

15 Limitation—Provision has been made in the Rules framed by various High Courts as to the period within which an appeal under this clause is to be filed. Under the Rules framed by the High Courts of Allahabad¹ Lahore² Patna³ and Rangoon⁴ the memorandum of appeal under this clause need not be accompanied by a copy of the judgment or decree appealed from. Hence it has been held that an appellant is not entitled to claim the benefit of an extension or exclusion of time under Ss. 4 and 12 of the Limitation Act.⁵

See also the undermentioned cases.⁶

16 Court fee—Prior to the amendment of S. 4 of the Court fees Act by Act XXXIX of 1922 it was held in the undermentioned cases⁷ that a memorandum of appeal under this clause was not liable to any Court fee inasmuch as S. 4 did not provide for appeals under this clause. But under the amended Court fees Act it is liable for payment of Court fee under Sch. I Art. 1.

17 Review See Note 1 to S. 114 of the Code of Civil Procedure and the case cited below.⁸

18 Practice—Section 117 of the Code of Civil Procedure provides that the provisions of the Code shall apply to High Courts save as otherwise provided and O. 43 R. 3 exempts only certain provisions of the Code as not being applicable to the High Courts. Hence in a Letter Patent appeal under this clause the High Court can apply the provisions of O. 41 R. 11⁹ proceeded under O. 41 R. 10². But as already noticed in Note 10 to S. 10, the provisions of this clause are not controlled by S. 10, and an order of remand though not appealed against can be challenged in an appeal under this clause against the final judgment.⁴

An appeal under this clause cannot be proceeded with if necessary parties are not impleaded.⁴ In the undermentioned case the High Court of Madras allowed an appeal under this clause against the order of the District Judge in application for leave to appeal as a proper order under O. 43 P. 1. *It is unnecessary to the respondent* observing that such a procedure was in conformity with the practice of that Court.

Although a Letter Patent appeal is not preferred under the Civil Procedure Code the Court hearing the appeal is still an appellate Court and can exercise all the powers of an appellate Court under the Code of Civil Procedure and as such direct the plaint to be returned for presentation to the proper Court.⁶

16 And We do further ordain that the said High Court of Judicature at Madras [Bombay] Fort William in Bengal shall be a

Appel from Courts in the provinces Court of appeal from the Civil Courts of the Presidency of [Madras Bombay] Bengal Division of the Presidency of Fort William and from all other Courts subject to its superintendence and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force

Note 15

- 1 (1879) 2 All 192 (192) (F B)
[See also (1887) 9 All 110 (117) (F B)
Held period of limitation is 90 days from date of judgment.]
- 2 (1921) 1921 Lah 26 (27) 2 Lah 12²
(1921) 1921 Lah 237 (238)
- 3 (1921) 1921 Pat 365 (366) 3 Pat L Jour 701
- 4 (1927) 1927 Rang 20 (27) 4 Rang 263
[See however (1926) 1926 Rang 143 (144) Rule 5 of High Court Rules re

(1869) 11 Suth W R 107 (108)

(1863) 12 Suth W R 498 (499)

Note 16

- 1 (1922) 1922 All 164 (165) 44 All 13
(1922) 1922 Pat 13 (13) 1 Pat 384
(1923) 1923 Lah 215 (216) 3 Lah 470
(1899) 21 All 178 (180)
[See also (1922) 1922 M L 421 (422) 40 Mad 849]

Note 17

- 1 (1918) 1918 All 221 (221) Allahabad view following 1 All L J 503

Note 18

- 1 (1920) 1920 Pat 509 (509) 4 Pat L Jour 693
- 2 (1921) 1921 P C 80 (82-83) 48 Cal 431 43 Ind App 76 (P C)
- 3 See cases cited in Note 10 to S. 103
[See also (1929) 1929 Mad 349 (351)]
- 4 (1925) 1925 Lah 392 (392)
- 5 (1931) 1931 M L 198 (198 199) 53 Mad 245
- 6 (1934) 1934 All 551 (553)

4a

footing as leave to appeal to P C or leave to appeal as proper

- 5 (1870) 13 Suth W R 216 (216) Period of limitation 30 days
(1917) 1917 Cal 494 (495)

Synopsis

Appeal from Courts in Provinces Civil Courts	Note No	Subject to its superintendence	Note No
	1		3
	2		

1 Appeal from Courts in Provinces—The constitution of the High Court as a Court of appeal is quite different from its jurisdiction to hear appeals from every decree or order passed by a Subordinate Court. If there is no law or regulation which allows an appeal to the High Court in a particular case it cannot assume appellate jurisdiction in respect of that matter.¹

2 Civil Courts—The term Civil Courts in this clause does not cover a tribunal created under a particular status for a particular purpose. Thus no appeal will lie to the High Court against the decision of a commissioner acting as an election Court under the provisions of the United Provinces Municipalities Act (II of 1916).¹

3 Subject to its superintendence—This clause provides that every Civil Court of a Province is subject to the appellate jurisdiction of the High Court and S 104 of the Government of India Act provides that every Court subject to the appellate jurisdiction of the High Court is subject to its powers of superintendence. Reading these two together it follows that every civil Court in a province or Presidency is subject to the High Court's right of superintendence.¹

the Division Officer exercising Act (III of 1890) is not a Court coming of this clause.²

17. And we do further ordain that the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal shall have Jurisdiction as to infants and lunatics the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Presidency of [Madras] [Bombay] Bengal Division of the Presidency of Fort William as that which is now vested in the said High Court immediately before the publication of these presents.

Synopsis

Jurisdiction as to infants and lunatics Power of High Court to appoint	Note No	guardian in the case of minor members of Hindu joint families	Note No
	1		2

1 Jurisdiction as to infants and lunatics—The High Court as the successor and inheritor of the powers of the Old Supreme Court has no jurisdiction under this Clause over natives of India with respect to the persons and estates of infants, idiots and lunatics who reside outside the ordinary original jurisdiction of the High Court.¹ But in respect of European British subjects the High Court could exercise jurisdiction under this clause even though these parties reside outside of and have no property within the limits of its ordinary original jurisdiction.²

2 Power of High Court to appoint guardian in the case of minor members of Hindu joint families—Although a guardian 1890, for a minor belonging to an inherent jurisdiction conferred by appointment.¹ It has been held by the High Court of Allahabad that it can exercise it

- CI 16—Note 1** (1892) 1 All 159 (163) The Allahabad High Court has the same powers as those of the Calcutta High Court [But see (1930) 1330 Cal 590 (591) 57 Cal 533]
- Note 2** 1 (1926) 1326 All 113 (118) 48 All 104
- 1 (1925) 1325 All 380 (387) 17 All 513 (F I)
- Note 3** 1 (1928) 1928 Mad 1032 (1044)
- 2 (1922) 1322 Ma 1 337 (338 341)
- CI 17—Note 1** 1 (1930) 1332 Cal 11 (90) 58 Cal 11
- (1891) 21 Cal 906 (211)
- 1 (1932) 1332 Cal 507 (509) 53 Cal 570

jurisdiction under the clause even though another remedy by way of an application to the District Judge under the Guardians and Wards Act is open to the party.²

18 And we do further ordain that the Court for relief of Insolvent Debtors at [Madras] [Bombay], Calcutta shall be held before one of the Judges of the said High Court of Judicature at [Madras] [Bombay] Port William in Bengal and the said High Court, and any such Judge thereof, shall have and exercise, within the Presidency of [Madras] [Bombay] Bengal Division of the Presidency of Port William such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India.

Synopsis

Scope of the Clause	Note No 1	Laws relating to insolvent debtors	Note No 2
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1 **Scope of the Clause** The insolvency jurisdiction and the original civil jurisdiction of the High Court are separately dealt with in the Letters Patent. Therefore Cl 12 of the Letters Patent *ante* does not control the provisions of this clause so as to limit the insolvency jurisdiction of the Court. Thus the High Court has jurisdiction to adjudicate in insolvency proceedings on claims relating to immovable property situated outside the limits of its ordinary original civil jurisdiction.¹

2 **Laws relating to insolvent debtors**—The law of insolvency applicable to the High Courts is now laid down in the Presidency Towns Insolvency Act (III of 1909) prior to that Act The Insolvent Debtors Act (Stat 11 & 12 Vict c 21) was applicable as to cases under the latter Act and undermentioned cases.¹

Law to be administered by the High Court

19 And We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at [Madras] [Bombay], Port William in Bengal in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued.

Synopsis

Law or equity to be applied to each case	Note No 1	Applicability of English Law	Note No 2
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(1929) 1929 Bom 475 (477)

(1925) 1925 All 701 (703) 50 All 701

The jurisdiction as regards infants still exist in the Court but the High Court is reluctant to exercise it in the case of joint Hindu families.

2 (1934) 1934 All 7-2 (?) (723)

Clause 18—Note 1

1 (1928) 1928 Mid 732 (734) 31 Mid 540 (P B)

(1917) 1917 Mid 532 (536) 40 Mid 810

Note 2

1 (1857) 3 Bom H C R 461 (462) European

British subject residing in Bombay Presidency outside the town of Bombay is entitled to apply to the High Court for adjudicating him self as insolvent.

(1866) 1 Beng L R O C 84 (86-87) The jurisdiction of the Insolvency Court has been narrowed to the Bengal Division of the Presidency of Port William.

But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court

26 And We do further ordian that, on such point or points of law being reserved as aforesaid, or on its being certified by the said

High Court to review on certificate of the Advocate General

Advocate General that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or

points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right

Synopsis

	Note No		Note
Scope of Clauses 25 and 26	1	Power of Court on review	4
The certificate of the Advocate General	2	Decision under the Criminal Law	5
Procedure at the hearing	3	Amendment Act	

1 Scope of Clauses 25 and 26 —The High Court may review a decision of the High Court in its original criminal jurisdiction in the two following cases —

(1) Where the trial Court reserves any point or points of law for the opinion of the High Court (Cl 25)

(2) the it or

The point or points of law on which the Advocate General certifies an error in the decision thereof is not confined to the point reserved by the trial Court under Cl 25 ante

2 The certificate of the Advocate General —The certificate is presumably granted in the interests of justice after a careful consideration of all available materials. It should not be a mere surmise, but should reflect the judgment of the Advocate General¹. But whether the certificate is granted after careful consideration of the materials or not when once it is granted, the High Court is bound to deal with the case².

3 Procedure at the hearing —At the hearing of the case on review the counsel for the accused should begin and have a right of reply¹. When a Court is called upon to review a case under this Clause, it will accept as unquestionable the statement of the trial Judge as to what actually took place before him².

4. Power of Court on review —The High Court is empowered after deciding the point

words a point is contrasted with the words Such point

Note 2

- 1 (1915) 1915 Cal 773 (776) (F B)
 (1924) 1924 Cal 257 (261) (F B) The Advocate General must hear not only counsel for prisoner but also counsel for the Crown

- 2 (1915) 1915 Cal 773 (776)
 [See (1839) 1 Cal W N 433 (439). It is not compulsory on Court to deal

judge has not proper discretion in not granting an adjournment

Note 3

- 1 (1920) 1920 Cal 500 (501) 53 Ind Cas (933) 47 Cal 671 (F B)
 2 (1915) 1915 Cal 773 (782)
 (1924) 1924 Cal 257 (306)

Note 4

- 1 (1876) 1 Cal 207 (218)
 (1935) 1935 Wd 793 (794) (S B)

jurisdiction under the clause even though another remedy by way of an application to the District Judge under the Guardians and Wards Act is open to the party.²

18 And we do further ordain that the Court for relief of Insolvent Debtors at [Madras] [Bombay], Calcutta shall be held before one of the Judges of the said High Court of Judicature at [Madras], [Bombay] Fort William in Bengal and the said High Court, and any such Judge thereof shall have and exercise, within the Presidency of [Madras] [Bombay], Bengal Division of the Presidency of Fort William such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India.

Synopsis

Scope of the Clause	Note No 1	Laws relating to insolvent debtors	Note No 2
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1 **Scope of the Clause** The insolvency jurisdiction and the original civil jurisdiction of the High Court are separately dealt with in the Letters Patent. Therefore Cl 12 of the Letters Patent ante does not limit the provisions of this clause so as to limit the insolvency jurisdiction of the Court. Thus the High Court has jurisdiction to adjudicate in insolvency proceedings on claims relating to immovable property situated outside the limits of its ordinary original civil jurisdiction.¹

2 **Laws relating to insolvent debtors**—The law of insolvency applicable to the High Courts is now laid down in the Presidency Towns Insolvency Act (III of 1903). Prior to that Act The Insolvent Debtors Act (Stat 11 & 12 Vict c 21) was applicable. As to cases under the latter Act see undermentioned cases.¹

Law to be administered by the High Court

19 And We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at [Madras], [Bombay], Fort William in Bengal in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued.

Synopsis

Law or equity to be applied to each case	Note No 1	Applicability of English Law	Note No 2
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(1923) 122 J 1001 470 (477)

(1928) 1928 All 701 (703) 50 All 703
The jurisdiction as regards infants still exists in the Court but the High Court is reluctant to exercise it in the case of joint Hindu families.

2 (1934) 1934 All 722 (2) (723)

Clause 18—Note 1

1 (1928) 1928 Mad 732 (734) 51 Mad 540 (1935)

(1917) 1917 Mad 532 (536) 40 Mad 810

Note 2

1 (1955) 3 Bom HC R 461 (462) European

British subject residing in Bombay Presidency outside the town of Bombay is entitled to apply to the High Court for an order.

(1865) 1 Beng L R O C 84 (56 87) The jurisdiction of the Insolvency Court has been narrowed to the Bengal Division of the Presidency of Fort William.

Synopsis

Appeal from Courts in Provinces Civil Courts	Note No 1 2	Subject to its superintendence	Note No 3

1 Appeal from Courts in Provinces—The constitution of the High Court as a Court of appeal is quite different from its jurisdiction to hear appeals from every decree or order passed by a Subordinate Court. If there is no law or regulation which allows an appeal to the High Court in a particular case it cannot assume appellate jurisdiction in respect of that matter.¹

2 Civil Courts—The term Civil Courts in this clause does not cover a tribunal created under a particular status for a particular purpose. Thus no appeal will lie to the High Court against the decision of a commissioner acting as an election Court under the provisions of the United Provinces Municipalities Act (II of 1916).¹

3 Subject to its superintendence—This clause provides that every Civil Court of a Province is subject to the appellate jurisdiction of the High Court and S 107 of the Government of India Act provides that every Court subject to the appellate jurisdiction of the High Court is subject to its powers of superintendence. Reading these two together, it follows that every civil Court in a province or Presidency is subject to the High Court's right of superintendence.¹

The High Court of Madras has held that a Revenue Division Officer exercising jurisdiction under S 7 of the Madras Hereditary Village Officers' Act (III of 1895) is not a Court subject to the superintendence of the High Court within the meaning of this clause.²

17. And we do further ordain that the said High Court of Judicature at [Madras,] [Bombay], Fort William in Bengal shall have Jurisdiction as to infants and lunatics the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Presidency of Madras, [Bombay] Bengal Division of the Presidency of Fort William as that which is now vested in the said High Court immediately before the publication of these presents.

Synopsis

Jurisdiction as to infants and lunatics Power of High Court to appoint	Note No 1	guardian in the case of minor members of Hindu joint families	Note No 2

1 Jurisdiction as to infants and lunatics—The High Court as the successor and inheritor of the powers of the Old Supreme Court, has no jurisdiction under this clause over natives of India with respect to the persons and estates of infants, idiots and lunatics, who reside outside the ordinary original jurisdiction of the High Court.¹ But in respect of European British subjects the High Court could exercise jurisdiction under this clause even though these parties reside outside of and have no property within the limits of its ordinary original jurisdiction.²

2 Power of High Court to appoint guardian in the case of minor members of Hindu joint families—Although a guardian 1890, for a minor, belonging to an inherent jurisdiction conferred by appointment.¹ It has been held by the High Court of Allahabad that it can exercise¹

CI 16—Note 1

1 (1926) 1926 All 113 (113) 48 All 104

Note 2

1 (1925) 1925 All 380 (382) 47 All 513 (F 1)

Note 3

1 (1928) 1928 Mad 1032 (1044)

2 (1922) 1922 Mad 337 (338 341)

CI 17—Note 1

1 (1932) 1932 Cal 91 (92) 59 Cal 910

(1911) 21 Cal 906 (211)

57 Cal 593

2 (1905) 2 All L J 81 (82) The High Court has the same powers as that of the Calcutta High Court

Note 2

1 (1932) 1932 Cal 502 (503) 59 Cal 570

Criminal Jurisdiction

22 And We do further ordain that the said High Court of Judicature at Calcutta, [Madras] [Bombay] shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction, and also in respect of all such persons, beyond such limits over whom the said High Court of Judicature at Calcutta [Madras] [Bombay] shall have criminal jurisdiction at the date of the publication of these presents

23 And We do further ordain that the said High Court of Judicature at Madras [Bombay], Fort William in Bengal in the exercise of its ordinary original criminal jurisdiction shall be empowered to try all persons brought before it in due course of law

24 And We do further ordain that the said High Court of Judicature at Madras [Bombay], Fort William in Bengal shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of the said Court now subject to the superintendence of the said High Court and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Advocate General or by any Magistrate or other officer specially empowered by the Government in that behalf

Synopsis

	Note No 1		Note No 2
Extraordinary criminal jurisdiction	1	High Court	2
Subject to the superintendence of the		Practice in the Calcutta High Court	3

1 Extraordinary criminal jurisdiction—The High Court can under this Clause remove a criminal case from the mofussil and have it before itself¹. Where a commitment is made to the High Court before trial in a case in which the Sessions Court of a division has local jurisdiction the High Court can on grounds of expediency and convenience direct the trial to proceed in the High Court if and though the commitment is not liable to be quashed for want of jurisdiction².

2 Subject to the superintendence of the High Court—The Court of the Judicial Superintendent of Railways in the Nizam's Dominions is subordinate to the High Court of Bombay in respect of all criminal matters relating to European British subjects¹. The Criminal Courts in Santal Parganas subordinate to the Sessions Court have been declared by Regulation V of 1893 to be not subordinate to the High Court and therefore are not subject to its superintendence².

3 Practice in the Calcutta High Court—An application to exercise the jurisdiction under this Clause must be made according to Ch 37 R 2 of the Crown Side Rules of the Calcutta High Court on the appellate side¹.

25 And We do further ordain that there shall be no appeal to the said High Court of Judicature at [Madras] [Bombay], Fort William in Bengal from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court

No appeal from High Court exercising original jurisdiction—Court may reserve points of law

CI 24—Note 1

1 (1932) 1932 Cal 229 (230)
2 (1920) 1920 Mad 824 (825) 51 Ind C is 468
(470) 49 Mad 791

Note 2

1 (1890) J Bom 268 (235) Per Sugent C J

C P C 394 A 395

Contra Bayley, J

2 (1909) 1928 Pat 211 (212) 7 Pat 337

Note 3

1 (1932) 1932 Cal 394 (395)

Other Topics

Questions relating to Muhammadan mosque— See Note 1 F N. (3).
Whether Muhammadan Law could be applied

1 Law or equity to be applied to each case.—The Letters Patent of 1862 which were revoked by the present Letters Patent of 1865 provided in Cl 18 thereof that the law or equity to be applied to the cases coming before the High Court shall be the law or equity which would have been applied by the Supreme Courts at Calcutta, Bombay and Madras respectively¹. By the Charters constituting the Supreme Courts they were expressly made Courts of equity and given equitable jurisdiction corresponding to that of the Court of Chancery in England. And the High Courts of Calcutta, Bombay and Madras have now succeeded to the jurisdiction conferred upon their predecessors the Supreme Courts and exercise the same equitable jurisdiction². But such jurisdiction cannot be employed to subvert the native substantive laws. It only affords a means of continually ameliorating them and so preventing their desuetude by a system of rules borrowed from the English Courts of equity³.

2 Applicability of English law—According to the Charter Acts 'Justice equity and good conscience are the true guides and therefore the High Court on the original side is not bound to decide questions on the basis of English precedents and English Common Law Procedure where the following of such precedents and procedure may be against justice equity and good conscience'¹.

20 And We do further ordain that, with respect to the law or equity and

In the exercise of extraordinary original civil jurisdiction

rule of good conscience to be applied to each case coming before the said High Court of Judicature at [Madras] [Bombay], Fort William in Bengal in the exercise of its extraordinary original civil jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein

21 And We do further ordain that the said High Court of Judicature at

By the High Court in the exercise of appellate jurisdiction

Fort William in Bengal shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction and also in respect of all such persons both within the limits of the Bengal Division of the Presidency of Fort William, and beyond such limits and not within the limits of the criminal jurisdiction of any other High Court or Court established by competent legislative authority for India as the said High Court of Judicature at Fort William in Bengal shall have criminal jurisdiction over at the date of the publication of these presents

1 Scope—It has been held by the High Court of Madras in the undermentioned cases that the principle of S 119, Transfer of Property Act 1882, is a rule of equity and can be applied to a case not governed by that Act

Cl 19—Note 1

1 (1875) 22 Suth W R 370 (371)
[See also (1909) 3 Ind Cas 990 (990 991) 33 Bom 460]

2 (1927) 1927 Bom 278 (236) 51 Bom 516 (F B) The Court must first acquire jurisdiction under Cls 11 and 12 before applying the Law or equity applicable under Cl 19]

3 (1880 51) 5 Bom 104 (173)

(See 1140 (1921) 1921 Bom 333 (31) Mahomedan Law applied in deciding questions relating to a Mahomedan mosque)

Note 2

1 (1915) 1915 Mad 334 (916) 33 Mad 547 [But see (1882) 5 Mad 37 (40)]

Cl 21—Note 1

1 (1917) 1917 Mad 390 (393) 35 Ind Cas 32 (30)

Criminal Jurisdiction

22 And We do further ordain that the said High Court of Judicature at Calcutta, [Madras] [Bombay] shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction, and also in respect of all such persons beyond such limits over whom the said High Court of Judicature at Calcutta [Madras] [Bombay] shall have criminal jurisdiction at the date of the publication of these presents

23 And We do further ordain that the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal in the exercise of its ordinary original criminal jurisdiction shall be empowered to try all persons brought before it in due course of law

24 And We do further ordain that the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of the said Court now subject to the superintendence of the said High Court and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Advocate General or by any Magistrate or other officer specially empowered by the Government in that behalf

Synopsis

	Note No 1		Note No 2
Extraordinary criminal jurisdiction	1	High Court	2
Subject to the superintendence of the		Practice in the Calcutta High Court	3

1 Extraordinary criminal jurisdiction—The High Court can under this Clause remove a criminal case from the mofussil and have it before itself¹ Where a commitment is made to the High Court by a Magistrate in a case in which the Sessions Court of a division has local jurisdiction the High Court can on grounds of expediency and convenience direct the trial to proceed in the High Court itself and the commitment is not liable to be quashed for want of jurisdiction²

2 Subject to the superintendence of the High Court—The Court of the Judicial Superintendent of Railways in the Nizam's Dominions is subordinate to the High Court of Bombay in respect of all criminal matters relating to European British subjects³ The Criminal Courts in Santal Parganas subordinate to the Sessions Court have been declared by Regulation V of 1893 to be not subordinate to the High Court and therefore are not subject to its superintendence⁴

3 Practice in the Calcutta High Court—An application to exercise the jurisdiction under this Clause must be made according to Ch 37 R 2 of the Crown Side Rules of the Calcutta High Court on the appellate side⁵

25 And We do further ordain that there shall be no appeal to the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court

No appeal from High Court exercising original jurisdiction—Court may reserve points of law

Cl 24 Note 1

1 (1932) 1932 Cal 229 (230)

2 (1920) 1920 Mad 824 (825) 51 Ind C 164 (170) 42 Mad 791

Note 2

1 (1893) J Bor 1 288 (290) Per Sugent C J

C P C 394 A 395

Contra Bayley J

2 (1928) 1928 Pat 211 (212) 7 Pat 337

Note 3

1 (1932) 1932 C 1394 (30)

But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court

26 And We do further ordian that, on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate General that in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or

High Court to review on certificate of the Advocate General

points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case or such part of it as may be necessary and finally determine such point or points of law and thereupon to alter the sentence passed by the Court of original jurisdiction and to pass such judgment and sentence as to the said High Court shall seem right

Synopsis

	Note No		Note No
Scope of Clauses 25 and 26	1	Power of Court on review	4
The certificate of the Advocate General	2	Decision under the Criminal Law	5
Procedure at the hearing	3	Amendment Act	5

1 Scope of Clauses 25 and 26—The High Court may review a decision of the High Court in its original criminal jurisdiction in the two following cases —

(1) Where the trial Court reserves any point or points of law for the opinion of the High Court (Cl 25)

(2) Where the Advocate General certifies that in his judgment there is an error in the decision of a point or points of law decided by the trial Court or that a point or points of law so decided should be further considered (Cl 26)

The point or points of law on which the Advocate General certifies an error in the decision thereof is not confined to the point reserved by the trial Court under Cl 25 ante¹

2 The certificate of the Advocate General—The certificate is presumably granted in the interests of justice after a careful consideration of all available materials. It should not be a mere surmise but should reflect the judgment of the Advocate General¹. But whether the certificate is granted after careful consideration of the materials or not when once it is granted the High Court is bound to deal with the case².

3 Procedure at the hearing—At the hearing of the case on review the counsel for the accused should begin and have a right of reply¹. When a Court is called upon to review a case under this Clause it will accept as unquestionable the statement of the trial Judge as to what actually took place before him².

4 Power of Court on review—The High Court is empowered after deciding the point reserved or certified to pass such judgment or sentence as it may think right. In other words it can upon reviewing the whole case either quash or confirm the conviction¹. But this can however be done only when the High Court decides that there has been an error of law, if there has been no such error there is no power to deal with the case further². Otherwise an accused person who could obtain a certificate under this clause could in effect obtain an appeal on the

Cl. 25 & 26—Note 1

- 1 (1930) 1930 Mad W N 249 (249) See the words a point as contrasted with the words Such point

Note 2

- 1 (1915) 1915 Cal 773 (776) (F B)
(1924) 1924 Cal 207 (261) (F B) The Advocate General must hear not only counsel for prisoner but also counsel for the Crown
2 (1915) 1915 Cal 773 (776)
[see (1899) 4 Cal W N 433 (439) It is not compulsory on Court to deal

with a certificate in which the Advocate General thinks that the trial Judge has not properly exercised his discretion in not granting an adjournment

Note 3

- 1 (1920) 1920 Cal 500 (504) 59 Ind Cal 97 (933) 47 Cal 671 (F B)

- 2 (1915) 1915 Cal 773 (782)
(1924) 1924 Cal 257 (306)

Note 4

- 1 (1876) 1 Cal 207 (218)
(1935) 1935 Mad 733 (791) (S B)

severity of his sentence, while an accused who could not obtain such a certificate, would not have the same privilege

The High Court has no power under this clause to remit the case for a fresh trial³ or to reopen any question decided by the trial Judge other than the one reserved or certified⁴

5 Decision under the Criminal Law Amendment Act—The judgment of a special Criminal Bench constituted under S 6 of the Indian Criminal Law Amendment Act of 1908 is open to review under this Clause on a certificate granted by the Advocate General¹

27. And We do further ordain that the said High Court of Judicature at

Appeal from Criminal Courts in the Provinces. [Madras, [Bombay], Fort William in Bengal shall be a Court of appeal from the Criminal Courts of the Presidency of [Madras] [Bombay], Bengal division of the Presidency of Fort William and from all other Courts, subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force

Subject to its superintendence See Note 1 Pt (2)

1 Criminal appellate jurisdiction—The High Court has been declared under this clause to be a general Court of criminal appeal the actual exercise of the appellate jurisdiction being defined by the concluding portion of this clause¹

It has been held in the undermentioned case² that the general power of superintendence conferred by S 10 of the Government of India Act is different from the superintendence spoken of in this clause

28 And we do further ordain that the said High Court of Judicature at

Hearing of referred cases and revision of criminal trials

[Madras, [Bombay] Fort William in Bengal shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction and shall have power to hear and determine all such cases referred to it by the

Sessions Judges or by any other Officers now authorized to refer cases to the said High Court, and to revise all such cases tried by any officer or Court possessing criminal jurisdiction as are now subject to reference or to revision by the said High Court

1 Criminal revisional jurisdiction—The High Court has a general power of superintendence under this clause over the Criminal Courts subject to its appellate jurisdiction. It can revise the decisions of such Courts. It is also a Court of reference empowered to determine references made by the Sessions Judges or by any such officer as is referred to in this clause. The High Court of Bombay has thus power to quash proceedings before a village *Dast* under its powers of superintendence¹. It cannot under this Clause revise an order of the Secretary to the Bengal Government issuing a warrant under the *Goondas Act* (I of 1923) inasmuch as such person was not an officer possessing criminal jurisdiction at the time of the issue of the Letters Patent

(1920) 1920 Cal 500 (502 503 510)

(1919) 1919 Cal 142 (144)

(1917) 1917 Cal 123 (126 129 131)

(1890) 17 Cal 642 (667 668)

(1889) 16 Cal 238 (244 245)

(1923) 76 Ind Cas 966 (967) (Cal)

(1908) 32 Bom 111 (120) High Court has power to review the whole case and not only quash the wrongly admitted evidence

(1877 78) 2 Bom 61 (65)

(1930) 1930 Mad WN 249 (280) Misdirection to jury may amount to a point of law and may be reviewed provided the accused was really prejudiced thereby

2 (1924) 1924 Cal 257 (285 315)

(1934) 1934 All 273 (275 276) 56 All 428 (1915) 1915 Cal 773 (779 781 783)

3 (1920) 1920 Cal 500 (502 509 510)

4 (1908) 32 Bom 111 (132 145) *Per Dair and Beaman JJ*

(1912) 14 Ind Cas 896 (901 902) (Mad).

Note 5

1 (1912) 14 Ind Cas 896 (898 908 923, 940) (Mad)

CI 27—Note 1

1 (1921) 1921 Cal 703 (715) 48 Cal 935

2 (1918) 1918 Pat 103 (107) 3 Pat L Jour 581.

CI 28—Note 1

1 (1919) 1919 Bom 79 (80)

2 (1924) 1924 Cal 693 (700) 51 Cal 460

The High Court hearing a reference under S 307 of the Criminal Procedure Code hears it as a Court of reference in the exercise of the jurisdiction vested in it under this clause and not in its original criminal jurisdiction³

As to whether the High Court can revise an order of discharge passed by a District Magistrate see the undermentioned cases⁴

29 And We do further ordain that the said High Court shall have power

High Court may direct the transfer of a case from one Court to another

to direct the transfer of any criminal case on appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it though such case belongs in ordinary course to the jurisdiction of some other officer or Court

Synopsis

Transfer of criminal case	Note No 1	Practice of the Calcutta High Court	Note No 2
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Other Topics

Equal or inferior jurisdiction	See Note 1	Power of High Court to stay proceedings	See Note 1 Pt (4)
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1 Transfer of Criminal Case—Under this clause the High Court is empowered to direct the transfer of any criminal case to any other Court of equal or superior jurisdiction¹. The words from any Court must be read as from any Court subordinate to the High Court's authority. Thus the Allahabad High Court has no jurisdiction to transfer a case from a panchayat constituted under the provisions of the United Provinces Act VI of 1920²

The word Criminal Case in this clause will include proceedings under S 145 of the Criminal Procedure Code³

The power of superintendence conferred by this Clause includes by implication the power to send for the record of any case pending in the lower Courts this must necessarily have the effect of staying further proceedings in the case in that Court. The High Court has power therefore to stay criminal proceedings instituted on a sanction by a Civil Court under S 476 of the Criminal Procedure Code till the disposal of the appeal from the Civil Court⁴

See also the undermentioned case⁵

2 Practice of the Calcutta High Court—An application to exercise the jurisdiction conferred by this clause must be made according to Ch 37 R 2 of the Crown Side Rules on the appellate side of the Calcutta High Court¹

	The has a jail	<i>Stuart J's</i> prevailing judgment <i>Kankyalal J</i> contra
		3 (1901) 28 Cal 709 (720) Per <i>Taylor J</i>
		4 (1908) 31 Mad 510 (511)
4 (1900) 27 Cal 126 (130) Cl 28 does not apply but only S 15 of the High Courts Act		5 (1928) 1928 Pat 241 (242) 7 Pat 337 Appeal for transfer from one Criminal Court to another in Santal Parganas—High Court has no jurisdiction as it has no powers of superintendence over intermediate Criminal Courts in Santal Parganas
(1893) 26 Cal 746 (748) Clause 28 applies		

Cl 29—Note 1

1 Single Judge of the High Court has power to make this transfer

- (1905) 29 Bom 575 (579)
- (1871) 15 Suth W R Cr 69 (70)
- (1912) 14 Mad 121 (125)
- (1883) 6 Mad 32 (36)
- (1911) 11 Ind Cas 70 (76) 30 Mad 739
- 2 (1924) 1924 All 260 (266) 46 All 167 Per

Note 2.

- 1 (1932) 1932 Cal 394 (395)
- [See (1932) 1932 Cal 123 (123) Appeal upon a complaint for taking proceedings against a person not in India does not lie under this Clause]

Criminal Law

30 And We do further ordain that all persons brought for trial before the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of appeal, reference or revision, charged with any offence for which provision is made by Act No XLV of 1860 called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents shall be liable to punishment under the said Act or Acts, and not otherwise

1 Offenders to be punished under the Indian Penal Code—The offenders brought for trial before the High Court should be punished only under the provisions of the Indian Penal Code the High Court cannot engraft thereon the rules of the Common Law of England¹

Exercise of jurisdiction elsewhere than at the ordinary place of sitting of the High Court

31 And We do further ordain that whenever it shall appear to the Governor in Council convenient that the jurisdiction and power by these Our Letters Patent or by the recited Act, vested in the said High Court of Judicature at [Madras], [Bombay] Fort William in Bengal should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of the said High Court other than the usual place of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court at such place or places shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India

Admiralty and Vice Admiralty Jurisdiction

32 And We do further ordain that the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice Admiralty and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India as may now be exercised by the said High Court

Synopsis

Civil and maritime jurisdiction	Art No	1	Necessaries supplied to a ship	Note No	2

1 Civil and maritime jurisdiction—The effect of this Clause is to vest the High Courts with such civil and maritime jurisdiction as might have been exercised by the Supreme Courts under their respective charters.¹

2 Necessaries supplied to a ship—Before the passing of the statute 3 & 4 Vict Ch, 65, it was held in England that the Court of Admiralty in England had no jurisdiction in the case of necessaries supplied to a ship though perhaps it occasionally purported to exercise the jurisdiction where not prohibited.¹ The same view was also held in India.²

Cl 30—Note 1

1 (1921) 1921 Cal 1 (6) 48 Cal 388 (S 1)

Cl 32—Note 1

(1915) 1915 Cal 691 (693) 42 Cal 50

Note 2

1 (1872) 4 P C 161 The two Ellens Johnson v Black—*Out of* in 1910 Cal 631(633) (1896) 11 & C 270
2 (1843) 1 Fulton

It was also held subsequently in the undermentioned cases ³ that the powers conferred by the above statute as extended by 24 Vict c 10 (the Admiralty Courts Act of 1861) did not become vested in the High Courts by virtue of their several Letters Patent. But at present the jurisdiction of the High Court in relation to necessities supplied to a ship rests on the Colonial Courts of Admiralty Act 1890 53 & 54 Vict c 27 which vests in it *inter alia* the powers described in S 5 of 24 Vict c 10. And under S 5 of the latter statute the High Court in its Admiralty side has jurisdiction over any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs ⁴.

33 And We do further ordain that the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal shall have

Criminal

and exercise all such criminal jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice Admiralty or otherwise in connection with maritime matters or matters of prize

Testamentary and Intestate Jurisdiction

34 And We do further ordain that the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal shall have

Testamentary and intestate jurisdiction

the like power and authority as that which may now be lawfully exercised by the said High Court in relation to the granting of probates of last wills and testaments and letters of administration of the goods chattels credits and all other effects whatsoever of persons dying intestate within or without the Presidency of [Madras] [Bombay] Bengal Division of the Presidency of Fort William. Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India by which power is given to any other Court to grant such probates and letters of administration

Synopsis

Letters Patent Bombay and Madras	Note No 1	Testamentary and intestate jurisdiction	Note No 2
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Other Topics

Jurisdiction of High Court to grant Probate or Letters of Administration See Note ¹ Pt (1)

1 Letters Patent Bombay and Madras—For Bombay and Madras after the words exercised by the said High Court read as follows—

In relation to the granting of Probates of last wills and testaments and letters of administration of the goods chattels credits and all other effects of persons dying intestate whether within or without the Presidency of Bombay (Madras)

2 Testamentary and intestate jurisdiction—The High Court of Madras has held that it has no jurisdiction to grant probate of the will of a testator or letters of administration to the estate of an intestate who did not dwell and who did not leave assets within the limits of the Madras Presidency ¹

The High Court acting under S 302 of the Indian Succession Act XXXI of 19 Act 19 in pursuance of the jurisdiction vested in it under this Clause and not in its ordinary Original Civil jurisdiction ²

—Referred in 42 Cal 55

CI 34—Note 2

1 (1901) 24 Mad 120 (121)

2 (1930) 1930 Cal 258 (261) 56 Cal 303

Matrimonial Jurisdiction

35 And We do further ordain that the said High Court of Judicature at [Madras] [Bombay,] Fort William in Bengal shall have jurisdiction, within the Presidency of [Madras] [Bombay,] Bengal Division of the Presidency of Fort William in matters matrimonial between Our subjects professing the Christian religion. Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter within the said Presidency lawfully possessed thereof

Synopsis

	Note No		Note No
Between our subjects professing the Christian religion	1	Respondent not within the Presidency	3
Both parties other than Christians	2	Matters matrimonial	4

1 Between our subjects professing the Christian religion—This Clause was intended to replace in a wider and modern form the ecclesiastical jurisdiction of the Supreme Court and its scope was confined to proceedings in which both the parties were Christians. See also Paragraph 33 of the Despatch from the Secretary of State dated 14th May 1863 and among the first Letters Patent of the Calcutta High Court^{1a}. But the limitation has now been removed by the enactment of the Indian Divorce Act IV of 1869 which does not require that both parties should profess the Christian religion. The High Court has therefore jurisdiction to entertain a suit for restitution of conjugal rights instituted by a Christian woman against her husband who is a Parsee².

2 Both parties other than Christians—It was held by the Privy Council in the undermentioned case¹ that the Supreme Court of Bombay had no jurisdiction to entertain a suit on its ecclesiastical side by a Parsee wife against a Parsee husband for the restitution of conjugal rights. Their Lordships of the Privy Council also observed as follows —

But we should much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life against them. Clause 12 *ante* was intended to remove this difficulty and by virtue of that Clause the High Court has jurisdiction to entertain a suit arising out of matrimonial disputes between persons other than Christians for instance between Jews.²

3 Respondent not within the Presidency—The High Court has no jurisdiction to grant relief in case of restitution of conjugal rights against a respondent who is absent from the Presidency at the time the suit is instituted and remains absent subsequently also¹.

4 Matters matrimonial—The jurisdiction of the High Court in matters matrimonial is only such jurisdiction as is comprised within the provisions of the Indian Divorce Act IV of 1869 therefore a suit for a declaration that a marriage was a valid and lawful marriage does not lie¹. Similarly a suit does not lie under this Clause to declare a marriage null and void on the ground that the essential ceremonies have not been performed².

CI 35—Note 1

- 1 (1926) 1326 Bom 163 (173) 50 Bom 369
- 1a Appendix III
- 2 (1930) 1930 Bom 885 (889 890 891) 54 Bom 877 (F B) Overruling 20 Ind C 15492

Note 2

- 1 (1886) 6 Moo Ind App 348 (350) (P C)
- 2 (1926) 1926 Bom 163 (173 174) 50 Bom 369
- [See also (1930) 1930 Cal 558 (568 569) 57 Cal 1089 Suit for judicial

separation — Parties professing Jewish religion—Wife praying for order against her husband to pay her costs—Clause 35 does not apply but Clause 12 applies and case is governed by S 35 C P Code]

Note 3

- 1 (1914) 1914 Bom 211 (213) 38 Bom 125

Note 4

- 1 (1923) 1923 Pat 301 (302)
- 2 (1934) 1934 All 273 (275 276) 56 All 423

Powers of Single Judges and Division Courts

36 And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at [Madras] [Bombay,] Fort William in Bengal in the exercise of its original or appellate jurisdiction may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose, in pursuance of section 108 of the Government of India Act, 1915 and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point such point shall be decided according to the opinion of the majority of the Judges if there shall be a majority, but if the Judges should be equally divided they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it

Synopsis

	Note No		Note No
Amendment of the Clause	1	When the Judges are equally divided	3
May be performed by any Judge or by		Reference	4
any Division Bench thereof	2		

1 Amendment of the Clause—

- (1) The words in pursuance of S 108 of the Government of India Act 1915 were substituted for the words under the provisions of the 13th section of the aforesaid Act of the Twenty fourth and Twenty fifth years of our reign by the amended Letters Patent of 11th March 1919
- (2) By the amendment of the Letters Patent in 1928 the words following the words equally divided till the end of the clause were substituted for the words the opinion of the Senior Judge shall prevail As to the effect of this amendment see Note 12 to S 98 Civil Procedure Code

2 May be performed by any Judge or by any Division Bench thereof—Where the Court takes action in contempt proceedings the rule need not be issued by the Court as an entire body A single Judge or Division Bench has jurisdiction to issue the rule¹

The fact that a matter coming before second appellate Court constituted by a single Judge in High Court is one of difficulty does not necessitate its being referred to a Bench of two Judges²

3 When the Judges are equally divided—The amendment of this clause made in 1928 mentioned in Note 1 *ante* applies to all cases pending on the date of such amendment¹

As to the effect of S 98 C P Code upon this clause and the procedure in such cases see Note 12 to that section and also the undermentioned cases.³

CI 36—Note 2

1 (1929) 1929 Pat 72 (73) 8 Pat 323 (F B)

2 (1931) 1931 All 207 (207)

Note 3

and point of difference should be stated by Division Bench

this case cannot be accepted as correct in view of the reasoning in 1921 P C 6

See also the following cases decided before the amendment of S 98 and of this Clause—

(1112) 16 Ind Cas 222 (J.C.) (Cal) This Clause applies to appeals under the Code also

Before the amendment of 1928 it was held in the following cases that the opinion of the Senior Judge prevailed on a difference of opinion between the Judges of the Division Bench.³

4 Reference—In order that a reference may be made under this clause it is not necessary that there must be a difference on a particular point. It may be made even when there is a difference as to the result of the appeal heard by the High Court.¹

A single Judge of the High Court is competent to hear a reference under this clause.²

Where a reference is made only the points of difference and not the whole case should be referred to.³

Civil Procedure

37 And We do further ordain that it shall be lawful for the said High Court of Judicature at [Madras] [Bombay,] Fort William in Bengal from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice Admiralty, testamentary, intestate and matrimonial jurisdiction respectively. Provided always that the said High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure, being an Act passed by the Governor General in Council and being Act No VIII of 1859 and the provisions of any law which has been made amending or altering the same by competent legislative authority for India.

Power to delegate. See Note 1 Pt (2)

1 Rules and Orders—This Clause gives the High Court the power to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court.¹ But it does not authorise the High Court to frame a rule delegating a judicial function to one of its officers. Thus R 515 A of the Rules and Orders of the Calcutta High Court delegating to the registrar the function of granting leave under Cl 12 ante is *ultra vires*.²

Where a Rule of the Civil Procedure Code is inconsistent with the Rules of the High Court made in pursuance of the power conferred by this Clause the latter must prevail.³

See also the undermentioned case.⁴

- (1925) 192 Rang 150 (164) 2 Rang 587 (F B) (Do)
- (1919) 1919 Mad 626 (628) 41 Mad 313 Appeals under S 54 of the Land Acquisition Act—Governed by S 98
- (1879) 8 Bom 204 (205) Appeals under Code S 98 applies
- (1853) 11 All 176 (182) A case not coming under S 98—Cl 27 of the Allahabad Letters Patent applies
- (1921) 1921 Lah 1 (3) 2 Lah 133 (F B) Senior Judge not pressing his view but submitting case to Chief Justice for reference to Full Bench. Cl 26 does not apply
- 3 (1924) 1924 Cal 668 (686) 51 Cal 180 Reference under Income tax Act
- (1925) 1925 Mad 281 (285 286) Revision under S 20 of Provincial Small Cause Courts Act
- Rule under S 115 C P Code to set aside sanction granted under S 193 Cr P Code
- (1912) 14 In 1 Cas 755 (757) (Cal)
- (1915) 1915 Mal 1193 (1136)
- (1912) 14 Ind Cas 305 (314) 39 Mad 70 (F B)
- (1920) 1920 Cal 417 (419) 47 Cal 438 Revision against an order under S 145 Cr P Code

[See (1891) 10 Bom 452 (475) Reference to High Court by Sessions Judge under S 807 Cr P Code Held S 421 Cr P Code overrides Cl 96]

Note 4

- 1 (1939) 1939 Pat 67 (68) 11 Pat 772
- 2 (1933) 1933 Pat 67 (63) 11 Pat 772
- 3 (1933) 1933 All 561 (874 875)

Cl 37—Note 1

- 1 (1916) 1916 Mad 479 (474) Rule 100 of Appellate Side Rules of Madras High Court directing dismissal of appeal for non payment of printing charges is not *ultra vires*
- (1917) 1917 Mad 49 (53) Rule 283 of the Original Side Rules of the Madras High Court giving right of audience on the original side to vakils and withholding it from attorneys is not *ultra vires*—Following 1 Mad 24
- 2 (1907) 31 Cal 615 (623)
- 4 (1932) 1932 Cal 1 (2) 50 Cal 370 Order 3 R 4 sub R (5) is inconsistent with Rules made by the Calcutta High Court
- 4 (1912 2 63) 1 Mad H C R 115 (120) This clause does not render S 187 of Act VIII of 1859 a repeal of S 101 of Act IX of 1850

Criminal Procedure

38 And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal in the exercise of its ordinary original criminal jurisdiction and also in all other criminal cases over which the said High Court had jurisdiction immediately before the publication of these presents shall be regulated by the procedure and practice which was in use in the said High Court immediately before such publication subject to any law which has been or may be made in relation thereto by competent legislative authority for India and that proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor General in Council and being Act No XXV of 1861 or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid

Appeals to Privy Council

39 And We do further ordain that any person or persons may appeal to Us Our heirs and successors in Our or Their Privy Council in any matter not being of criminal jurisdiction from any final judgment decree or order of the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal made on appeal and from any final judgment decree or order made in exercise of original jurisdiction by Judges of the said High Court or of any Division Court from which an appeal shall not lie to the said High Court under the provisions contained in the 15th Clause of these presents Provided in either case that the sum or matter at issue is of the amount or value of not less than Rs 10 000 or that such judgment decree or order shall involve directly or indirectly some claim demand or question to or respecting property amounting to or of the value of not less than Rs 10 000 or from any other final judgment decree or order made either on appeal or otherwise as aforesaid when the said High Court shall declare that the case is a fit one for appeal to Us Our heirs or successors in Our or Their Privy Council subject always to such Rules and Orders as are now in force or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the said Presidency except so far as the said existing Rules and Orders respectively are hereby varied and subject also to such further Rules and Orders as We may with the advice of Our Privy Council hereafter make in that behalf

Synopsis

	Note No		Note No
Scope of the Clause	1	ment of decree	See S 109 Note 5
In any matter not being of criminal jurisdiction	2	1t (8)	8
Judgment decree or order made on appeal	3	Orders in insolvency	9
Appellate order made in land acquisition cases — See S 109 Note 2 Pts (11) and (11)	4	Decrees on appeal made by High Court under Special Acts	10
Decree passed by High Court in pursuance of directions by Privy Council	5	Judgment decree or order made in the exercise of original jurisdiction	11
Orders passed on review — See S 109 Note 5 1t (4)	6	Decision under the Income tax Act	12
Orders passed in revision — See S 109 Note 5 1ts (16) and (1) and also S 111 Note 3 1t (1)	7	Order made in the exercise of disciplinary jurisdiction under Cl 10 ante	13
Order rejecting application for amend		Order refusing to quash proceedings by writ of certiorari	14
		Judgment decree or order must be final	15
		Appeal from order granting certificate	16

Other Topics

Order under Specimen Relief Act whether appealable See Note 12 F N (2)

1 Scope of the Clause—The right of appeal to the Privy Council rests upon this clause and is elaborated in §§ 109 to 112 of the Civil Procedure Code¹. This Clause deals with two categories of cases—(a) judgments, decrees or orders made *on appeal* and (b) judgments, decrees or orders made in the exercise of *original jurisdiction* whether by individual Judges or by Division Courts².

There was a conflict of opinion as to whether a party desirous of appealing against a judgment was bound to appeal under Clause 15 *ante* before appealing to Privy Council where the Judges hearing an appeal were equally divided in opinion³. In view of the amendment of Clause 30 of the Letters Patent made in 1928 this difficulty cannot now occur.

2 In any matter not being of Criminal Jurisdiction—The words 'in any matter not being of Criminal Jurisdiction' govern both the classes of judgments, decrees or orders which are mentioned in this Clause¹. Thus the High Court has no jurisdiction to grant leave to appeal to Privy Council against a judgment of High Court sitting in Criminal appeal from the judgment of a Court of Session². Such leave cannot be granted even by virtue of the words 'when the said High Court shall declare that the case is a fit one for appeal'.

3 Judgment decree or order made on appeal—Where a decree is passed by the High Court on appeal from another tribunal in order that the decree of the High Court may be appealable to the Privy Council the said tribunal must be a Court subject to the superintendence of the High Court within the meaning of Clause 16 *ante*¹.

See Notes 4 to 9 *infra*.

4 Appealable order made in land acquisition cases—See S 109 Note 2 points (11) and (11a).

5 Decree passed by High Court in pursuance of directions by Privy Council—See S 109 Note 3 point (3) and also the undermentioned case¹.

6 Orders passed on review—See S 109 Note 5 point 4.

7 Orders passed in revision—See S 109 Note 5 points (16) and (17) and also S 111 Note 3 point (1).

8 Order rejecting application for amendment of decree—See S 109 Note 5 point (5).

9 Order in insolvency—An appeal will lie to the Privy Council against an order of the High Court under S 8 of the Presidency Towns Insolvency Act made on appeal or against an appellate order of the High Court dismissing an Insolvency petition under the Provincial Insolvency Act V of 1920².

10 Decrees on appeal made by High Court under special Acts—See S 109 Note 2 points (9) and (10) and also the unmentioned case¹.

11 Judgment decree or order made in the exercise of original jurisdiction—The words 'original jurisdiction' are only used in contra distinction to the words 'made on appeal' occurring earlier in the Clause¹. See also Notes 12 to 14 *infra*.

CL 15 N 1

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Council directing accounts to be taken—Division Bench made a final decree—Appeal lies to Privy Council under Cl 39.

Cl 15

(1871) 16 Suth W R 191 (192) Decree on appeal—Appeal to Privy Council lies whether appeal under Cl 15 lies or not.

Note 2

1 (1931) 1931 Cal 526 (527) 58 Cal 344
2 (1931) 1931 Cal 526 (527) 58 Cal 344

Note 3

1 (1931) 1931 P C 149 (153) 59 Cal 55 58 Ind App 259 (P C)

Note 5

1 (1905) 32 Cal 963 (967) Remanded by Privy

Note 9

1 (1925) 1925 Mad 243 (244)
2 (1913) 19 Ind Cas 435 (436) 40 Cal 635

Note 10

1 (1931) 1931 P C 149 (153) 58 Ind App 259 59 Cal 55 (P C) Award of tribunal under Calcutta Improvement Act (Bengal Act V of 1911)—Provision for finality in S 71 excludes further appeal from High Court.

Note 11

1 (1923) 1923 P C 145 (160) 50 Ind App 212 47 Bom 7

Criminal Procedure

38 And We do further ordain that the proceedings in all criminal cases

Regulation of proceed-
ings

which shall be brought before the said High Court of Judicature at [Madras], [Bombay], Fort William in Bengal in the exercise of its ordinary original criminal

jurisdiction, and also in all other criminal cases over which the said High Court had jurisdiction immediately before the publication of these presents, shall be regulated by the procedure and practice which was in use in the said High Court immediately before such publication subject to any law which has been or may be made in relation thereto by competent legislative authority for India, and that proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor General in Council and being Act No XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid

Appeals to Privy Council

39 And We do further ordain that any person or persons may appeal to

Power to appeal

Us Our heirs and successors, in Our or Their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment decree or order of the said High

Court of Judicature at [Madras], [Bombay], Fort William in Bengal made on appeal, and from any final judgment decree or order made in exercise of original jurisdiction by Judges of the said High Court or of any Division Court from which an appeal shall not lie to the said High Court under the provisions contained in the 15th Clause of these presents. Provided, in either case, that the sum or matter at issue is of the amount or value of not less than Rs 10,000 or that such judgment, decree or order shall involve directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than Rs 10,000, or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors, in Our or Their Privy Council, subject always to such Rules and Orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the said Presidency, except so far as the said existing Rules and Orders respectively are hereby varied, and subject also to such further Rules and Orders as We may, with the advice of Our Privy Council, hereafter make in that behalf

Synopsis

	Note No		Note No
Scope of the Clause	1	ment of decree See S 109 Pt (8)	8
In any matter not being of criminal jurisdiction	2	Orders in insolvency	9
Judgment decree or order made on appeal	3	" " " " " "	10
Appellate order made in land acquisition cases — See S 109 Note 2, Pts (11) and (11 a)	4	" " " " " "	11
Decree passed by High Court in pursuance of directions by Privy Council	5	Order made in the exercise of disciplinary jurisdiction under Cl ante	12
Orders passed on review — See S 109, Note 5 Pt (4)	6	Order refusing to quash proceedings by writ of certiorari	13
Orders passed in revision — See S 109, Note 5 Pts (16) and (17) and also S 111 Note 3 Pt (1)	7	Judgment decree or order must be final	14
Order rejecting application for amend		Appeal from order granting certificate	15

Other Topics

Order under Specific Relief Act whether appealable See Note 12 F N (3)

1 Scope of the Clause—The right of appeal to the Privy Council rests upon the clause and is elaborated in Sec 109 to 112 of the Civil Procedure Code¹. This Clause deals with two categories of cases (a) judgments, decrees or orders made *on appeal* and (b) judgments, decrees or orders made in the exercise of *original jurisdiction* whether by individual Judges or Division Courts².

There was a conflict of opinion as to whether a party desirous of appealing against a judgment was bound to appeal under Clause 15 *ante* before appealing to Privy Council when the Judges hearing an appeal were equally divided in opinion³. In view of the amendment Clause 36 of the Letters Patent made in 1928 this difficulty cannot now occur.

2 In any matter not being of Criminal Jurisdiction—The words "in any matter"

when the said High Court shall declare that the case is a fit one for appeal

3 Judgment, decree or order made on appeal—Where a decree is passed by the High Court on appeal from another tribunal in order that the decree of the High Court may be appealable to the Privy Council the said tribunal must be a Court subject to the superintendence of the High Court within the meaning of Clause 16 *ante*¹.

See Note 4 to 9 *infra*

4 Appealable order made in land acquisition cases—See S 109 Note 2 point (11) and (11a)

5 Decree passed by High Court in pursuance of directions by Privy Council—See S 109 Note 5 point (9) and also the undermentioned case¹

6 Orders passed on review—See S 109 Note 5 point 4

7 Orders passed in revision—See S 109 Note 5 points (16) and (17) and also S 110 Note 3 point (1)

8 Order rejecting application for amendment of decree—See S 109 Note 5 point (5)

9 Order in insolvency—An appeal will lie to the Privy Council against an order of the High Court under S 8 of the Presidency Towns Insolvency Act made on appeal¹ or against an appellate order of the High Court dismissing an Insolvency petition under the Provincial Insolvency Act V of 1920².

10 Decrees on appeal made by High Court under special Acts—See S 109 Note 5 points (9) and (10) and also the undermentioned case¹

11 Judgment, decree or order made in the exercise of original jurisdiction—The words "original jurisdiction" are only used in contradistinction to the words "made on appeal" occurring earlier in this Clause¹. See also Notes 12 to 14 *infra*.

CIVIL APPEALS

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Cl 15
(181) 19 South W R 191 (192) Decree on appeal—Appeal to Privy Council lies whether appeal under Cl 15 lies or not

Note 2

1 (1931) 1931 Cal 526 (527) 58 Cal 344
2 (1931) 1931 Cal 526 (527) 58 Cal 344

Note 3

1 (1931) 1931 P C 149 (153) 59 Cal 50 58 Ind App 229 (P C)

Note 5

1 (1905) 32 Cal 963 (965) Remanded by Privy

Council. *Amending decrees* taken—Division Bench made a decree—Appeal lies to Privy Council under Cl 33

Note 9

1 (1925) 1925 Mad 743 (244)
2 (1913) 19 Ind Cas 435 (436) 40 Cal 600

Note 10

1 (1931) 1931 P C 149 (153) 58 Ind App 2 59 Cal 50 (P C) Award of tribute under Calcutta Improvement (Bengal) Act (V of 1911)—Provision for finally in S 71 excludes final appeal from High Court

Note 11

1 (1923) 1923 P C 148 (150) 50 Ind App 2 41 Bom 724

12 Decision under the Income tax Act—It was held by the Privy Council in the undermentioned case¹ that a judgment of the High Court passed on a reference under S 51 of the Income tax Act of 1918 was only advisory and therefore, not appealable to the Privy Council. But it is now provided by S 66 A of the Act amended by the Act XXIV of 1926 that an appeal to the Privy Council will lie in such a case.

Section 66 A of the Income tax Act does not, however, provide for an appeal from an order of the High Court under S 66 Sub S (3) refusing to require the Commissioner to state a case. The High Court of Lahore has held that such an order is final judgment passed in the exercise of original jurisdiction and is therefore appealable.² But the High Court of Rangoon has held that it has no jurisdiction to grant leave to appeal in such a case.³

13 Order made in the exercise of disciplinary jurisdiction under Clause 10 *ante*—See S 109 Note 2 points (5) and (6) and also the undermentioned cases¹.

14 Order refusing to quash proceedings by writ of certiorari—No appeal lies to the Privy Council under this clause against an order of a Division Bench of the High Court refusing to quash by writ of certiorari the proceedings of Deputy Collector who, as an Income tax officer directed the prosecution of a person under S 133 Indian Penal Code.¹ The reason is that the order is neither one passed on appeal nor one passed in the exercise of original jurisdiction.

15 Judgment decree or order must be final—See Note 4 to S 109 and the undermentioned cases¹.

1. of a Judge of a High Court to the Privy Council is not before not appealable under that Clause¹.

40 And We do further ordain that it shall be lawful for the said High Court of Judicature at [Madras] [Bombay], Fort William Appeal from final judgment in Bengal at its direction, on the motion, or if the said High Court be not sitting then for any Judge of the said High Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree order or sentence of the said High Court in any such proceeding as aforesaid, not being of criminal jurisdiction to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or Their Privy Council, subject to the same rules, regulations and limitation as are herein expressed respecting appeals from final judgments, decrees orders and sentences.

Order refusing the appointment of a receiver in a suit. See Note 1, Pt (6)

1 Appeal from interlocutory judgment—There is no appeal to the Privy Council as of right in interlocutory matters and but for the provisions of this Clause an appeal in such

Note 12

1 (1923) 1923 P C 148 (133) O Ind App 212
47 Bom 724 (P C) Overruling 1921
Bom 125

2 (1911) 1931 Lah 175 (134) 12 Lah 106
(P B)

[See also (1921) 1921 P C 378 (318
319) Appeal lies from order of High
Court refusing to direct the Chief
Revenue Authority, under S 45 of
the Specific Relief Act to state a case
under S 51 of the Income tax Act
(1918)]

3 (1930) 1930 Rang 274 (277) 5 Rang 435

Note 13

1 (1902) 32 Bom 106 (107) No appeal lies—
The applicant may, however apply
to His Majesty the King for leave to
appeal.

(1914) 1914 Cal 77 (19) 41 Cal 731 No

appeal lies
[But see (1933) 1933 All 225 (226)
It is the practice of the Allahabad
High Court to grant leave to appeal
in such cases—Following 1933 All
15.]

(1931) 1931 All 538 (301 302) 55 All 76

Note 14

1 (1913) 21 Ind Cas 836 (837) (Mad)

Note 15

1 (1932) 1932 Rang 159 (151) 10 Rang 4
Order of remand, when stay is final
[See also Pts 9 and 10 Note 4
S 109]

(1932) 1932 Rang 132 (132) 10 Rang 304
Order refusing leave to appeal in
form a pauper is not final order—
[See also S 109 Note 1 Pt 12]

Note 16

1 (1900) 17 Cal 175 (175)

a matter would be incompetent ¹ This Clause only contemplates orders which have been made on appeal by the High Court under Clause 15 *ante* and such orders as are by reason of the number of Judges who have taken part in the decision not appealable to the High Court ²

The granting of the permission to appeal under this Clause is entirely discretionary with the Court or Judge empowered to give it ³ As a general rule and in the absence of special circumstances or some unusual occasion for its exercise the power of making interlocutory order is one which is not a suitable subject for review ⁴ Thus no leave to appeal to the Privy Council will be granted under this Clause against an order relating to a question of practice such as an order for inspection of documents or against an order refusing an appointment of a receiver ⁵ But where the order complained of involves a matter of real importance such as a question of jurisdiction to make a particular order leave to appeal will be granted ⁶

41 And We do further ordain that from any judgment order or sentence of the said High Court of Judicature at [Madras]

Appeal in criminal cases (Bombay) Fort William in Bengal made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided by any Court which has exercised original jurisdiction it shall be lawful for the person aggrieved by such judgment order or sentence to appeal to Us Our heirs or successors in Council provided the said High Court shall declare that the case is a fit one for such appeal and under such conditions as the said High Court may establish or require subject always to such rules and orders as We may with the advice of Our Privy Council hereafter make in that behalf

1 Appeal in criminal cases—The wording of this clause is very precise and must be strictly construed ¹ In a criminal case the Court's power to grant leave to appeal to the Privy Council is only under this Clause Thus the High Court has no power to grant leave to appeal from a judgment passed by it in a criminal appeal ² or against an order made by it under S. 118 of the Criminal Procedure Code ³

As to whether an appeal lies against the decision of the High Court after a hearing in pursuance of a certificate granted by the Advocate General under Cl. 96 *ante* see the under mentioned case ⁴

The right of appeal given by this Clause is subject to the condition that the High Court shall declare that the case is a fit one for appeal the High Court has therefore the duty of satisfying itself before declaring a case fit for appeal that the case falls within the limit prescribed by the Privy Council in *Dal Singh v. Emperor*, 1 L. R. 44 Cal 876 ⁵

2 Original Criminal Jurisdiction—The jurisdiction exercised by the High Court in a reference for confirmation of sentence and also in an appeal by Government when the jury have acquitted the accused is not of an original nature but is of an appellate character ¹

3 Appeal in exercise of Royal Prerogative—Leave not necessary—Where there is no right of appeal under the Letters Patent or under the Privy Council Act and the appellant

CL 40 Note 1

1 (1923) 1923 P. C. 148 (1906) 50 Ind App 212
17 Bom 724 (P. C.) Citing *Golling v.*
La Panque D'Hocelaga (1886) 5

by High Court under Cl 134 thus referring to itself a suit from the Court of the Resident at Aden

appeals to the Privy Council for the exercise of the Royal prerogative no leave or certificate is necessary under this clause ¹

42 And We do further ordain that, in all cases of appeal made from any judgment, order, sentence or decree of the said High Court of Judicature at [Madras], [Bombay], Fort William in Bengal to Us, Our heirs or successors, in Our or Their Privy Council, such High Court shall certify and transmit

Rule as to transmission of copies of evidence and other documents

to Us, Our heirs and successors, in Our or Their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against. And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or Their Privy Council shall think fit to make in the premises in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court, should or might have been executed.

1 Transmission of records—This Clause expressly requires that the reasons for the decisions of the High Court should be recorded by the Judges and transmitted to the Privy Council for its information ¹. Where an appeal to the Privy Council against a decree has been admitted such proceedings as applications for review of the judgment and the order of the Court thereon ought not to form part of the records to be transmitted to England ².

Calls for Records, etc., by the Government

43. And it is Our further will and pleasure that the said High Court of Judicature at [Madras], [Bombay] Fort William in Bengal shall comply with such requisitions as may be made by the Government for records, returns and statements, in such form and manner as such Government

High Court to comply with requisition from Government for records etc.

may deem proper.

44 And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, and also of the Governor-General in Council under section 71 of the Government of India Act, 1915, and also of the Governor-General, in cases of emergency under S 72 of the Act, and may be in all respects amended and altered thereby.

Powers of the Indian Legislature preserved

Synopsis

	Note No		Note No
Alterations in the Clause	1	Legislative powers of the Governor	3
Scope of the Clause	2	General in Council	

1 Alterations in the Clause—The material alteration made by the amending Letters Patent is that the words "Governor-General in Legislative Council" have been substituted for the words "powers of the Governor-General in Council".

2 Scope of the Clause—This Clause makes the provisions of the Letters Patent subject to the legislative powers of the Governor-General in Legislative Council and also the

Note 3

1 (1935) 1935 Pat 66 (67); 14 Pat 318.

CI 42—Note 1

1 (1863) 12 Moo Ind App 495 (502) (P C)
2. (1864) 1 Beng L R 1 (5) (F B).

Governor General in Council See the undermentioned cases¹ as to instances of exercise of the power conferred by this Clause But the Letters Patent cannot be varied by mere resolutions of the local Government or of the Government of India²

[now S 106 of the Government of India Act (1915)]
Her Letters Patent that they may be subject to the
therefore this Clause is not *ultra vires* of the powers of

Her Majesty³

3 Legislative powers of the Governor General in Council—Section 92 of the Indian Councils Act 1861 (24 & 25 Vict C 61) gives power to the Governor General in Council to make laws or regulations for repealing amending or altering any laws or regulations then in force or thereafter to be in force in the Indian territories It is also provided by that section that the Governor General in Council has no power to make any laws or regulations which shall repeal or in any way affect any of the provisions of the Act or of any provisions of certain other Acts named therein or of any Act passed in that session of Parliament Thus the Governor General in Council has no power to make any alteration in regard to the qualification of Judges prescribed in S 2 or in regard to powers of the superintendence of the High Court given by S 106 of the Government of India Act 1915¹ Similarly the Governor General in Council has no power to legislate so as to deprive a British subject of his right of suit against the Secretary of State for India in Council in such cases as are allowed by S 65 of the Government of India Act 1903 which Act is mentioned in the proviso to S 22 of the Indian Councils Act²

45 And it is Our further will and pleasure that these Letters Patent shall be published by the Governor in Council and shall come into operation from and after the date of such publication and that from and after the date on which effect shall have been given to them so much of the aforesaid Letters Patent granted by His Majesty King George the Third as was not revoked or determined by the said Letters Patent of the Twenty sixth of June One thousand eight hundred and sixty two and is inconsistent with these Letters Patent shall cease determine and be utterly void to all intents and purposes whatsoever

In witness whereof We have caused these Our Letters to be made Patent Witness Ourselves at Westminster the Twenty eighth day of December in the Twenty ninth year of Our Reign

By warrant under the Queen's Sign Manual

(Sd) C ROMILLY

CL 44—Note 2

- 1 (19 9) 4 Cal 172 (1 7 178) 5 Ind App 1 8
(1 C) Removal of territory from the jurisdiction of the High Court In *re Ja es Currie* (1897) 21 Bom 405 (1908)

for leave to appeal to Privy Council (1933) 1933 Bom 1 (3 4) (S B) Power of revision and appeal of High Courts taken away by S 51 of Ordinance No II of 1932

(1918) 1918 Pat 103 (105 115 120) 3 Pat L Jour 281 S 8 of the Defence of India Act IV of 1915 takes away right of appeal or revision to the High Court against the decision of the commissioners

(1921) 1921 Mad 208 (60 261) 44 Mad 446 Madras Legislative Council has no power to

diction
(1896) 1 Cal 431 (400) S 5 of Act VI of 1874—Providing that in cases of concurrent decisions there must be a substantial question of law to give a right of appeal to the Privy Council is not *ultra vires* the Letters Patent Clause 39

(1917) 1917 Mad 670 (670 681) 40 Mad 651 S 117 C P Code

(1924) 1924 Mad 399 (399) 46 Mad 958 S 111 C P Code overrides Cl 39 Letters Patent

(1914) 1914 Cal 679 (680) 42 Cal 35 The enactment of S 12 Limitation Act 1908 so far as it relates to applications

Note 3
1 (1874) 22 South W R (C) 54 (60)
2 (1919) 18 Ind Cas 22 (24) 40 Cal 391 40 Ind App 48 7 L B R 10 (P C)

appeals to the Privy Council for the exercise of the Royal prerogative no leave or certificate is necessary under this clause 1

42 And We do further ordain that, in all cases of appeal made from any judgment, order, sentence or decree of the said High Court of Judicature at [Madras], [Bombay], Fort William in Bengal to Us, Our heirs or successors, in Our or Their Privy Council, such High Court shall certify and transmit

Rule as to transmission of copies of evidence and other documents

to Us, Our heirs and successors, in Our or Their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court And that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or Their Privy Council shall think fit to make in the premises in such manner in order or rule of the

that the reasons for the decisions of the High Court should be recorded by the Judges and transmitted to the Privy Council against a decree has been and the order of the England 3

Calls for Records, etc., by the Government

43. And it is Our further will and pleasure that the said High Court of Judicature at [Madras], [Bombay], Fort William in Bengal shall comply with such requisitions as may be made by the Government for records, returns and state

High Court to comply with requisition from Government for records, etc.

may deem proper.

44 And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, and also of the Governor-General in Council under section 71 of the Government of India Act, 1915, and also of the

Powers of the Indian Legislature preserved

Governor-General, in cases of emergency under S 72 of the Act, and may be in all respects amended and altered thereby.

Synopsis.

	Note No		Note No
Alterations in the Clause.	1	Legislative powers of the Governor	3
Scope of the Clause	2	General in Council	

made by the amending Letters General in Legislative Council, substituted for the words 'powers of

2. Scope of the Clause—This Clause makes the provisions of the Letters Patent subject to the legislative powers of the Governor-General in Legislative Council and also the

Note 3

1 (1935) 1935 Pat 66 (67); 14 Pat 318

CI 42—Note 1

1 (1863) 12 Moo Ind App 495 (502) (P C)
2 (1864) 1 Beng L R 1 (5) (P B)

Governor-General in Council. See the undermentioned cases¹ as to instances of exercise of the power conferred by this Clause. But the Letters Patent cannot be varied by mere resolutions either of the local Government or of the Government of India.²

Section 9 of the High Courts Act (now S 106 of the Government of India Act (1915)) gives power to Her Majesty to direct by Her Letters Patent that they may be subject to the powers of the Indian Legislature and, therefore, this Clause is not *ultra vires* of the powers of the Indian Council to

the Indian
a Council to

force, or thereafter

that the Governor-General shall reject or in any way affect any of the provisions of the Act or of any provisions of certain other Acts named therein or of any Act passed in that session of Parliament. Thus the Governor-General in Council has no power to make any alteration in regard to the qualification of Judges prescribed in S 2 or in regard to powers of the superintendence of the High Court given by S 106 of the Government of India Act 1915.¹ Similarly the Governor-General in Council has no power to legislate so as to deprive a British subject of his right of suit against the Secretary of State for India in Council in such cases as are allowed by S 65 of the Government of India Act 1915 which Act is mentioned in the proviso to S 22 of the Indian Councils Act.²

45 And it is Our further will and pleasure that these Letters Patent shall be published by the Governor in Council and shall come into operation from and after the date of such publication and that from and after the date on which effect shall have been given to them, so much of the aforesaid Letters Patent granted by His Majesty King

Provisions of former
Letter Patent inconsis-
tent with the Letter
Patent to be void

George the Third as was not revoked or determined by the said Letters Patent of the Twenty sixth of June One thousand eight hundred and sixty two, and is inconsistent with these Letters Patent, shall cease determine, and be utterly void, to all intents and purposes whatsoever

In witness whereof, We have caused these Our Letters to be made Patent Witness Ourselves at Westminster, the Twenty eighth day of December in the Twenty ninth year of Our Reign

By warrant under the Queen's Sign Manual

(Sd) C ROMILLY

CI 44—Note 2

1 (1879) 4 Cal 172 (177 178) 5 Ind App 178 (P C) Removal of territory from the jurisdiction of the High Court. In re *James Currie* (1877) 21 Bom 405 (408) (Du)

(1910) 5 Ind Cas 729 (700) (Mad) Conferring jurisdiction on the High Court in a class of suits arising outside its jurisdiction

(1896) 1 Cal 431 (400) S 5 of Act VI of 1874—Providing that in cases of con current decisions there must be a substantial question of law to give a right of appeal to the Privy Council is not *ultra vires* the Letters Patent Clause 39

(1917) 1917 Mad 670 (670 671) 40 Mad 651 S 117 C P Code

(1924) 1324 Mad 399 (399) 46 Mad 958 S 111 C P Code overrides CI 33, Letters Patent

(1914) 1914 Cal 679 (680) 42 Cal 35 The enactment of S 12, Limitation Act, 1908, so far as it relates to applications

for leave to appeal to Privy Council (1933) 1933 Bom 1 (8 4) (S B) Power of revision and appeal of High Courts taken away by S 51 of Ordinance No II of 1932

(1918) 1918 Pat 103 (105 115 120) 3 Pat L Jour 531 S 8 of the Defence of India Act IV of 1915 takes away right of appeal or revision to the

the Presidency Town of Madras under the Letters Patent—Madras the

2
3 (1918) 1918 Pat 103 3 Pat L Jour 531

Note 3

1 (1874) 22 Suth W R (Cr) 54 (60)
2 (1912) 18 Ind Cas 22 (24) 40 Cal 391, 40 Ind App 48 7 L B R 10 (P C)

Testamentary and Intestate Jurisdiction

25 And We do further ordain that the said High Court of Judicature for the North Western Provinces shall have the like power and authority as that which is now lawfully exercised within the said Provinces by the said High Court of Judicature at Fort William in Bengal in relation to the granting of probates of last wills and testaments and letters of administration of the goods chattels credits and all other effects whatsoever of persons dying intestate and that the jurisdiction of the said last mentioned High Court in relation thereto shall cease from the date of the publication of these presents Provided always that any proceedings already commenced in relation to any of the matters aforesaid in the said last mentioned High Court shall continue as if these presents had not been issued Provided also that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India by which power is given to any other Court to grant such probates and letters of administration

Matrimonial jurisdiction

26 See Calcutta CI 35

Powers of Single Judges and Division Courts

27 See Calcutta CI 36

Civil Procedure

28 And We do further ordain that it shall be lawful for the said High Court of Judicature for the North Western Provinces from time to time to make Rules and Orders for the purpose of adopting as far as possible the provisions of the Code of Civil Procedure being an Act passed by the Governor General in Council and being Act No VIII of 1859 and the provisions of any law which has been or may be made amending or altering the same by competent legislative authority for India to all proceedings in its testamentary intestate and matrimonial jurisdictions respectively

Criminal Procedure

29 And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court in the exercise of its ordinary original criminal jurisdiction shall be regulated by the procedure and practice which was in use in the High Court of Judicature for Fort William in Bengal, immediately before the publication of these presents subject to any law which has been or may be made in relation thereto by competent legislative authority for India and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor General in Council, and being Act No XXI of 1861 or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid

Appeals to Privy Council

30 See Calcutta CI 39

31 See Calcutta Cl 40

32 See Calcutta Cl 41

33 And We do further ordain that in all cases of appeal made from any judgment order sentence or decree of the said High Court of Judicature for the North Western Provinces to Us Our heirs or successors in Our or Their Privy Council such High Court shall certify and transmit to Us Our heirs and successors in Our or Their Privy Council a true and correct copy of all evidence, proceedings judgments decrees and orders had or made in such cases appealed so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court, and that the said High Court shall also certify and transmit to Us Our heirs and successors in Our or Their Privy Council a copy of the reasons given by the Judges of such Court, or by any such Judges for or against the judgment or determination appealed against

And We do further ordain that the said High Court shall in all cases of appeal to Us, Our heirs or successors conform to and execute or cause to be executed, such judgments and orders as We, Our heirs or successors in Our or Their Privy Council shall think fit to make in the premises in such manner as any original judgment, decree or decretal orders or other order or rule of the said High Court, should or might have been executed

Calls for Records etc, by the Government

34 See Calcutta Cl 43

Powers of Indian Legislature preserved

35 See Calcutta Cl 44

In witness whereof We have caused these Our Letters to be made Patent Witness Ourselves at Westminster the seventeenth day of March in the twentieth year of Our reign

By warrant under the Queen's Sign Manual

(Sd) C ROMILLY

appeals to the Privy Council for the exercise of the Royal prerogative no leave or certificate is necessary under this clause¹

42 And We do further ordain that, in all cases of appeal made from any judgment, order, sentence or decree of the said High Court of Judicature at [Madras], [Bombay], Fort William in Bengal to Us, Our heirs or successors, in Our or Their Privy Council, such High Court shall certify and transmit to Us, Our heirs and successors, in Our or Their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court And that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or Their Privy Council shall think fit to make in the premises in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court, should or might have been executed

1 Transmission of records—This Clause expressly requires that the reasons for the judgment appealed to the Privy Council at a decree has been the order of the original²

Calls for Records, etc., by the Government

43 And it is Our further will and pleasure that the said High Court of Judicature at [Madras], [Bombay] Fort William in Bengal shall comply with such requisitions as may be made by the Government for records, returns and statements, in such form and manner as such Government may deem proper.

44 And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, and also of the Governor-General in Council under section 71 of the Government of India Act, 1915, and also of the Governor-General, in cases of emergency under S 72 of the Act, and may be in all respects amended and altered thereby

Synopsis

	Note No		Note No
Alterations in the Clause	1	Legislative powers of the Governor	3
Scope of the Clause	2	General in Council	

made by the amending Letters General in Legislative Council substituted for the words 'powers of

2 Scope of the Clause—This Clause makes the provisions of the Letters Patent subject to the legislative powers of the Governor General in Legislative Council and also the

Note 3

1 (1935) 1935 Pat 66 (67). 14 Pat 313

Cl 42—Note 1

1 (1963) 12 Moo Ind App 495 (502) (P C)
2 (1964) 1 Peng L R 1 (5) (1 B)

Governor General in Council. See the undermentioned cases¹ as to instances of exercise of the power conferred by this Clause. But the Letters Patent cannot be varied by mere resolutions either of the local Government or of the Government of India.²

Section 2 of the High Courts Act (now S. 10a of the Government of India Act, (1915)) gives power to Her Majesty to direct by Her Letters Patent that they may be subject to the powers of the Indian Legislature and, therefore, this Clause is not *ultra vires* of the powers of Her Majesty.³

3 Legislative powers of the Governor General in Council—Section 22 of the Indian Governor General in Council to laws or regulations then also provided by that section

that the Governor General in Council has no power to make any laws or regulations which shall repeal or in any way affect any of the provisions of the Act or of any provisions of certain other Acts named therein or of any Act passed in that session of Parliament. Thus the Governor-General in Council has no power to make any alteration in regard to the qualification of Judges prescribed in S. 2 or in regard to powers of the superintendence of the High Court given by S. 10a of the Government of India Act, 1915.¹ Similarly, the Governor General in Council has no power to legislate so as to deprive a British subject of his right of suit against the Secretary of State for India in Council in such cases as are allowed by S. 6a of the Government of India Act, 1915 which Act is mentioned in the proviso to S. 22 of the Indian Councils Act.²

45 And it is Our further will and pleasure that these Letters Patent shall be published by the Governor in Council and shall come into operation from and after the date of such publication and that from and after the date on which effect shall have been given to them so much of the aforesaid Letters Patent granted by His Majesty King

George the Third as was not revoked or determined by the said Letters Patent of the Twenty sixth of June One thousand eight hundred and sixty two, and is inconsistent with these Letters Patent shall cease, determine, and be utterly void, to all intents and purposes whatsoever.

In witness whereof We have caused these Our Letters to be made Patent Witness Ourselves, at Westminster, the Twenty eighth day of December in the Twenty ninth year of Our Reign.

By warrant under the Queen's Sign Manual

(sd) C. ROMILLY

Cl. 44—Note 2

- (1873) 4 Cal 172 (177 178) 5 Ind App 178 (P.C.) Removal of territory from the jurisdiction of the High Court. In re *James Currie* (1877) 21 Ind 403 (404) (D.)
- (1910) 5 Ind Cas 729 (770) (M.L.) C. referring jurisdiction on the High Court in a class of suits arising outside its jurisdiction.
- (1896) 1 Cal 431 (430) S. 5 of Act VI of 1874—Providing that in cases of concurrent decisions there must be a substantial question of law to give a right of appeal to the Privy Council is not *ultra vires* the Letters Patent Clause 3J.
- (1917) 1917 Mad 670 (670 671) 40 Mad 651 S. 117 C.P. Code.
- (1924) 1924 Mad 339 (339) 46 Mad 958 S. 111 C.P. Code overrides Cl. 3J Letters Patent.
- (1914) 1914 Cal 679 (680) 42 Cal 85 The enactment of S. 12 Limitation Act 1908 so far as it relates to applications

- for leave to appeal to Privy Council (1833) 133 Bom 1 (3 4) (S.B.) Power of revision and appeal of High Courts taken away by S. 51 of Ordinance No. II of 1932.
- (1918) 1918 L. 103 (103 115 120) 3 Pat L Jour 581 S. 8 of the Defence of India Act IV of 1915 takes away right of appeal or revision to the High Court against the decision of the commissioners.
- (1921) 1921 Mad 258 (260 261) 44 Mad 446 Madras Legislative Council has no power to alter any law applicable to the Presidency Town of Madras under the Letters Patent—the

2
3 (1918) 1918 Pat 103 3 Pat L Jour 591

Note 3

- 1 (1874) 22 Suth W R (Cr) 54 (60)
2 (1912) 18 Ind Cas 22 (24) 40 Cal 391 40 Ind App 48 7 L B R 10 (P.C.)

LETTERS PATENT (ALLAHABAD)

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Establishing a High Court in the North-Western Provinces of the Bengal Presidency, dated 17th March, 1866

[The first two paragraphs of the Preamble are similar to those in Calcutta Letters Patent of 1865]

And whereas it is further declared by the said recited Act that it shall be lawful for Us by Letters Patent, to erect and establish a High Court of Judicature in and for any portion of the territories, within Her Majesty's dominions in India not included within the limits of the local jurisdiction of

CLAUSES

19 High Court to review cases on points of law reserved by one or more Judges of the said High Court

20 Appeals from Criminal Courts in the Provinces

21 Hearing of referred cases, and revision of criminal trials

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Testamentary and Intestate Jurisdiction

25 Testamentary and Intestate jurisdiction

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29 Regulation of proceedings

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30 Power to appeal

31 Appeal from interlocutory judgment

32 Appeal in criminal cases etc

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Calls for Records, etc., by the Government

34 High Court to comply with requisition from Government for records, etc

35 Powers of Indian Legislature preserved

another High Court, to consist of a Chief Justice and such number of other Judges with such qualifications as were by the same Act required in persons to be appointed to the High Courts established at the said Presidencies, as We from time to time might think fit and appoint and that subject to the directions of the Letters Patent all the provisions of the said recited Act relative to High Courts and to the Chief Justice and other Judges of such Courts and to the Governor General or Governor of the Presidency in which such High Courts were established shall in all circumstances may permit be applicable to any new High Court which may be established in the said territories and to the Chief Justice and other Judges thereof and to the persons administering the Government of the said territories

And whereas We did upon full consideration of the premises think fit to erect and establish and by Our Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland bearing date at Westminster, the fourteenth day of May in the twenty fifth year of Our Reign in the year of Our Lord one thousand eight hundred and sixty two did accordingly, for Us Our heirs and successors erect and establish at Fort William in Bengal for the Bengal Division of the Presidency of Fort William aforesaid a High Court of Judicature which should be called the High Court of Judicature at Fort William in Bengal and did thereby constitute the said Court to be a Court of Record

1 Now know Ye that We upon full consideration of the premises and *of Our special grace certain knowledge and mere motion*
Establishment of High Court for the North Western Provinces have thought fit to erect and establish and by these presents We do accordingly for Us Our heirs and successors erect and establish for the North Western Provinces of the Presidency of Fort William aforesaid a High Court of Judicature which shall be called the High Court of Judicature for the North Western Provinces and We do hereby constitute the said Court to be a Court of Record

2 And We do hereby appoint and ordain that the said High Court of Judicature for the North Western Provinces shall until further or other provision shall be made by Us of Our heirs and successors in that behalf in accordance with the said recited Act consist of a Chief Justice and five Judges the first Chief Justice being Walter Morgan Esquire and the five Judges being Alexander Ross Esquire William Edwards Esquire William Rberts Esquire Francis Boyle Pearson Esquire and Charles Arthur Turner Esquire being respectively qualified as in the said Act is declared

1 Appointment of sixth Judge —The appointment of a xth Puisne Judge by the Sovereign to the High Court of Allahabad is not invalid 1

3 And We do hereby ordain that the Chief Justice and every Judge of the said High Court of Judicature for the North Western Provinces previously to entering upon the execution of the duties of his office shall make and subscribe the following declaration before such authority, or person as the Governor General in Council may commission to receive it —

I declare to be made by Judge

"I, *I B*, appointed Chief Justice (or Judge) of the High Court of Judicature, for the North-Western Provinces, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

4 See Calcutta Cl 6

5 See Calcutta Cl 7

Admission of Advocates, Vakils and Attorneys

6 See Calcutta Cl 8

7 See Calcutta Cl 9

8 See Calcutta Cl 10

Civil Jurisdiction of High Court

9 See Calcutta Cl 13

10 See Calcutta Cl 15

11 See Calcutta Cl 16

12 And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall have the like

Jurisdiction as to infants and lunatics

power and authority with respect to the persons and estates of infants, idiots and lunatics within the North-Western Provinces, as that which is exercised in the Bengal Division of the Presidency of Fort William, by the High Court of Judicature at Fort William in Bengal, but subject to the provisions of any laws or regulations now in force

See Notes to Cl 17 of the Calcutta Letters Patent.

13 See Calcutta Cl 20

14 See Calcutta Cl 21

Criminal Jurisdiction

15 And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have ordinary original

Ordinary original jurisdiction of the High Court

criminal jurisdiction in respect of all such persons within the said Provinces as the High Court of Judicature at Fort William in Bengal shall have criminal jurisdiction over, at the date of the publication of these presents and the criminal jurisdiction of the said last mentioned High Court over such persons shall cease at such date. Provided, nevertheless, that criminal proceedings which shall at such date have been commenced in the said last mentioned High Court shall continue as if these presents had not been issued

16 See Calcutta Cl 23.

17 And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have extraordinary

Extraordinary original criminal jurisdiction

original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the Sudder Nizamut Adawlat, and shall have authority to try at its discretion any such persons brought before

it on charges preferred by any Magistrate or other officer specially empowered by the Government in that behalf

18 See Calcutta Cl 25

19 And We do further ordain that on such point or points of law being so reserved as aforesaid the said High Court shall have full power and authority to review the case or such part of it as may be necessary and finally determine such point or points of law and thereupon to alter the sentence passed by the Court of original jurisdiction and to pass such judgment and sentence as to the said High Court

High Court to review cases on points of law reserved by one or more Judges of the said High Court

shall seem right

20 And We do further ordain that the said High Court of Judicature, for the North Western Provinces shall be a Court of Appeal from the Criminal Courts of the said Provinces and from all other Courts from which there is now an appeal to the Court of Sudder Nizamut Adawlut for the said Provinces and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Adawlut by virtue of any law now in force.

Appeals from Criminal Courts in the Provinces

21 And We do further ordain that the said High Court shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other officers now authorized

Hearing of referred cases and revision of criminal trials

to refer cases to the Court of Sudder Nizamut Adawlut of the North Western Provinces and to revise all such cases tried by any officer or Court possessing criminal jurisdiction as are now subject to reference or to revision by the said Court of Sudder Nizamut Adawlut

22 See Calcutta Cl 29

Act under which punishments to be inflicted

23 See Calcutta Cl 30

24 And We do further ordain that whenever it shall appear to the Lieutenant Governor of the North Western Provinces subject to the control of the Governor General in Council convenient that the jurisdiction and power by these Our Letters Patent or by the recited Act vested in the said High Court should be exercised in any place

Judges may be authorized to sit in any places by way of circuit or special commission

within the jurisdiction of any Court now subject to the superintendence of any Sudder Dewanny Adawlut or the Sudder Nizamut Adawlut of the North Western Provinces other than the usual places of sitting of the said High Court or at several such places by way of circuit the proceedings in cases before the said High Court at such place or places shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Testamentary and Intestate Jurisdiction

- 25 And We do further ordain that the said High Court of Judicature, for the North Western Provinces, shall have the like power

Testamentary and in and authority as that which is now lawfully exercised
 testate jurisdiction within the said Provinces, by the said High Court of Judicature at Fort William in Bengal in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels credits and all other effects whatsoever of persons dying intestate and that the jurisdiction of the said last mentioned High Court in relation thereto shall cease from the date of the publication of these presents Provided always that any proceedings already commenced in relation to any of the matters aforesaid in the said last mentioned High Court shall continue as if these presents had not been issued Provided also that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India by which power is given to any other Court to grant such probates and letters of administration

Matrimonial jurisdiction

- 26 See Calcutta Cl 35

Powers of Single Judges and Division Courts

- 27 See Calcutta Cl 36

Civil Procedure

- 28 And We do further ordain that it shall be lawful for the said High Court of Judicature for the North Western Provinces

Regulation of proceed from time to time to make Rules and Orders for the
 ings purpose of adopting as far as possible, the provisions of the Code of Civil Procedure being an Act passed by the Governor General in Council and being Act No VIII of 1859, and the provisions of any law which has been or may be made amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary intestate and matrimonial jurisdictions, respectively

Criminal Procedure

- 29 And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court

Regulation of proceed in the exercise of its ordinary original criminal jurisdic
 ings tion shall be regulated by the procedure and practice which was in use in the High Court of Judicature for Fort William in Bengal, immediately before the publication of these presents, subject to any law which has been or may be made in relation thereto by competent legislative authority for India and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, prescribed by an Act passed by the Governor General in Council, and being Act No XXX of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid

Appeals to Privy Council

- 30 See Calcutta Cl 39

31 See Calcutta Cl 40

32 See Calcutta Cl 41

33 And We do further ordain that in all cases of appeal made from any judgment order sentence or decree of the said High Court of Judicature for the North Western Provinces to Us Our heirs or successors in Our or Their Privy Council such High Court shall certify and transmit to Us Our heirs and successors in Our or Their Privy Council a true and correct copy of all evidence, proceedings judgments decrees and orders had or made in such cases appealed so far as the same have relation to the matters of appeal such copies to be certified under the seal of the said High Court and that the said High Court shall also certify and transmit to Us Our heirs and successors in Our or Their Privy Council a copy of the reasons given by the Judges of such Court or by any such Judges for or against the judgment or determination appealed against

And We do further ordain that the said High Court shall in all cases of appeal to Us Our heirs or successors conform to and execute or cause to be executed, such judgments and orders as We Our heirs or successors in Our or Their Privy Council shall think fit to make in the premises in such manner as any original judgment decree or decretal orders or other order or rule of the said High Court should or might have been executed

Calls for Records etc by the Government

34 See Calcutta Cl 43

Powers of Indian Legislature preserved

35 See Calcutta Cl 44

In witness whereof We have caused these Our Letters to be made Patent Witness Ourselves at Westminster the seventeenth day of March in the twenty ninth year of Our reign

By warrant under the Queen's Sign Manual

(Sd) C. ROMILLY

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LETTERS PATENT (PATNA)

*Letters Patent constituting the High Court of Judicature at Patna,
for the Provinces of Bihar and Orissa,
Dated the 9th February 1916*

Recital of Act 21 & 25
Act, c 104

GEORGE THE FIFTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India
To all to whom, these Presents shall come, greeting
Whereas by an Act of Parliament passed in the Twenty-fourth and Twenty-fifth Years of the Reign of Her late Majesty Queen Victoria, and called the Indian High Courts Act, 1861, it was, amongst other things, enacted, by section one that it should be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William

and by section two that such High Court should consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time think fit to appoint, who should be selected from among persons qualified as in the said Act was declared

and, by section eight, that upon the establishment of such High Court as aforesaid the Supreme Court and the Court of Sadar Diwani Adalat and Sadar Nizam Adalat at Calcutta, in the said Presidency, should be abolished,

and, by section nine, that the High Court of Judicature so to be established should have and exercise all such civil, criminal, admiralty and vice admiralty, testamentary, intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the said Presidency, as Her Majesty might by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations, as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency-town, as might be prescribed thereby, and that, save as by such Letters Patent might be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last mentioned Courts

And whereas it was further declared by section sixteen of the said recited Act that it should be lawful for Us by Letters Patent to erect and establish a High Court of Judicature in and for any portion of territories within Our Dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and such number of other Judges, with such qualifications as were by the same Act required in persons to be appointed to the High Courts established at the Presidencies of Fort William in Bengal, of Madras, and of Bombay, as We from time to time

might think fit and appoint and that it should be lawful for Us, by such Letters Patent, to confer on any new High Court which might be so established any such jurisdiction powers and authority as under the same Act was authorized to be conferred on or would become vested in the High Court established in any of the said Presidencies and that subject to the directions of the Letters Patent, all the provisions of the said recited Act relative to High Courts and to the Chief Justice and other Judges of such Courts, and to the Governor General or Governor of the Presidency in which such High Courts were established in any of the said Presidencies and that subject to the directions of the High Court which might be established in the said territories, and to the Chief Justice and other Judges thereof and to the persons administering the Government of the said territories

And whereas upon full consideration of the premises, Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster, the Fourteenth day of May, in the Twenty fifth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty-two, did erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William aforesaid and did constitute that Court to be a Court of Record

And whereas Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Twenty eighth day of December in the Twenty ninth Year of Her Reign in the Year of Our Lord One thousand eight hundred and sixty five did revoke the said Letters Patent bearing date the Fourteenth day of May in the Year of Our Lord One thousand eight hundred and sixty two but notwithstanding that revocation did continue the said High Court of Judicature at Fort William in Bengal and declared that the Court should continue to be a Court of Record

And whereas, upon full consideration of the premises, Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Seventeenth day of March, in the Twenty ninth Year of Her Reign in the Year of Our Lord One thousand eight hundred and sixty six did erect and establish a High Court of Judicature for the North Western Provinces, which said Court is situated at Allahabad in the Province of Agra and is now called the High Court of Judicature at Allahabad, and did constitute that Court to be a Court of record

And whereas by an Act of Parliament passed in the First and Second Years of Our Reign, and called the Indian High Courts Act, 1861 it was enacted, amongst other things, by Section one that the maximum number of Judges of a High Court of Judicature in India including the Chief Justice should be twenty,

and, by Section two, that Our power under Section sixteen of the Indian High Courts Act 1861, might be exercised from time to time and that a High Court might be established under the said Section sixteen in any portion of the territories within Our Dominions in India whether or not included within the limits of the local jurisdiction of another High Court and that, where such a High Court was established in any part of such territories included within the limits of the local jurisdiction of another High Court, it should be lawful for us, by Letters

Patent to alter the local jurisdiction of that other High Court and to make such incidental consequential and supplemental provisions as might appear to be necessary by reason of the alterations of those limits

And whereas the said Indian High Courts Acts 1861 and 1911 have been recited and re-enacted by an Act of Parliament passed in the Fifth and Sixth Years of our Reign and called the Government of India Act 1915

And whereas certain territories formerly subject to and included within the limits of the Presidency of Fort William in Bengal were by proclamation made by the Governor General of India on the Twenty second day of March in the Year of Our Lord One thousand nine hundred and twelve constituted a separate Province called the Province of Bihar and Orissa and are now governed by Lieutenant Governor in Council

1 Now know ye that We upon full consideration of the premises and of Our special grace certain knowledge and mere motion have thought fit to erect and establish and by these presents We do accordingly for Us Our heirs and successors erect and establish for the Province of Bihar and Orissa aforesaid with effect from the date of the publication of these presents in the Bihar and Orissa Gazette a High Court of Judicature which shall be called the High Court of Judicature at Patna and We do hereby constitute the said Court to be a Court of Record

2 And We do hereby appoint and ordain that the High Court of Judicature at Patna shall until further or other provision be made by Us or Our heirs and successors in that behalf in accordance with section One hundred and one of the said recited Government of India Act 1915 consist of a Chief Justice and six other Judges the first Chief Justice being Sir Edward Maynard Des Chames Chamier Knight and the six other Judges being Sayid Shuruf ud din Esquire Edmund Pelly Chapman Esquire Basanta Kumar Mullick, Esquire Francis Reginald Roe Esquire the Honble Cecil Atkinson and Jowala Prasad Esquire being respectively qualified as in the said Act is declared

3 See Calcutta Cl 5

4 See Calcutta Cl 6

5 See Calcutta Cl 7

6 See Calcutta Cl 8

Admission of Advocates Vakils and Attorneys

7 See Calcutta Cl 9

8 See Calcutta Cl 10

Civil Jurisdiction of the High Court

9 See Calcutta Cl 13

10 See Calcutta Cl 15

11 And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the Civil Courts of the Province of Bihar and Orissa and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were immediately before the date of the publication of these presents subject to appeal to the High Court of Judicature at Fort William in Bengal by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India

12 See Calcutta Cl 17

Law to be administered by the High Court

13 See Calcutta Cl 20

14 See Calcutta Cl 21

Criminal Jurisdiction

15 And We do further ordain that the High Court of Judicature at Patna shall have ordinary original criminal jurisdiction in respect of all such persons within the Province of Bihar and Orissa as the High Court of Judicature at Fort William in Bengal had such criminal jurisdiction over immediately before the publication of these presents

16 See Calcutta Cl 23

17 See Calcutta Cl 24

18 See Calcutta Cl 25

19 And We do further ordain that, on such point or points of law being so reserved as aforesaid the High Court of Judicature at Patna shall have full power and authority to review the case or such part of it as may be necessary and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court may seem right

20 See Calcutta Cl 27

21 And We do further ordain that the High Court of Judicature at Patna shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other officers in the Province of Bihar and Orissa, who were immediately before the publication of these presents authorized to refer cases to the High Court of Judicature at Fort William in Bengal, and to revise all such cases tried by any officer or Court possessing criminal jurisdiction in the Province of Bihar and Orissa as were, immediately before the publication of these presents, subject to reference to or revision by the High Court of Judicature at Fort William in Bengal

22 See Calcutta Cl 29

Criminal Law

23 See Calcutta CI 27

Admiralty Jurisdiction

24 And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa all such civil and maritime jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty and also such jurisdiction for the trial and adjudication of prize cases and other maritime question as was so exercisable by the High Court of Judicature at Fort William in Bengal

Civil

25 And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa all such criminal jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty or otherwise in connection with maritime matters or matters of prize

Criminal

Testamentary and Intestate Jurisdiction

26 See Calcutta CI 34

Matrimonial Jurisdiction

27 See Calcutta CI 35

Powers of Single Judges and Division Courts

28 See Calcutta CI 36

Civil Procedure

29 And We do further ordain that it shall be lawful for the High Court of Judicature at Patna from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adopting as far as possible the provisions of the Code of Civil Procedure being an Act No V of 1908 passed by the Governor General in Council and the provisions of any law which has been or may be made amending or altering the same by competent legislative authority for India to all proceedings in its testamentary intestate and matrimonial jurisdiction respectively

Regulation of proceedings

1 Civil Procedure Code S 122—As to whether S 122 Civil Procedure Code applies to the High Court of Patna see Note 4 to S 122 and Note 1 to S 124 a te

Criminal Procedure

30 See Calcutta CI 38

Appeals to Privy Council

31 See Calcutta CI 39

32 And We do further ordain that it shall be lawful for the High Court of Judicature at Patna at its discretion on the motion or, if the said High Court be not sitting then for any Judge of the said High Court upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgments

Appeal from interlocutory judgments

tory judgment decree or order of the said High Court, in any such proceeding as aforesaid not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or Their Privy Council subject to the same rules regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders

33 See Calcutta Cl 41

34 See Calcutta Cl 42

Exercise of jurisdiction elsewhere than at the usual place of sitting of the High Court

35 And We do further ordain that unless the Governor General in Council otherwise directs one or more Judges of the High Court of Judicature at Patna shall visit the Division of Orissa by way of circuit, whenever the Chief Justice from time to time appoints in order to exercise in respect of cases arising in that Division the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act 1915, vested in the said High Court. Provided always that such visits shall be made not less than four times in every year, unless the Chief Justice, with the approval of the Lieutenant Governor in Council otherwise directs. Provided also that the said High Court shall have power from time to time to make Rules with the previous sanction of the Lieutenant Governor in Council for declaring what cases or classes of cases arising in the Division of Orissa shall be heard at Patna and not in that Division, and that the Chief Justice may in his discretion order that any particular case arising in the Division of Orissa shall be heard at Patna or in that Division

1 Vacation Judge in Patna—Powers of—A vacation Judge of the High Court of Judicature at Patna shall exercise the jurisdiction and power vested in the said High Court by or under the Government of India Act, 1915, vested in the said High Court of Judicature at Patna shall visit the Division of Orissa by way of circuit, whenever the Chief Justice from time to time appoints in order to exercise in respect of cases arising in that Division the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the said High Court of Judicature at Patna shall have power from time to time to make Rules with the previous sanction of the Lieutenant Governor in Council for declaring what cases or classes of cases arising in the Division of Orissa shall be heard at Patna and not in that Division, and that the Chief Justice may in his discretion order that any particular case arising in the Division of Orissa shall be heard at Patna or in that Division

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36 And We do further ordain that whenever it appears to the Lieutenant Governor in Council, subject to the control of Governor General in Council, convenient that the jurisdiction and power by these Our Letters Patent or by or under the Government of India Act, 1915, vested in the High Court of Judicature at Patna should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit one or more Judges of the Court shall visit such place or places accordingly

37 And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Patna visit any place under the 35th or the 36th Clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India

Delegation of Duties to Officers

38 The High Court of Judicature at Patna may from time to time make rules for delegating to any Registrar Prothonotary or Master or other officer of the Court any judicial quasi-judicial and non judicial duties

Cessation of Jurisdiction of the High Court of Judicature at Fort William in Bengal

39 And We do further ordain that the jurisdiction of the High Court of Judicature at Fort William in Bengal in any matter in which jurisdiction is by these presents given to the High Court of Judicature at Patna shall cease from the date of the publication of these presents and that all proceedings pending in the former Court on that date in reference to any such matter shall be transferred to the latter Court

Provided first that the High Court of Judicature at Fort William in Bengal shall continue to exercise jurisdiction—

(a) in all proceedings pending in that Court on the date of the publication of these presents in which any decree or order other than an order of an interlocutory nature has been passed or made by that Court or in which the validity of any such decree or order is directly in question and

(b) in all proceedings [not being proceedings referred to in paragraph (a) of this Clause] pending in that Court on the date of the publication of these presents, under the 13th 15th, 22nd 23rd 24th 25th 26th 27th 28th, 29th, 32nd, 33rd, 34th, or 35th Clause of the Letters Patent bearing date at Westminster, the twenty eighth day of December in the Year of Our Lord One thousand eight hundred and sixty five, relating to that Court and

(c) in all proceedings instituted in that Court on or after the date of the publication of these presents with reference to any decree or order passed or made by that Court

Provided secondly that if any question arises as to whether any case is covered by the first proviso to this Clause the matter shall be referred to the Chief Justice of the High Court of Judicature at Fort William in Bengal and his decision shall be final

1 Cessation of jurisdiction of Calcutta High Court

The High Court of Patna has no jurisdiction to execute an order of His Majesty in Council in an appeal from a decree of the High Court of Calcutta passed on appeal from the decree of a Subordinate Court in the Province of Bihar the application for execution must be made to the High Court of Calcutta¹

Calls for Records etc by the Government

40 See Calcutta Cl 43

Issues of Indian Legislatures

41 See Calcutta Cl 44

In witness whereof We have caused these our letters to be made patent Witness Ourself at Westminster the Ninth day of February in the year of Our Lord One thousand nine hundred and sixteen and in the sixth year of Our reign

By warrant under the King's Sign Manual

(Sd) SCHUSTER

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LETTERS PATENT (LAHORE)

Letters Patent constituting the High Court of Judicature at Lahore, for the Provinces of Punjab and Delhi, dated 21st March, 1919

GEORGE THE FIFTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas,

King, Defender of the Faith Emperor of India To all to whom these Presents shall come greeting. Whereas by an Act of Parliament passed in the Fifth and Sixth years of Our Reign and called the Government of India Act 1915 it was amongst other things enacted that it should be lawful for Us by Letters Patent to establish a High Court of Judicature in any territory in British India whether or not included within the limits of the local jurisdiction of another High Court and to confer on any High Court so established any such jurisdiction, powers and authority as were vested in or might be conferred on any High Court existing at the commencement of that Act and

WHILAS the Provinces of the Punjab and Delhi are now subject to the jurisdiction of the Chief Court of the Punjab which was established by an Act of the Governor General of India in Council being Act No XVIII of 1865 and was continued by later enactments and no part of the said Provinces is included within the limits of the local jurisdiction of any High Court

1 Now know ye that We upon full consideration of the premises and of Our special grace certain knowledge and mere motion, have thought fit to erect and establish and by these presents We do accordingly for Us Our heirs and successors erect and establish for the Provinces of the Punjab and Delhi aforesaid with effect from the date of the publication of these presents in the *Gazette of India* a High Court of Judicature which shall be called the High Court of Judicature at Lahore and We do hereby constitute the said Court to be a Court of Record

2 And We do hereby appoint and ordain that the High Court of Judicature at Lahore shall until further or other provision be made by Us or Our heirs and successors in that behalf in accordance with section one hundred and one of the said recited Government of India Act 1915 consist of a Chief Justice and six other Judges the first Chief Justice being Sir Henry Adolphus Rattigan Knight and the six other Judges being William Chevis Esquire Henry Scott Smith Esquire Shadi Lal Esquire Rai Bahadur Walter Aubin Le Rossignol Esquire Leicester Hudson Leslie Jones Esquire and Alan Brice Broadway Esquire being respectively qualified as in the said Act is declared

3 See Calcutta Cl 5

4 See Calcutta Cl 6

5 See Calcutta Cl 7

6 See Calcutta Cl 8

Admission of Advocates Vakils and Attorneys

7 See Calcutta Cl 9

8 See Calcutta Cl 10

Civil Jurisdiction of the High Court

9 See Calcutta Cl 13

10 See Calcutta Cl 15

11 And We do further ordain that the High Court of Judicature at Lahore shall be a Court of Appeal from the Civil Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were immediately before the date of the publication of these presents, subject to appeal to the Chief Court of the Punjab by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India

12 And We do further ordain that the High Court of Judicature at Lahore shall have the like power and authority with Jurisdiction as to infants and lunatics in respect to the persons and estates of infants, idiots and lunatics within the Provinces of the Punjab and Delhi as that which was vested in the Chief Court of the Punjab immediately before the publication of these presents

Law to be administered by the High Court

13 See Calcutta Cl 20

14 See Calcutta Cl 21

Criminal Jurisdiction

15 And We do further ordain that the High Court of Judicature at Lahore shall have ordinary original criminal jurisdiction in respect of all such persons within the Provinces of the Punjab and Delhi as the Chief Court of the Punjab had such criminal jurisdiction over immediately before the publication of these presents

1 Original criminal jurisdiction.—The original criminal jurisdiction of the High Court of Lahore is co extensive with that of the late Chief Court of the Punjab. The High Court of Lahore has no jurisdiction to try on its original criminal side a British Indian subject for an offence, since the Chief Court had no such original criminal jurisdiction except in the case of European British subjects¹

16 See Calcutta Cl 23

17 See Calcutta Cl 24

18 See Calcutta Cl 25

19 And We do further ordain that, on such point or points of law here so reserved as aforesaid, the High Court of Judicature at Lahore shall have full power and authority to review the case, or such part of it as may be necessary and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original

High Court to review cases on points of law reserved by one or more Judges of the High Court

jurisdiction, and to pass such judgment and sentence as to the said High Court may seem right

20 And We do further ordain that the High Court of Judicature at Lahore shall be a Court of appeal from the Criminal Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence and shall exercise appellate jurisdiction in such cases as were immediately before the date of the publication of these pre ents, subject to appeal to the Chief Court of the Punjab by virtue of any law then in force or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India

21 See Calcutta Cl 28

22 See Calcutta Cl 29

Criminal Law

23 See Calcutta Cl 30

Testamentary and Intestate Jurisdiction

24 See Calcutta Cl 31

Matrimonial Jurisdiction

25 See Calcutta Cl 35

Powers of single Judges and Division Courts

26 See Calcutta Cl 36

Civil Procedure

27 And We do further ordain that it shall be lawful for the High Court of Judicature at Lahore from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adopting as far as possible the provisions of the Code of Civil Procedure being an Act No V of 1908 passed by the Governor General in Council and the provisions of any law which has been or may be made amending or altering the same by competent legislative authority for India to all proceedings in its testamentary intestate and matrimonial jurisdiction, respectively

Criminal Procedure

28 And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Lahore shall be regulated by the Code of Criminal Procedure, being an Act No V of 1898 passed by the Governor-General in Council or by such further or other laws in relation to criminal procedure as may have been or may be made by competent legislative authority for India

Appeals to Privy Council

29 See Calcutta Cl 39

30 And We do further ordain that it shall be lawful for the High Court of Judicature at Lahore at its discretion on the motion or if the said High Court be not sitting then for any Judge of the said High Court upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment decree or order of the said High Court in any such proceeding as aforesaid not being of criminal jurisdiction to grant permission to such party to appeal against the same to Us Our heirs and successors in Our or Their Privy Council subject to the same rules regulations and limitations as are herein expressed respecting appeals from final judgments decrees and orders

31 See Calcutta Cl 41

32 See Calcutta Cl 42

Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court

33 And We do further ordain that whenever it appears to the Lieutenant Governor of the Punjab subject to the control of the Governor General in Council convenient that the jurisdiction and power by these Our Letters Patent or by or under the Government of India Act 1915 vested in the High Court of Judicature at Lahore should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court other than the usual place of sitting of the said High Court or at several such places by way of circuit one or more Judges of the Court shall visit such place or places accordingly

34 And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Lahore visit any place under the 33rd clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India

Delegation of Duties to Officers

35 The High Court of Judicature at Lahore may from time to time make Rules for delegating to any Registrar Prothonotary or Master or other official of the Court any judicial quasi-judicial and non-judicial duties

Calls for records etc by the Government

36 See Calcutta Cl 43

Powers of Indian Legislatures

37 See Calcutta Cl 44

IN WITNESS whereof We have caused these Our Letters to be made Patent

Witness Ourselves at Westminster the 21st day of March in the year of Our Lord One thousand nine hundred and nineteen and in the ninth year of Our Reign

By WARRANT under the King's Sign Manual

(Sd) SCHUSTER

LETTERS PATENT (RANGOON)

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LETTERS PATENT (RANGOON)

11th November, 1922

GEORGE THE FIFTH by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King Defender of the Faith Emperor of India

To all to whom these presents shall come greeting,

WHEREAS in the Government of India Act it was amongst other things enacted that it should be lawful for Us by Letters Patent to establish a High Court of Judicature in any territory in British India whether or not included within the limits of the local jurisdiction of another High Court and to confer on any High Court so established any such jurisdiction powers and authority as were vested in or might be conferred on any High Court existing at the commencement of that Act

And whereas that portion of the Province of Burma known as Lower Burma is now within the limits of the jurisdiction of the Chief Court of Lower Burma which was established by an Act of the Governor General of India in Council being Act No VI of 1900 and whereas that portion of the said Province known as Upper Burma is with certain exceptions now within the limits of the jurisdiction of the Judicial Commissioner of Upper Burma appointed in pursuance of a Regulation of the Governor General of India in Council being Regulation No V of 1892 and of the Court of the Judicial Commissioner of Upper Burma which was established by a Regulation of the Governor General of India in Council being Regulation No VIII of 1886 and was continued by a Regulation of the Governor General of India in Council being Regulation No I of 1896

And whereas no part of the said Province is included within the limits of the local jurisdiction of any High Court

1 Now know ye that We, upon full consideration of the premises and of

Our special grace certain knowledge and mere motion
I establishment of High Court at Rangoon
have thought fit to erect and establish and by these presents We do accordingly for Us Our heirs and successors erect and establish for those portions of the province of Burma at present within the limits of the jurisdiction of the said Chief Court of Lower Burma and of the said Judicial Commissioner and of the said Court of the Judicial Commissioner of Upper Burma as aforesaid with effect from the date of the publication of these presents in the *Gazette of India* a High Court of Judicature which shall be called the High Court of Judicature at Rangoon, and We do hereby constitute the said Court to be a Court of Record

2 And We do hereby appoint and ordain that the High Court of Judicature at Rangoon shall until further or other provision

Constitution and first Judges of the High Court
be made by Us or Our heirs and successors in that behalf in accordance with section one hundred and one of the Government of India Act ordinarily consist of a Chief Justice and not less than seven other Judges the first Chief Justice being Sir Sydney Madrick Robinson, Kt and the other Judges being Leslie Harry Saunders Esq, CSI Munir Khan Esq Charles Phillip Radford Young Esq Henry Sheldon Pratt Esq, Benjamin Herbert Heald Esq, John Guy Rutledge Esq, one of Our Counsel

learned in the Law and Hugh Ernest MacColl, Esq., being respectively qualified as in the said Act is declared

3 See Calcutta Cl 5

4 See Calcutta Cl 6

5 See Calcutta Cl 7

6 See Calcutta Cl 8

Admission of Advocates and Pleaders

7 See Calcutta Cl 9

8 See Calcutta Cl 10.

Civil Jurisdiction of the High Court

9 See Calcutta Cl 11

10 And We do further ordain that the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction shall be empowered to receive try and determine suits of every description if in the case of suits for land or other immoveable property such land or property shall be situated, or in all other cases if the cause of action shall have arisen either wholly, or, in case the leave of the Court shall have been first obtained in part, within the local limits of the ordinary original civil jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Rangoon Small Cause Court

Original jurisdiction as to suits. 1 Suit for land.—The expression suit for land or other immoveable property means suits in which having regard to the nature of the claim in the pleading the decree or order will affect directly the proprietary or possessory title to land or other immoveable property. A suit to enforce a mortgage is a suit in which the plaintiff asks the Court to sell the property in the event of the mortgage debt not being paid within the time allowed for redemption.

11 See Calcutta Cl 13

12 See Calcutta Cl 14

13 See Calcutta Cl 15

14 And We do further ordain that the High Court of Judicature at Rangoon shall be a Court of Appeal from the Civil Courts of the Province of Burma for which immediately before the publication of these presents the Chief Court of Lower Burma or the Court of the Judicial Commissioner of Upper Burma was a Court of Appeal and from all other Civil Courts whether with in or without the Province of Burma for which the said High Court is declared to be a Court of Appeal by any law made by the local legislature or by competent legislative authority for India and shall exercise appellate jurisdiction in such cases as were immediately before the date of the publication of these presents subject to appeal to the Chief Court of Lower Burma or to the Court of the Judicial Commissioner of Upper Burma by virtue of any law then in force, or as may after that date be declared subject to appeal to

the said High Court by any law made by the local legislature or by competent legislative authority for India.

15 See Calcutta Cl 17.

16 And We do further ordain that the Court for relief of insolvent debtors at Rangoon shall be held before one of the Judges of the High Court of Judicature at Rangoon and the said High Court, and any such Judge thereof, shall have and exercise within the Province of Burma, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in the Province of Burma

17. And We do further ordain that, with respect to the law to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction, such law shall be the law which would have been applied by the Chief Court of Lower Burma to such case if these Letters Patent had not issued

Law to be administered by the High Court in the exercise of ordinary original civil jurisdiction
 1 Law, meaning of—The word 'law' as used in this Clause merely means the legal enactments of the Indian and Burmese legislatures and the English common law and equity which was applied by the late Chief Court of Burma. It does not include the published decisions of that Court and, therefore the High Court in the exercise of its ordinary original jurisdiction is not bound by the authorized reports of decisions of the Chief Court of Lower Burma¹

See also the undermentioned case²

18 And We do further ordain that, with respect to the equity to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction, such equity shall be the equity as nearly as may be which the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction is authorized to apply to such case

19 See Calcutta Cl 20

20 See Calcutta Cl 21

Criminal Jurisdiction

21 See Calcutta Cl 22

22 See Calcutta Cl 23

23 See Calcutta Cl 24

24 See Calcutta Cl 25

25 And We do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the Government Advocate that in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or

High Court to review on certificate of the Government Advocate

Cl 17—Note 1

1 (1927) 1927 Rang 4 (6 & 10 14) 4 Rang 313.

2. (1927) 1927 Rang 212 (213) 5 Rang 212

that a point or points of law which has or have been decided by the said Court, should be further considered, the High Court of Judicature at Rangoon shall have full power and authority to review the case, or such part of it, as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right

26 And We do further ordain that the High Court of Judicature at Rangoon shall be a Court of Appeal from the Criminal Courts for which immediately before the publication of these presents the Chief Court of Lower Burma or the Judicial Commissioner of Upper Burma was a Court of Appeal and from all other Criminal Courts whether within or without the Province of Burma, for which the said High Court is declared to be a Court of Appeal by any law made by the local legislature or by competent legislative authority for India and shall exercise appellate jurisdiction in such cases as were immediately before the date of the publication of these presents subject to appeal to the Chief Court of Lower Burma or to the Judicial Commissioner of Upper Burma by virtue of any law then in force or as may after that date be declared subject to appeal to the said High Court by any law made by the local legislature or by competent legislative authority for India

27 See Calcutta Cl 28

28 And We do further ordain that the High Court of Judicature at Rangoon shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it though such case belongs in ordinary course to the jurisdiction of some other officer or Court

1 Power of transfer—This Clause does not confer any power of transfer over and above that conferred by S 526 of the Code of Criminal Procedure¹ The reason is that this Clause is qualified by Cl 26 *infra*

Criminal Law

29 See Calcutta Cl 30

Admiralty Jurisdiction

30 And We do further ordain that the High Court of Judicature at Rangoon shall have and exercise all such civil and maritime jurisdiction as might be exercised by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty immediately before the date of the publication of these presents and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India as might be exercised by the said High Court at the said date

31 And We do further ordain that the High Court of Judicature at Rangoon shall have and exercise all such criminal jurisdiction as might immediately before the publication of these presents be exercised by the High Court of Judicature at

the said High Court by any law made by the local legislature or by competent legislative authority for India

15 See Calcutta Cl 17

16 And We do further ordain that the Court for relief of insolvent debtors at Rangoon shall be held before one of the Judges of the High Court of Judicature at Rangoon and the said High Court, and any such Judge thereof shall have and exercise within the Province of Burma such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in the Province of Burma

17 And We do further ordain that with respect to the law to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction, such law shall be the law which would have been applied by the Chief Court of Lower Burma to such case if these Letters Patent had not issued

1 Law meaning of—The word law as used in this Clause merely means the legal enactments of the Indian and Burmese legislatures and the English common law and equity which was applied by the late Chief Court of Burma. It does not include the published decisions of that Court and therefore the High Court in the exercise of its ordinary original jurisdiction is not bound by the authorized reports of decisions of the Chief Court of Lower Burma¹

See also the undermentioned case²

18 And We do further ordain that with respect to the equity to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction, such equity shall be the equity as nearly as may be which the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction is authorized to apply to such case

19 See Calcutta Cl 20

20 See Calcutta Cl 21

Criminal Jurisdiction

21 See Calcutta Cl 22

22 See Calcutta Cl 23

23 See Calcutta Cl 24

24 See Calcutta Cl 25

25 And We do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the Government Advocate that in his judgment there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction or

Cl 17—Note 1

that a point or points of law which has or have been decided by the said Court, should be further considered, the High Court of Judicature at Rangoon shall have full power and authority to review the case, or such part of it, as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right

26 And We do further ordain that the High Court of Judicature at Rangoon shall be a Court of Appeal from the Criminal Courts for which immediately before the publication of these presents the Chief Court of Lower Burma or the Judicial Commissioner of Upper Burma was a Court of Appeal and from all other Criminal Courts, whether within or without the Province of Burma, for which the said High Court is declared to be a Court of Appeal by any law made by the local legislature or by competent legislative authority for India and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of Lower Burma or to the Judicial Commissioner of Upper Burma by virtue of any law then in force or as may after that date be declared subject to appeal to the said High Court by any law made by the local legislature or by competent legislative authority for India

27 See Calcutta Cl 28

28 And We do further ordain that the High Court of Judicature at Rangoon shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it though such case belongs in ordinary course to the jurisdiction of some other officer or Court

1 Power of transfer—This Clause does not confer any power of transfer over and above that conferred by S 526 of the Code of Criminal Procedure¹ The reason is that this Clause is qualified by Cl 36 *infra*

Criminal Law

29 See Calcutta Cl 30

Admiralty Jurisdiction

30 And We do further ordain that the High Court of Judicature at Rangoon shall have and exercise all such civil and maritime jurisdiction as might be exercised by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty immediately before the date of the publication of these presents and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India as might be exercised by the said High Court at the said date

31 And We do further ordain that the High Court of Judicature at Rangoon shall have and exercise all such criminal jurisdiction as might immediately before the publication of these presents be exercised by the High Court of Judicature at

Fort William in Bengal as a Court of Admiralty or otherwise in connection with maritime matters or matters of prize

Testamentary and intestate jurisdiction

32 See Calcutta Cl 34

Matrimonial jurisdiction

33 See Calcutta Cl 35

Powers of single Judges and Division Courts

34 See Calcutta Cl 36

Civil Procedure

35 And We do further ordain that it shall be lawful for the High Court of Judicature at Rangoon from time to time to make Rules and Orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court including proceedings in its Admiralty testamentary

Regulation of proceedings

intestate and matrimonial jurisdiction respectively Provided always that the said High Court shall be guided in making such Rules and Orders as far as possible by the provisions of the Code of Civil Procedure being an Act passed by the Governor General of India in Legislative Council and being Act No 7 of 1908 and the provisions of any law which has been or may be made amending or altering the same by the local legislature or by competent legislative authority for India

1 Power to make Rules This Clause enable the High Court to make Rules and Orders in civil cases It does not enable the High Court to make Rules and Orders in criminal cases Thus R 28 of the Appeal is *ultra vires* in so far as it contemplates that a Judge other than the Judge who passed a judgment may declare that a case is a fit one for appeal under Cl 13 ante

Criminal Procedure

36 And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Rangoon shall be regulated by the Code of Criminal Procedure being an Act No 7 of 1898 passed by the Governor General of India in Legislative Council or by such further or other laws in relation to criminal procedure as have been or may be made by the local legislature or by competent legislative authority for India

Regulations of proceedings

See notes to Cl 23 ante

Appeals to Privy Council

37 See Calcutta Cl 37

38 And We do further ordain that it shall be lawful for the High Court of Judicature at Rangoon at its discretion on the motion or if the said High Court do not sit then for any Judge of the said High Court upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment decree or order of the said High Court in any such

Appeal from interlocutory judgments

proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors in Our or Their Privy Council, subject to the same Rules regulations and limitations as are herein expressed respecting appeals from final judgments decrees and orders

39 See Calcutta Cl 41

40 See Calcutta Cl 42

Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court

41 And We do further ordain that unless the Governor of Burma in Council otherwise directs one or more Judges of the High Court of Judicature at Rangoon as the Chief Justice may from time to time direct shall sit at Mandalay in order to exercise in respect of cases arising in such areas in Upper Burma as the Governor of Burma in Council may direct the jurisdiction and power by these Our Letters Patent or by or under the Government of India Act vested in the said High Court Provided that the Chief Justice may in his discretion order that any particular case arising in the said areas in Upper Burma shall be heard at Rangoon

42 And We do further ordain that whenever it appears convenient to the Governor of Burma in Council that the jurisdiction and power by these Our Letters Patent or by or under the Government of India Act vested in the High Court of Judicature at Rangoon should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court other than the usual place of sitting of the said High Court or at several such places by way of circuit one or more Judges of the said High Court shall visit such place or places accordingly

43 And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Rangoon shall visit or sit at any place under the 41st or the 42nd Clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by the local legislature or by a competent legislative authority for India

Provisions regarding Pending Proceedings

44 And We do further ordain that all suits appeals revisions applications reviews executions and other proceedings whatsoever pending immediately before the publication of these presents in the Chief Court of Lower Burma or before the Judicial Commissioner of Upper Burma or in the Court of the Judicial Commissioner of Upper Burma or in the exercise of any jurisdiction vested in them by any law shall be continued and concluded in the High Court of Judicature at Rangoon as if the same had been instituted in the said High Court and the said High Court shall in relation to all such proceedings exercise the jurisdiction given to it by these presents

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Delegation of Duties to Officers

- 45 The High Court of Judicature at Rangoon may from time to time make Rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi-judicial and non-judicial duties

Calls for Records, etc , by the Government.

- 46 See Calcutta Cl 43

Powers of Indian Legislatures

- 47 See Calcutta Cl 44.

In witness whereof We have caused these our letters to be made patent

Witness Ourselves at Westminster, the eleventh day of November in the year of Our Lord One thousand nine hundred and twenty-two, and in the Thirteenth Year of Our Reign

By Warrant under the King's Sign Manual

(Sd) SCHUSTER

— —

APPENDIX IV.

RULES OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, 1925.

INTERPRETATION

1—(1) In these Rules unless the context otherwise requires —

Interpretation

Appeal means an appeal to His Majesty in Council

Judgment includes decree order sentence or decision of any Court Judge or Judicial Officer

Record means the aggregate of papers relating to an appeal (including the pleadings proceedings evidence and judgments) proper to be laid before His Majesty in Council on the hearing of the appeal

Registrar means the Registrar or other proper officer having the custody of the records in the Court appealed from

Abroad means the country or place where the Court appealed from is situated

Agent means a person qualified by virtue of Her Late Majesty's Order in Council of the 6th March 1896 to conduct proceedings before His Majesty in Council on behalf of another

Party and all words descriptive of parties to proceedings before His Majesty in Council (such as petitioner appellant respondent) mean in respect of all acts proper to be done by an Agent the Agent of the party in question where such party is represented by an Agent

Respondent includes Intervener

Month means calendar month

Words in the singular shall include the plural and words in the plural shall include the singular

(2) Where by these Rules any step is required to be taken in England in connexion with proceeding before His Majesty in Council whether in the way of lodging a petition or other document entering in appearance lodging security or otherwise such step shall be taken in the Registry of the Privy Council Downing Street London

LEAVE TO APPEAL

2 All appeals shall be brought either in pursuance of leave obtained from the Court appealed from or in the absence of such leave in pursuance of special leave to appeal granted by His Majesty in Council upon a petition in that behalf presented by the

Leave to appeal generally
attending appellant

SPECIAL LEAVE TO APPEAL

3 A petition for special leave to appeal to His Majesty in Council shall state succinctly and clearly all such facts as it may be necessary to state in

Form of petition for special leave to appeal
if he appears in person
necessary for the purpose of explaining and supporting the particular grounds upon which special leave to appeal is sought

4 The petitioner shall lodge at least five copies of his petition for special leave to appeal together with the affidavit in support thereof prescribed by R 50 hereinafter contained, and, unless as Caveat as prescribed by R 48 has been lodged by the other parties who appeared in the Court below, an affidavit of service of notice of the intended application upon such parties or their Solicitors or Agents, either abroad or in England

5 A petition for special leave to appeal may be lodged at any time after the date of the judgment sought to be appealed from, but the Petitioner shall, in every case, lodge his Petition with the least possible delay

6 Where the Judicial Committee agree to advise His Majesty to grant special leave to appeal, they shall, in their Report, specify the amount of the security for costs (if any) to be lodged by the Petitioner, and shall, unless the circumstances of a particular case render such a course unnecessary provide for the transmission* of the Record to the Registrar of the Privy Council and for such further matters as the justice of the case may require Unless otherwise ordered the security shall be lodged at any time before the Appellant enters an Appearance

7 Save as by the four last preceding Rules otherwise provided, the provisions of Rr 47 to 50 and 52 to 53 (all inclusive) hereinafter contained shall apply *mutatis mutandis* to Petitions for special leave to appeal

8 Rules 3 to 7 (both inclusive) shall apply *mutatis mutandis* to Petitions for leave to appeal in *forma pauperis*, but in addition to the Affidavits referred to in R 4 every such Petition shall be accompanied by an Affidavit from the Petitioner stating that he is not worth £25 in the world excepting his wearing apparel and his interest in the subject matter of the intended Appeal and that he is unable to provide securities and also by a Certificate of Council that the Petitioner has reasonable ground of appeal

9 Where a Petitioner obtains leave to appeal in *forma pauperis* he shall not be required to lodge security for the costs of the Respondent or to pay any Council Office fees

10 A petitioner whose petition for leave to appeal in *forma pauperis* is dismissed may, notwithstanding such dismissal be excused from paying the Council Office fees usually chargeable to a petitioner in respect of a petition for leave to appeal, if His Majesty in Council on the advice of the Judicial Committee shall think fit so to order

RECORD AND APPEARANCE BY APPELLANT

11 As soon as the Appeal has been admitted, whether by an Order of the Court appealed from or by an order of His Majesty in Council granting special leave to appeal, the Applicant shall without delay take all necessary steps to have the Record transmitted to the Registrar of the Privy Council, and the Registrar shall, with all convenient speed, certify to the Registrar of the Privy Council that the Respondent has received notice or is otherwise aware of the order of the Court appealed from admitting the Appeal, of the Order of His Majesty in Council giving the Appellant special leave to appeal and has also received notice, or is otherwise aware of the despatch of the Record to England Where an Appellant who has obtained special leave to appeal by an Order of His Majesty in Council fails to have the Record transmitted to the Registrar of the Privy Council with due diligence, the Registrar of the Privy Council shall call upon the Appellant to explain his default and if no explanation is offered, or if the explanation offered is in the opinion of the said Registrar insufficient, the said Registrar may issue a summons to the Appellant calling upon him to show cause before the Judicial Committee at a time to be named in the said summons why the special leave to appeal granted should not be rescinded The Respondent shall be entitled to be heard before the Judicial Committee in the event of

the said Summons and to ask for his costs and such other relief as he may be advised. The Judicial Committee may after considering the matter of the said Summons recommend to His Majesty to rescind the grant of special leave to appeal or give such other directions therein as the justice of the case may require.

12 The Record shall be printed in accordance with the Rules contained in Schedule A hereto. It may be printed either abroad or in England. When printed abroad the parties in England shall upon perusal consider whether the order of the documents is in accordance with these Rule and if it is not they shall agree upon the proper order. The Appellant shall then arrange copies of the Record for the use of the Judicial Committee and the other parties. In the event of the parties being unable to agree the matter shall be referred to the Registrar of the Privy Council who if he thinks fit may require the parties to attend before the Judicial Committee for directions.

13 Where the Record is printed abroad the Registrar shall at the expense of the Appellant transmit to the Registrar of the Privy Council 40 copies of such Record one of which copies he shall certify to be correct by signing his name on or initialling every eighth page thereof and by affixing thereto the seal of any of the Court appealed from.

14 Where the Record is to be printed in England the Registrar shall at the expense of the Appellant transmit to the Registrar of the Privy Council one certified copy of such Record together with an index of all the papers and exhibits in the case. No other certified copies of the Record shall be transmitted to the Agents in England by or on behalf of the parties to the Appeal.

15 Where part of the Record is printed abroad and part is to be printed in England Rr 13 and 14 shall in so far as practicable apply to such parts as are printed abroad and such as are to be printed in England respectively.

16 The reasons given by the Judge or any of the Judges for or against any judgment pronounced in the course of the proceedings out of which the Appeal arises shall by such Judge or Judges be communicated in writing to the Registrar and shall be included in the Record.

17 The Registrar as well as the parties and their Agents shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) that are not relevant to the subject matter of the Appeal and generally to reduce the bulk of the Record in so far as practicable taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents but the documents omitted to be printed or copied shall be enumerated in a type written list to be transmitted with the Record.

18 Where in the course of the preparation of a Record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant and the other party nevertheless insists upon its being included the record as finally printed (whether abroad or in England) shall with a view to the subsequent adjustment of the costs of and incidental to such document indicate in the index of papers or otherwise the fact that and the party by whom the inclusion of the document was objected to.

19 As soon as the Record is received in the Registry of the Privy Council it shall be registered in the said Registry with the date of arrival the names of the parties and the description whether printed or written. A Record or any part of a Record not printed in accordance with the Rules contained in Schedule A hereto shall be treated as written. Appeals shall be numbered consecutively in each year in the order in which the Records are received in the said Registry.

Inspection of Records
by parties

20 The parties shall be entitled to inspect the Record and to extract all necessary particulars therefrom for the purpose of entering an Appearance

21 The Appellant shall enter an Appearance before taking any step in the prosecution of the Appeal and after entering such Appearance shall forthwith give notice thereof to the Respondent if the latter has entered an Appearance

22 Where the Record arrives in England either wholly written, or partly written and partly printed the Appellant shall, within a period of four months from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedule B hereto and within a period of two months from the same date in the case of Appeals from any other Court enter an Appearance and bespeak a typewritten copy of the Record or of such parts thereof as it may be necessary to have copied and shall engage to pay the cost of preparing such copy at the following rates per folio typed (exclusive of tabular matter) 2d per folio of English matter 2½d per folio of Indian matter and 3½d per folio of foreign matter and shall also engage to pay at such price as shall be fixed by the Registrar of the Privy Council the cost of printing at has 50 copies thereof

23 As soon as the Appellant has obtained the type written copy of the Record he shall proceed with due diligence to arrange the documents in suitable order to check the index to insert marginal notes and check the same with the index and generally, to do whatever may be required for the purpose of preparing the copy for the printer in accordance with the Rules contained in Schedule A hereto and shall if the Respondent has entered an Appearance submit the copy as prepared for the printer to the Respondent for his approval. In the event of the parties being unable to agree the matter shall be referred to the Registrar of the Privy Council who if he thinks fit may require the parties to attend before the Judicial Committee for directions

24 As soon as the typewritten copy of the Record is ready for the printer, the Appellant shall lodge it in the Registry of the Privy Council for printing by a printer selected by the Registrar of the Privy Council and at the same time shall lodge the amount of the estimated cost of printing the Record

25 Whenever it shall be found that the decision of a matter on appeal is likely to turn exclusively on a question of law, the parties with the sanction of the Registrar of the Privy Council may submit such question of law to the Judicial Committee in the form of a Special Case and print such parts only of the Record as may be necessary for the discussion of the same provided that nothing herein contained shall in any way prevent the Judicial Committee from ordering the full discussion of the whole case, if they shall so think fit and that in order to

26 The Registrar of the Privy Council shall, as soon as the proof prints of the Record are ready, give notice to all parties who have entered an Appearance requesting them to attend at the Registry of the Privy Council at a time to be named in such notice in order to examine the said proof prints and compare the same with the certified Record and shall for that purpose furnish each of the said parties with one proof print After the examination has been completed the Appellant shall, within a day, lodge his proof print, duly corrected and (so far as necessary) approved by the Respondent, and the Registrar of the Privy Council shall thereupon cause the copy of the Record to be struck off from such proof print

27 Each party who has entered an Appearance shall be entitled to receive for his own use, six copies of the Record.

28 Each party who has entered an Appearance shall be entitled to receive for his own use, six copies of the Record.

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31 Each party who has entered an Appearance shall be entitled to receive for his own use, six copies of the Record.

32 Each party who has entered an Appearance shall be entitled to receive for his own use, six copies of the Record.

28 Subject to any special direction from the Judicial Committee to the contrary the costs of and incidental to the printing of the Record shall form part of the costs of the Appeal but the costs of and incidental to the printing of any document objected to by one party, in accordance with R 18, shall, if such document is found on the taxation of costs to be unnecessary or irrelevant, be disallowed to, or borne by, the party insisting on including the same in the record

PETITION OF APPEAL.

Times within which petition shall be lodged

29 The Appellant shall lodge his Petition of Appeal—

(a) where the Record arrives in England printed, within a period of four months from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedule B hereto, and within a period of two months from the same date in the case of Appeals from any other Courts,

(b) where the Record arrives in England written, within a period of one month from, but not before, the date of the completion of the printing thereof

Provided that nothing in this Rule contained shall preclude the Appellant from lodging his Petition of Appeal prior to the arrival of the Record, or the completion of the printing thereof, if there are special reasons why, in the opinion of the Registrar of the Privy Council, it should be desirable for him to do so

30 The Petition of Appeal shall be lodged in the form prescribed by R 47 hereinafter contained. It shall recite succinctly and, as far as possible in chronological order the principal steps in the proceedings leading up to the Appeal from the commencement thereof down to the admission of the Appeal, but shall not contain argumentative matter or travel into the merits of the case

Form of petition

31 The Appellant shall, after lodging his Petition of Appeal serve a copy thereof without delay on the respondent, as soon as the latter has entered an Appearance, and shall endorse such copy with the date of the lodgment

Service of petition

WITHDRAWAL OF APPEAL

32 Where an Appellant, who has not lodged his Petition of Appeal, desires to withdraw his Appeal he shall give notice in writing to that effect to the Registrar of the Privy Council, and the said Registrar shall, with all convenient speed after the receipt of such notice by letter notify the Registrar of the Court appealed from that the Appeal has been withdrawn, and the said Appeal shall thereupon stand dismissed as from the date of the said letter without further Order

Withdrawal of Appeal before Petition of Appeal has been lodged

33 Where an Appellant, who has lodged his Petition of Appeal, desires to withdraw his Appeal, he shall present a Petition to that effect to His Majesty in Council. On the hearing of any such Petition a Respondent who has entered an Appearance in the Appeal shall, subject to any agreement between him and the Appellant to the contrary, be entitled to apply to the Judicial Committee for his costs, but where the Respondent has not entered an Appearance, or having entered an Appearance, consents in writing to the prayer of the Petition, the Petition may, if the Judicial Committee think fit be disposed of in the same way *mutatis mutandis* as a consent Petition under the provisions of R 56 hereinafter contained

Withdrawal of Appeal after Petition of Appeal has been lodged

NON PROSECUTION OF APPEAL

34 Where an appellant takes no step in prosecution of his appeal within a period of four months from the date of the arrival of the Record in England in the case of an Appeal from a Court situate in any of the countries or places named in Schedule B hereto, or within a period of two months from the same date in the case of an Appeal from any other Court the Registrar of the Privy Council shall, with all convenient speed, by letter notify the Registrar of the Court appealed

Dismissal of Appeal where Appellant takes no step in prosecution thereof

from that the Appeal has not been prosecuted, and the Appeal shall thereupon stand dismissed for non prosecution as from the date of the said letter without further order, and a copy of the said letter shall be sent by the Registrar of the Privy Council to any respondent who has entered an Appearance in the Appeal

Dismissal of Appeal for non prosecution after Appellant's Appearance and before lodgment of Petition of Appeal

35 Where an Appellant who has entered an Appearance

- (a) fails to bespeak a copy of a written Record, or of part of a written Record in accordance with and within the periods prescribed by R 22, or
- (b) having bespoken such copy within the periods prescribed by R 22, fails thereafter to proceed with due diligence to take all such further steps as may be necessary for the purpose of completing the printing of the said record, or
- (c) fails to lodge his Petition of Appeal within the periods respectively prescribed by R 22 the Registrar of the Privy Council shall call upon the Appellant to explain his default and if no explanation is offered or if the explanation offered is in the opinion of the said Registrar insufficient the said Registrar shall with all convenient speed by letter notify the Registrar of the Court appealed from that the Appeal has not been effectually prosecuted, and the Appeal shall thereupon stand dismissed for non prosecution as from the date of the said letter without further order and a copy of the said letter shall be sent by the Registrar of the Privy Council to all the parties who have entered an Appearance in the Appeal

36 Where an Appeal

Dismissal of Appeal for non prosecution after lodgment of Petition of Appeal

planation is offered or if the explanation offered is in the opinion of the said Registrar insufficient the said Registrar shall issue a Summons to the Appellant calling upon him to show cause before the Judicial Committee at a time to be named in the said Summons why the appeal should not be dismissed for non prosecution Provided that no such Summons shall be issued by the said Registrar before the expiration of one year from the date of the arrival of the Record in England If the Respondent has entered an Appearance in the Appeal the Registrar of the Privy Council shall send him a copy of the said Summons and the Respondent shall be entitled to be heard before the Judicial Committee in the matter of the said Summons at the time named and to ask for his costs and such other relief as he may be advised The Judicial Committee may after considering the matter of the said Summons recommend to His Majesty the dismissal of the Appeal for non prosecution, or give such other directions therein as the justice of the case may require

Restoring an Appeal dismissed for non prosecution

37 An Appellant whose Appeal has been dismissed for non prosecution may present a Petition to His Majesty in Council praying that his Appeal may be restored

APPEARANCE BY RESPONDENT

38 The Respondent may enter an appearance at any time between the arrival of the Record and the hearing of the Appeal but if he unduly delays entering an Appearance he shall bear, or be disallowed the costs occasioned by such delay, unless the Judicial Committee otherwise direct

39 The Respondent shall forthwith after entering an Appearance give notice thereof to the Appellant if the latter has entered an Appearance

Form of Appearance where all the Respondents do not appear

40 Where there are two or more respondents and only one, or some of them, enter an Appearance, the Appearance form shall set out the names of the appearing Respondents

Separate Appearances

41 Two or more Respondents may, at their own risk as to costs enter separate Appearances in the same Appeal

Non appearing Respondent not entitled to receive notices or lodge case

42 A Respondent who has not entered an Appearance shall not be entitled to receive any notices relating to the Appeal from the Registrar of the Privy Council nor be allowed to lodge a case in the Appeal

Procedure on non appearance of Respondent

43 Where a Respondent fails to enter an Appearance in an Appeal the following Rules shall subject to any special Order of the Judicial Committee to the contrary, apply —

(a) If the non appearing Respondent was a Respondent at the time when the Appeal was admitted whether by the Order of the Court appealed from or by an Order of His Majesty in Council giving the Appellant special leave to Appeal, and it appears from the terms of the said Order, or Order in Council, or otherwise from the Record or from a certificate of the Registrar of the Court appealed from that the said non appearing Respondent has received notice, or was otherwise aware of the Order of the Court appealed from admitting the appeal or of the order of His Majesty in Council giving the Appellant special leave to appeal and has also received notice, or was otherwise aware, of the despatch of the Record to England the Appeal may, if all other conditions of its being set down are satisfied be set down *ex parte* as against the said non appearing Respondent at any time after the expiration of three months from the date of the lodging of the Petition of Appeal

(b) If the non appearing Respondent was made a Respondent by an order of His Majesty in Council subsequently to the admission of the Appeal, and it appears from the Record, or from a Supplementary Record, or from a Certificate of the Registrar of the Court appealed from, that the said non appearing respondent has received notice, or was otherwise aware of any intended application to bring him on the Record as a Respondent the Appeal may, if all other conditions of its being set down are satisfied, be set down *ex parte* as against the said non appearing Respondent at any time after the expiration of three months from the date on which he shall have been served with a copy of His Majesty's Order in Council bringing him on the Record, as a Respondent

Provided that where it is shown to the satisfaction of the Registrar of the Privy Council by Affidavit or otherwise, either that an Appellant has made every reasonable endeavour to serve a non appearing Respondent with the notices mentioned in Cls (a) and (b) respectively and has failed to effect such service or that it is not the intention of the non appearing Respondent to enter an Appearance to the Appeal, the Appeal may, without further Order in that behalf and at the risk of the Appellant be proceeded with *ex parte* as against the said non appearing Respondent

44 A Respondent who desires to defend an Appeal in *forma pauperis* may present a Petition to that effect to His Majesty in Council, which Petition shall be accompanied by an Affidavit from the petitioner stating that he is not worth £25 in the world excepting his wearing apparel and his interest in the subject matter of the appeal

PETITIONS GENERALLY

45 All petitions for orders or directions as to matters of practice or procedure arising after the lodging of the Petition of Appeal and not involving any change in the parties to an Appeal shall be addressed to the Judicial Committee All other Petitions shall be addressed to His Majesty in Council, but a Petition which is properly addressed to His Majesty in Council may include, as incidental to the relief thereby sought, a prayer for orders or directions as to matters of practice or procedure

46 Where an Order made by the Judicial Committee does not embody any special terms or include any special directions, it shall not be necessary to draw up such order, unless the Committee otherwise direct, but a Note thereof shall be made by the Registrar of the Privy Council

47 All Petitions shall consist of paragraphs numbered consecutively and shall be written, typewritten or lithographed on brief paper with quarter margin and endorsed with the name of the Court appealed from the full title and Privy Council number of the Appeal to which the Petition relates or the full title of the Petition (as the case may be) and the name and address of the London Agent (if any) of the petitioner but need not be signed, except as provided by R 3 Unless the petition is a Consent Petition within the meaning of R 36 at least five copies thereof shall be lodged

48 Where a Petition is expected to be lodged or has been lodged, which does not relate to any pending Appeal of which the Record has been registered in the Registry of the Privy Council any person claiming a right to appear before the Judicial Committee on the hearing of such Petition may lodge a Caveat in the matter thereof, and shall thereupon be entitled to receive from the Registrar of the Privy Council notice of the lodging of the Petition, if at the time of the lodging of the Caveat such Petition has not yet been lodged and if and when the Petition has been lodged to require the Petitioner to serve him with a copy of the Petition and to furnish him at his own expense with copies of any papers lodged by the Petitioner in support of his Petition The Caveator shall forthwith after lodging his Caveat give notice thereof to the Petitioner if the Petition has been lodged

49 Where a Petition is lodged in the matter of any pending Appeal of which the Record has been registered in the Registry of the Privy Council the petitioner shall serve any party who has entered an Appearance in the Appeal with a copy of such Petition, and the party so served shall thereupon be entitled to require the Petitioner to furnish him at his own expense with copies of any papers lodged by the Petitioner in support of his Petition

50 A Petition not relating to any appeal of which the Record has been registered in the Registry of the Privy Council and any other Petition containing allegations of fact which cannot be verified by reference to the registered Record or any certificate or duly authenticated statement of the Court appealed from shall be supported by Affidavit Where the Petitioner prosecutes his Petition in person the said Affidavit shall be sworn by the Petitioner himself and shall state that to the best of the deponent's knowledge information and belief the allegations contained in the Petition are true Where the Petitioner is represented by an Agent the said Affidavit shall be sworn by such Agent and shall besides stating that to the best of the deponent's knowledge information and belief the allegations contained in the Petition are true, shew how the deponent obtained his instructions and the information enabling him to present the Petition

51 A Petition for an Order of Revivor or substitution shall be accompanied by a certificate or duly authenticated statement from the Court appealed from showing who in the opinion of the said Court is the proper person to be substituted or entered on the Record in place of or in addition to a party who has died or undergone a change of status

52 The Registrar of the Privy Council may refuse to receive a Petition on the grounds that it discloses no reasonable cause of appeal, or is frivolous or contains scandalous matter, but the Petitioner may appeal by way of motion, from such refusal to the Judicial Committee

53 As soon as a Petition and all necessary documents are lodged, the Petition shall thereupon be deemed to be set down

54 On each day appointed by the Judicial Committee for the hearing of Petitions the Registrar of the Privy Council shall, unless the Committee otherwise direct, put in the paper for hearing all such Petitions as have been set down, provided that in the absence of special circumstances of urgency to be shown to the satisfaction of the said Registrar, no Petition, if opposed, shall be put in the paper for hearing before the expiration of ten clear days from the lodging thereof unless the opponent consents to the Petition being put in the paper on an earlier day

55 Subject to the provisions of the next following Rule the Registrar of the Privy Council shall, as soon as the Judicial Committee have appointed a day for the hearing of a Petition notify all parties concerned by Summons of the day so appointed

56 Where the prayer of a Petition is consented to in writing by the opposite party or where a petition is of a formal and non contentious character the Judicial Committee may, if they think fit make their Report to His Majesty on such Petition or make their Order thereon as the case may be without requiring the attendance of the parties in the council chamber and the Registrar of the Privy Council shall not in any such case issue the summons provided for by the last preceding rule but shall with all convenient speed after the committee have made their report or order notify the parties that the report or order has been made and of the date and nature of such report or order

57 A petitioner who desires to withdraw his petition shall give notice in writing to that effect to the Registrar of the Privy Council Where the Petition is opposed the opponent shall subject to any agreement between the parties to the contrary be entitled to apply to the Judicial Committee for his costs but where the Petition is unopposed or where in the case of an opposed Petition the parties have come to an agreement as to the costs of the Petition the Petition may if the Judicial Committee think fit be disposed of in the same way *mutatis mutandis* as a Consent Petition under the provisions of the last preceding Rule

58 Where a petitioner unduly delays bringing a Petition to a hearing the Registrar of the Privy Council shall call upon him to explain the delay and if no explanation is offered or if the explanation offered is in the opinion of the said Registrar insufficient the said Registrar may after notifying all parties interested by Summons of his intention to do so put the Petition in the paper for hearing on the next following day appointed by the Judicial Committee for the hearing of Petitions for such directions as the Committee may think fit to give thereon

59 At the hearing of a Petition not more than one counsel shall be admitted to be heard on a side

CASE

60 No party to an appeal shall be entitled to be heard by the Judicial Committee unless he has previously lodged his case in the appeal provided that where a respondent who has entered an appearance does not desire to lodge a case in the appeal he may give the Registrar of the Privy Council notice in writing of his intention not to lodge any case while reserving his right to address the Judicial Committee on the question of costs

61 The case may be printed either abroad or in England and shall in either event be printed in accordance with the Rules I to III contained in Schedule A hereto every tenth line thereof being numbered in the margin and shall be signed by at least one of the counsel who attends at the hearing of the appeal or by the party himself if he conducted his appeal in person

62 Each party shall lodge 30 prints of his case

63 The case shall consist of paragraphs numbered consecutively and shall state as concisely as possible the circumstances out of which the appeal arises the contentions to be urged by the party lodging the same and the reasons of appeal References by page and line to the relevant portions of the record as printed shall as far as practicable be printed in the margins and care shall be taken to avoid as far as possible the reprinting in the case of long extracts from the record The Taxing Officer in taxing the costs of the appeal shall either of his own motion or at the instance of the opposite party inquire into any unnecessary prolixity in the case and shall disallow the costs occasioned thereby

64 Two or more respondents may at their own risk as to costs lodge separate cases in the same appeal

65 Each party shall after lodging his case, forthwith give notice thereof to the other party

56 Where the prayer of a Petition is consented to in writing by the opposite party or where a petition is of a formal and non contentious character, the Judicial Committee may, if they think fit make their Report to His Majesty on such Petition or make their Order thereon as the case may be without requiring the attendance of the parties in the council chamber and the Registrar of the Privy Council shall not in any such case issue the summons provided for by the last preceding rule, but shall with all convenient speed after the committee have made their report or order notify the parties that the report or order has been made and of the date and nature of such report or order

57 A petitioner who desires to withdraw his petition shall give notice in writing to the Judicial Committee for his costs but where the Petition is unopposed or where in the case of an opposed Petition the parties have come to an agreement as to the costs of the Petition the Petition may if the Judicial Committee think fit be disposed of in the same way *mutatis mutandis* as a Consent Petition under the provisions of the last preceding Rule

58 Where a petitioner unduly delays bringing a Petition to a hearing the Registrar of the Privy Council shall call upon him to explain the delay and if no explanation is offered or if the explanation offered is in the opinion of the said Registrar insufficient the said Registrar may after notifying all parties interested by Summons of his intention to do so put the Petition in the paper for hearing on the next following day appointed by the Judicial Committee for the hearing of Petitions for such directions as the Committee may think fit to give thereon

59 At the hearing of a Petition not more than one counsel shall be admitted to be heard on a side

CASE

60 No party to an appeal shall be entitled to be heard by the Judicial Committee unless he has previously lodged his case in the appeal provided that where a respondent who has entered an appearance does not desire to lodge a case in the appeal he may give the Registrar of the Privy Council notice in writing of his intention not to lodge any case while reserving his right to address the Judicial Committee on the question of costs

61 The case may be printed either abroad or in England and shall in either event be printed in accordance with the Rules I to III contained in Schedule A hereto every tenth line thereof being numbered in the margin and shall be signed by at least one of the counsel who attends at the hearing of the appeal or by the party himself if he conducted his appeal in person

62 Each party shall lodge 30 prints of his case

63 The case shall consist of paragraphs numbered consecutively and shall state as concisely as possible the circumstances out of which the appeal arises the contentions to be urged by the party lodging the same

motion, or at the instance of the opposite party inquire into any unnecessary prolixity in the case, and shall disallow the costs occasioned thereby

64 Two or more respondents may at their own risk as to costs lodge separate cases in the same appeal

65 Each party shall, after lodging his case, forthwith give notice thereof to the other party

47 All Petitions shall consist of paragraphs numbered consecutively and shall be written, typewritten, or lithographed on brief paper with a margin and endorsed with the name of the Court appealed to.

Form of Petition and number of copies to be lodged

The full title and Privy Council number of the Appeal to which the Petition relates or the full title of the Petition (as the case may be), and the name and address of the London Agent (if any) of the petitioner but need not be signed, except as provided by R 3. Unless the petition is a consent Petition within the meaning of R 56 at least five copies thereof shall be lodged.

48 Where a Petition is expected to be lodged, or has been lodged, which does not relate to any pending Appeal of which the Record has been registered in the Registry of the Privy Council, any person claiming a right to appear before the Judicial Committee on the hearing of such Petition may lodge a Caveat in the matter thereof, and shall thereupon be entitled to receive from the Registrar of the Privy Council notice of the lodging of the Petition, if at the time of the lodging of the Caveat such Petition has not yet been lodged and if and when the Petition has been lodged to require the Petitioner to serve him with a copy of the Petition and to file with him at his own expense, with copies of any papers lodged by the Petitioner in support of the Petition. The Caveator shall forthwith after lodging his Caveat give notice thereof to the Petitioner if the Petition has been lodged.

Caveat

49 Where a Petition is lodged in the matter of any pending Appeal of which the Record has been registered in the Registry of the Privy Council, the petitioner shall serve any party who has entered an Appeal in the Appeal with a copy of such Petition, and the party so served shall thereupon be entitled to require the Petitioner to furnish him, at his own expense, with copies of any papers lodged by the Petitioner in support of his Petition.

Service of Petition

50 A Petition not relating to any appeal of which the Record has been registered in the Registry of the Privy Council, and any other Petition containing allegations of fact which cannot be verified by reference to the registered Record or any certificate or duly authenticated statement of the Court appealed from shall be supported by an Affidavit.

Verifying Petition by Affidavit

Where the Petitioner prosecutes his Petition in person the said Affidavit shall be sworn by the Petitioner himself and shall state that to the best of the deponent's knowledge, information and belief the allegations contained in the Petition are true. Where the Petitioner is represented by an Agent the said Affidavit shall be sworn by such Agent and shall be stating that to the best of the deponent's knowledge, information and belief, the allegations contained in the Petition are true. He shall shew how the deponent obtained his instructions and the information enabling him to present the Petition.

51 A Petition for an Order of Revivor or substitution shall be accompanied by a certificate or duly authenticated statement from the Court appealed to showing who in the opinion of the said Court is the proper person to be substituted or entered, or to a party who has died.

Petition for Order of Revivor or substitution

Petition disclosing no reasonable cause of appeal or containing scandalous matter to be refused

52 The Registrar of the Privy Council shall refuse to receive a Petition on the grounds that it discloses no reasonable cause of appeal.

Setting down petition

53 As soon as a Petition and all necessary documents are lodged, the Petition shall thereupon be deemed to be set down for hearing by the Judicial Committee for the hearing of Petitions. The Registrar of the Privy Council shall, unless the Committee otherwise direct, put in the paper for hearing all such Petitions which have been set down, provided that in the absence of special circumstances of urgency to be shown to the satisfaction of the Registrar, no Petition, if opposed, shall be put in the paper for hearing before the expiration of ten clear days from the lodging thereof, unless the petitioner consents to the Petition being put in the paper on an earlier day.

54 On each day appointed by the Judicial Committee for the hearing of Petitions the Registrar of the Privy Council shall, unless the Committee otherwise direct, put in the paper for hearing all such Petitions which have been set down, provided that in the absence of special circumstances of urgency to be shown to the satisfaction of the Registrar, no Petition, if opposed, shall be put in the paper for hearing before the expiration of ten clear days from the lodging thereof, unless the petitioner consents to the Petition being put in the paper on an earlier day.

Times within which set down petitions shall be heard

hearing before the expiration of ten clear days from the lodging thereof, unless the petitioner consents to the Petition being put in the paper on an earlier day

Notice to parties of day fixed for hearing Petition

55 Subject to the provisions of the next following Rule the Registrar of the Privy Council shall, as soon as the Judicial Committee have appointed a day for the hearing of a Petition notify all parties concerned by Summons of the day so appointed.

56 Where the power of a Petition is consented to in writing by the opposite party or where a petition is of a formal and non contentious character the Judicial Committee may, if they think fit make their Report to His Majesty on such Petition or make their Order thereon as the case may be without requiring the attendance of the parties in the council chamber and the Registrar of the Privy Council shall not in any such case issue the summons provided for by the last preceding rule but shall with all convenient speed after the committee have made their report or order notify the parties that the report or order has been made and of the date and nature of such report or order

57 A petitioner who desires to withdraw his petition shall give notice in writing to that effect to the Registrar of the Privy Council Where the Petition is opposed the opponent shall subject to any agreement between the parties to the contrary be entitled to apply to the Judicial Committee for his costs but where the Petition is unopposed or where in the case the Petition way mutatis

58 Where a petitioner unduly delays bringing a Petition to a hearing the Registrar of the Privy Council shall call upon him to explain the delay and if no explanation is offered or if the explanation offered is in the opinion of the said Registrar insufficient the said Registrar may after notifying all parties interested by Summons of his intention to do so put the Petition in the paper for hearing on the next following day appointed by the Judicial Committee for the hearing of Petitions for such directions as the Committee may think fit to give thereon

59 At the hearing of a Petition not more than one counsel shall be admitted to be heard on a side

CASE

60 No party to an appeal shall be entitled to be heard by the Judicial Committee unless he has previously lodged his case in the appeal provided that where a respondent who has entered an appearance does not desire to lodge a case in the appeal he may give the Registrar of the Privy Council notice in writing of his intention not to lodge any case while reserving his right to address the Judicial Committee on the question of costs

61 The case may be printed either abroad or in England and shall in either event be printed in accordance with the Rules I to III contained in Schedule A hereto every tenth line thereof being numbered in the margin and shall be signed by at least one of the counsel who attends at the hearing of the appeal or by the party himself if he conducted his appeal in person

62 Each party shall lodge 30 prints of his case

63 The case shall consist of paragraphs numbered consecutively and shall state as concisely as possible the circumstances out of which the appeal arises the contentions to be urged by the party lodging the same and the reasons of appeal References by page and line to the relevant portions of the record as printed shall as far as practicable be printed in the margins and care shall be taken to avoid as far as possible the reprinting in the case of long extract from the record The Taxing Officer in taxing the costs of the appeal shall either of his own motion or at the instance of the opposite party inquire into any unnecessary prolixity in the case, and shall disallow the costs occasioned thereby

64 Two or more respondents may at their own risk as to costs, lodge separate cases in the same appeal

65 Each party shall after lodging his case, forthwith give notice thereof to the other party

- 66 Subject as hereinafter provided, the party who lodges his case first may, at any time after the expiration of three clear days from the day on which he has given the other party the notice prescribed by the last preceding Rule, serve such other party, if the latter has not in the

Case notice

meantime lodged his case in a month from the day of his so doing the other party fails

at any time after the expiration of the time limited by the said case notice for the lodging of the case lodge an affidavit of service (which) shall set out the terms of the said case (notice) and the appeal shall thereupon if all other conditions of its being set down are satisfied be set down *ex parte* as against the party in default, provided that no case notice shall be served until after the completion of the printing or re arrangement under R 12 of the Record and also that nothing in this Rule contained shall preclude the party in default from lodging his case at his own risk as regards costs and otherwise at any time up to the date of hearing

- 67 Subject to the provisions of R 43 and of the last preceding Rule an appeal shall be set down *ipso facto* as soon as the cases on both sides are lodged and the parties shall thereupon exchange cases by handing one another either at the offices of one of the Agents or in the Registry of the Privy Council ten copies of their respective cases

Setting down Appeal and exchanging cases

BINDING RECORDS, ETC

- 68 As soon as an appeal is set down, the appellant shall attend at the Registry of the Privy Council and obtain ten copies of the record and cases to be

Mode of binding records etc for use of Judicial Committee

bound for the use of the Judicial Committee at the hearing. The copies shall be bound in cloth or in half leather with paper sides and six leaves of blank paper shall be inserted before the appellant's case. The front cover shall bear a printed label stating the title and Privy Council number of the appeal the contents of the volume and the names and addresses of the London Agents. The several documents indicated by incuts shall be arranged in the following order (1) Appellant's case, (2) Respondent's case, (3) Record (if in more than one part showing the separate parts by incuts all parts being prised at the top of the page) (4) Supplemental record (if any), and the short title and Privy Council number of the appeal shall also be shown on the back.

Time within which bound copies shall be lodged

69 The Appellant shall lodge the bound copies not less than four clear days before the commencement of the sittings during which the appeal is to be heard

HEARING

- 70 The Registrar of the Privy Council shall name a day on or before which appeals must be set down if they are to be entered in the list of business for the ensuing sittings. All appeals set down on or before the day named shall, subject to any directions from the Committee or to any agreement between the parties to the contrary, be entered in such list of business and shall subject to any directions from the Committee to the contrary, be heard in the order in which they are

Notice of day on or before which appeals must be set down for ensuing sittings.

set down

- 71 The Registrar of the Privy Council shall subject to the provisions of R 42, notify the parties to each appeal by Summons at the earliest possible date, of the day appointed by the Judicial Committee for the hearing of the appeal, and the parties shall be in readiness to be heard on the day so appointed

Notice to parties of day fixed for hearing appeal

Only two counsel heard on a side in appeals

Nautical assessors

72 At the hearing of an appeal not more than two counsel shall be admitted to be heard on a side

73 In Admiralty appeals the Judicial Committee may, if they think fit require the attendance of Nautical Assessors

JUDGMENT.

- 74 Where the Judicial Committee, after hearing an appeal decide to reserve their judgment thereon, the Registrar of the Privy Council shall in due course notify the parties by Summons of the day appointed by the Committee for the delivery of the judgment

Notice to parties of day fixed for delivery of judgment

COSTS

75 All Bills of Costs under the orders of the Judicial Committee on appeals Petitions and other matters, shall be referred to the Registrar of the Privy Council or such other person as the Judicial Committee may appoint, for taxation and all such taxation shall be regulated by the Schedule of Fees set forth in Schedule C hereto

Taxation of costs **76** The Taxation of costs in England shall be limited to costs incurred in England

77 The Registrar of the Privy Council shall with all convenient speed after the Order to tax appeal Petition or other matter issue to the party to whom costs have been awarded an order to tax and a notice specifying the day and hour appointed by him for taxation The party receiving such order to tax and notice shall not less than 48 hours before the time appointed for taxation lodge his bill of costs (together with all necessary vouchers for disbursements) and serve the opposite party with a copy of his bill of costs and of the order to tax and notice

78 The Taxing Officer may if he think fit disallow to any party who fails to lodge his bill of costs (together with all necessary vouchers for disbursements) within the time prescribed by the last preceding Rule or where taxation delayed through the fault of the party whose costs are to be taxed the charges to which such party would otherwise be entitled for drawing his bill of costs and attending the taxation

79 Any party aggrieved by a taxation may appeal from the decision of the Taxing Officer to the Judicial Committee The appeal shall be heard by way of motion and the party appealing shall give three clear days notice of motion to the opposite party and shall also leave a copy of such notice in the Registry of the Privy Council

80 The amount allowed by the Taxing Officer on the taxation shall subject to any appeal from his taxation to the Judicial Committee and to be inserted in His Majesty's Order in Council subject to any direction from the Committee to the contrary be inserted in His Majesty's Order in Council determining the Appeal or Petition

81 Where the Judicial Committee directs costs to be taxed on the pauper scale the Taxing Officer shall not allow any fees of counsel and shall only award to the agents out of pocket expenses and a reasonable allowance to cover office expenses such allowance to be taken at about three eighths of the usual professional charges in ordinary appeals Such pauper scale shall apply to and include the application upon which leave to appeal in *forma pauperis* was granted

82 Where the Appellant has lodged security for the Respondent's costs of an appeal in the Registry of the Privy Council the Registrar of the Privy Council shall deal with such security in accordance with the directions contained in His Majesty's order in council determining the appeal

MISCELLANEOUS

83 The Judicial Committee may for sufficient cause shown excuse the parties from compliance with any of the requirements of these Rules and may give such directions in matters of practice and procedure as they shall consider just and expedient Applications to be excused from compliance with the requirements of any of these Rules shall be addressed in the first instance to the Registrar of the Privy Council who shall take the instructions of the Committee thereon and communicate the same to the parties If in the opinion of the said Registrar it is desirable that the application should be dealt with by the Committee in open Court he may direct the party applying to lodge in the Registry of the Privy Council and to serve the opposite party with a notice of motion returnable before the Committee

84 Any document lodged in connection with an appeal petition or other matter pending before His Majesty in Council or the Judicial Committee may be amended by leave of the Registrar of the Privy Council but if the said Registrar is of opinion that an Application for leave to amend should be dealt with by the Committee in open Court he may direct the party applying to lodge in the Registry of the Privy Council and to serve the opposite party with a notice of motion returnable before the Committee

Affidavits may be sworn before the Registrar of the Privy Council 85 Affidavits relating to any Appeal Petition or other matter pending before His Majesty in Council or the Judicial Committee may be sworn before the Registrar of the Privy Council

86 Where a party to an Appeal Petition or other matter pending before His Majesty in Council changes his Agent such party or the new agent shall forthwith give the Registrar of the Privy Council and the outgoing agent notice of the change of Agent

87 Subject to the provisions of any Statute or of any statutory Rule or Order to the contrary these Rules shall apply to all matters falling within the Scope of application of Appellate Jurisdiction of His Majesty in Council

88 These Rules may be cited as the Judicial Committee Rules 1925 and they shall come into operation on the 1st day of January 1926

SCHEDULE A

Rules as to printing

I All Records and other proceedings in Appeals or other matters pending before His Majesty in Council or the Judicial Committee which are required by the above Rules to be printed shall be printed in the form known as *demy quarto*

II The size of the paper used shall be such that the sheet when folded and trimmed will be 11 inches in height and $8\frac{1}{2}$ inches in width

III The type to be used in the text shall be Pica type but Long Primer shall be used in printing accounts tabular matter and notes. The number of lines in each page of Pica type shall be 47 or thereabouts and every tenth line shall be numbered in the margin

IV Records shall be arranged in two parts in the same volume where practicable viz —

Part I The pleadings and proceedings the transcript of the evidence of the witnesses the judgments decrees etc of the Courts below down to the Order admitting the Appeal

Part II The exhibits and documents

V The Index to Part I shall be in chronological order and shall be placed at the beginning of the volume

The Index to Part II shall follow the order of the exhibit mark and shall be placed immediately after the index to Part I

VI Part I shall be arranged strictly in chronological order i.e. in the same order as the Index

Part II shall be arranged in the most convenient way for the use of the Judicial Committee as the circumstances of the case require. The documents shall be printed as far as suitable in chronological order mixing plaintiff's and defendant's documents together when necessary. Each document shall show its exhibit mark and whether it is a plaintiff's or defendant's document (unless this is clear from the exhibit mark) and in all cases documents relating to the same matter, such as

(a) a series of correspondence or

(b) proceedings in a suit other than the one under appeal shall be kept together. The order in the record of the documents in Part II will probably be different from the order of the Index and the proper page number of each document shall be inserted in the printed index

The parties will be responsible for arranging the Record in proper order for the Judicial Committee and in difficult cases Counsel may be asked to settle it.

VII The documents in Part I shall be numbered consecutively.

The documents in Part II shall not be numbered apart from the exhibit mark.

VIII Each document shall have a heading which shall consist of the number or exhibit mark and the description of the document in the Index without the date.

IX Each document shall have a marginal note which shall be repeated on each page over which the document extends:—

PART I

(a) Where the case has been before more than one Court the short name of the Court shall not appear. Where the case has been before only one Court the name of the Court need not appear.

(b) The marginal note of the document shall then appear consisting of the number and description of the document in the Index with the date except in the case of oral evidence.

(c) In the case of oral evidence plaintiff evidence or defendant's evidence shall appear beneath the name of the Court and then the marginal note consisting of the number in the Index and the witness name with examination cross examination or re-examination the case name.

PART II

The word Exhibit shall first appear

Then the title of the exhibit shall then appear consisting of the exhibit mark and the description of the document in the Index with the date.

X The parties shall agree to the omission of formal and irrelevant documents but the description of the document may appear (both in the index and in the record) if desired, with the words "not printed" against it.

A long series of documents such as accounts rent rolls inventories etc. shall not be printed in full unless Counsel so advise but the parties shall agree to short extracts being printed as specimens.

XI In cases where maps sent from abroad are of an inconvenient size or unsuitable in character the appellant shall in agreement with the respondent prepare in England from the materials sent from abroad maps drawn properly to scale and of reasonable size showing as far as possible the claim of the respective parties in different colours.

SCHEDULE B.

Countries and places referred to in Rules 22⁹⁹ and 34

Australia	Fiji
British Honduras	Hongkong
British North Borneo	India
Brunei	Mauritius
Ceylon	New Zealand
China	Persia
Eastern African Dependencies	Seychelles
Falkland Islands	Somaliland Protectorate
Federated Malay States	Straits Settlements

SCHEDULE C

I

Fees allowed to agents conducting appeals or other matters before the Judicial Committee of the Privy Council

(33 1/3 per cent is added to these fees)

	£	s	d
Retainer fee	0	13	4
Drawing appearance or caveat	0	5	0
Perusing printed record for every printed sheet of 8 pages	1	1	0
Perusing written record for every 20 folios	0	6	8
Drawing index per folio	0	2	0
Drawing marginal notes and headings per folio	0	0	6
Attending at the Registry to examine proof print of record with certified record per day	3	3	0
Attending at the Registry to examine proof print of record with certified record per half day	1	11	6
Correcting revised print of record per sheet of 8 pages			
Foreign or Indian cases	1	1	0
Other cases	0	10	6
Instruction for petition or motion or to oppose	0	10	0
Instructions for petition or appeal	0	10	0
Instructions for case	1	0	0
Drawing petition motion case or affidavit per folio	0	2	0
Copying petition motion case or affidavit per folio	0	0	6
Correcting proof of case per sheet of 8 pages Foreign or Indian cases	1	1	0
Other cases	0	10	6
Drawing and fair copy case notice	0	10	0
Perusing petition motion or affidavit per folio	0	2	0
Perusing petition of appeal	1	1	0
Perusing case per printed sheet of 8 pages	1	1	0
Instructions for and preparing retainer to counsel	0	10	0
Instructions to counsel to argue an appeal	1	0	0
Instructions to counsel to argue a petition or motion	0	10	0
Instructions to printer	0	10	0
Attending consultation	1	0	0
Attending at the council chamber for the hearing of a petition or motion	1	6	8
Attending at the council chamber all day on an appeal not called on	2	6	8
Attending the hearing of an appeal per day	3	6	8
Attending a judgment	1	6	8
Approving draft order	0	10	0
Attendances generally	0	10	0
Attendances on counsel where fee is 30 guineas or over	1	0	0
Drawing bill of costs per folio	0	1	0
Copying bill of costs per folio	0	0	6
Attending taxation of costs of an appeal	3	1	0
Attending taxation of costs of a petition or motion	1	1	0
Sessions fee for each year or part of a year from the date of appearance (in appeals only)	3	3	0
Letters etc. (in petitions)	1	1	0
Letters etc. (in appeals) for 1st year	2	1	0
For each following year	1	1	0

II

Council Office fees

	£	s.	d.
Entering appearance	1	0	0
Amending appearance	0	10	0
Examining proof print of record with the certified record at the Registry (chargeable to appellant only) per day	2	0	0
Examining proof print of record with the certified record at the Registry (chargeable to appellant only) per half day	1	0	0
Lodging petition of appeal	3	0	0
Lodging petition for special leave to appeal	2	0	0
Lodging any other petition or motion	1	0	0
Lodging case or notice under R 60	2	0	0
Setting down appeal (chargeable to appellant only)	5	0	0
Setting down petition for special leave to appeal (chargeable to petitioner only)	2	0	0
Setting down any other petition (chargeable to petitioner only)	1	0	0
Summons	1	0	0
Committee report on petition	2	0	0
Committee report on appeal	3	0	0
Original order of His Majesty in Council determining an appeal	5	0	0
Any other original order of His Majesty in Council	3	0	0
Plain copy of an order of His Majesty in Council	0	5	0
Original order of the Judicial Committee	2	0	0
Plain copy of Committee Order	0	5	0
Lodging affidavit	0	10	0
Certificate delivered to parties	0	10	0
Lodging Caveat	1	0	0
Subpoena to witnesses	0	10	0

Taxing fee 6d for each pound allowed or a fraction thereof up to £ 00 and one per cent beyond that sum calculated at the rate of 2s for each £25 or a portion thereof

APPENDIX V.

STATEMENT OF OBJECTS AND REASONS

The Bill is sufficiently explained in the Report of the Special Committee printed below.

H ERLE RICHARDS

Simla 3rd September, 1907

*Report of the Special Committee appointed to consider the amendment of
the Civil Procedure Code*

We have the honour to present this report on the proposals to amend the Code of C P which have been submitted for our consideration by the Government of India and annexed to it a draft Bill amended by us. A detailed account of the alterations introduced in the Bill will be found in the Notes on clauses which form the second part of this Report but we desire by way of preface to make some observations of a general character on the defects in the existing law which appear to us to call for reform and on the more important of those alterations.

1 The Code of C P of 1882 has been in force for 25 years and the experience of those years has shown that the general lines on which it proceeds are sound. The matters in which it has proved defective are for the most part matters of detail and they arise, as it seems to us, mainly from the fact that it is impossible to frame a fixed and rigid Code in such a manner as to sufficiently meet the varying needs of an area so diversified as that to which the Code applies. In our opinion it is essential that there should be some machinery to enable variations to be introduced in procedure to meet the different requirements of different localities as well as to enable defects to be remedied as they are discovered without resort to the tardy process of legislation. We propose to make provision for these purposes by a re-arrangement of the Code. We recommend that matters of mere machinery should be relegated to Rules capable of alteration by each High Court subject to certain checks and that those provisions only should be retained in the body of the Code in which some degree of permanence and uniformity is desirable. This re-arrangement is in accordance with precedent and possesses advantages so obvious that it is needless to enlarge upon them.

inconvenience must arise from this cause in the first instance but this is but a small disadvantage in consequence we cannot think that any should stand in the way

3 The adoption of this principle has necessarily involved a departure from the arrangement of the present Code but in other respects we have advisedly adhered as closely as possible to the existing language the meaning of which is now well understood by Courts and by practitioners. We have refrained from any change in the arrangement of the Code rather than to provide in the new Code for the

excessive elaboration of details of procedure tends to clog the actions of the Court and in consequence, to encourage technicalities. For this reason we have made no attempt to embody in the Code a digest of the very numerous decisions on the existing sections. We have made amendments to meet case law only on points on which there is a conflict of authority. And in this connexion we desire to point out that at the present time there is even less justification for the enactment of elaborate provisions in regard to procedure than at the time when the Code of 1882 was passed. Since then the standard of legal efficiency in the mofussil has been materially raised and the principles of procedure are now so well understood that the Courts may be trusted to apply them intelligently in cases for which no provision may be made in terms.

But although we have made the present Code the basis of our draft we have carefully examined the Bill settled by the Select Committee in 1903 and we desire to express our acknowledgments to that Committee for the store of information it contains and for the materials collected in their Report.

Apart from the rearrangement to which reference has been made we have not introduced many changes of a radical character in the Code.

4 The general nature of some of the amendments we recommend may be conveniently illustrated by a brief examination of the extent to which the various stages of a suit will be affected by them.

A To begin with it is hoped that the multiplicity of suits will be further curtailed by the new provisions we have inserted to remove limitations which we regard as needless on the comprehensive aspect and by the wider powers of amendment vested in the Courts under the Bill. An adequate check provided by the power of a Court to interfere where embarrassment is likely to result.

B Increased facilities have been given for the service of process to which further reference is made in the Notes on Clauses. It is hoped that in the gradual introduction of service by post may be found a solution of one of the principal defects in our legal system.

C In our opinion it is more easy than it is in this country should come to trial with all its procedure clearly defined and that case should not be expanded or grounds shifted without reference to the true facts. For this purpose we think that the present system of pleadings in the Mofussil which is too bulky should be improved and we have accordingly in the Rules and Order of pleading which it is hoped will lead to sounder and fairer methods of arriving at the real point in dispute. The forms have been revised and we hope that they will be brought into more general use in the mofussil.

We have not been able within the time at our disposal to make these forms or the other forms in the Appendix to Schedule I complete but this is a matter of detail which can be further considered before the Bill is passed into law.

D It is not possible to secure expedition in the disposal of suits unless the questions of fact on which there is a real contest are narrowed down as far as possible. As a step towards this we have incorporated in the rules an Order in which provision is made for the admission not only of documents but also of fact. It must be left to litigants and their advisers to make adequate use of this Order but it is hoped that the Courts will encourage the use of it since it certainly affords a means whereby the two principal evils of litigation delay and expense can be materially diminished.

E We attach much importance to a proper understanding made by Courts in the mofussil of the procedure prescribed for the first hearing. The Code as it stands makes provision for the examination of parties by the Court and we have altered the language so as to compel the production of documents at the first hearing. In our opinion this will act as a salutary check on the fabrication of documentary evidence.

F The provision relating to the hearing of suits do not call for material alteration but we have thought it well to provide expressly for the cases where a party dies between conclusion of the hearing and delivery of judgment. It would obviously be wrong that such an accident should in any way interfere with the disposal of the case and we have therefore inserted a provision to enable judgment to be pronounced notwithstanding the death.

G A change of importance has been made in regard to decrees. In the first place we have inserted an express provision recognizing the distinction between preliminary and final decrees. We hope in this way to afford facilities for checking the delay that now results from the objectionable practice of leaving for determination in execution on questions which should be decided by the decree. This change should ensure the more expeditious disposal of a class of suits which at present are conspicuous for the delay to which they give rise. Another amendment of importance which we have introduced is in regard to mortgage suits. These are very numerous and involve complicated questions of law. Hitherto some confusion has been caused by the co-existence of the provisions of the Transfer of Property Act and of the Code as regards execution in mortgage suits. We think that the provisions regulating this matter should be dealt with in their entirety in the Code and we have therefore introduced Rule 10 Order XXIV to give effect to our view. We propose that the sections of the Transfer of Property Act affected by this change should be repealed. We desire to call the attention of the Provinces to which that Act does not apply to the effect of these changes.

In our opinion, it is expedient to give greater assistance to the Courts in the framing of decrees. The importance of this branch of procedure cannot be over rated, it is surrounded by difficulties which are a fruitful source of error and consequently of litigation. We have amplified the provisions of the Code to meet this defect, and have introduced some forms which can be adopted to meet the requirements of individual cases. We think that further forms might be added with advantage before the Bill becomes law.

H Amongst other matters, we have removed limitations which at present exist on the power of appointing Receivers, and have conferred a power to appoint Receivers on Subordinate Courts.

5 **Execution**—The subject of execution is, perhaps one of the most difficult with which we have had to deal. The present system in the mofussil at any rate, tends to excite delay and affords facilities for defeating the claims of creditors. At the same time the creditor often has only himself to blame owing to his own laches in prosecuting his rights. In the Presidency Town the same objections cannot be fairly raised: the system works well, whilst in the mofussil the difficulties arise not so much from the machinery itself as from the defective manner in which it is worked. One of the most fruitful sources of litigation is the setting aside of execution sales on the ground of irregularity in the publication of the sale proclamation. It is notorious that in many of these cases the Court's officer either through negligence or dishonesty has not duly published the proclamation but it is impossible to deal with such cases by any provision in a Code. After a most careful consideration of the subject, we have not seen our way to any very drastic changes in the present system. We have found ourselves unable to accept the some what far reaching proposal of the Committee of 1902 in relation to the execution of decrees by precept but we are so far in accord with the view expressed by that Committee as to have been able to insert in the Bill a clause which enables the Court which passed the decree to issue a precept to any other Court to attach property of the judgment debtor pending execution in the ordinary course. Beyond this we have felt we could not safely go.

We anticipate that there will be a substantial saving of time and consequent expense from the provision requiring that mesne profits shall be ascertained by the Court under the decree itself and not as now in execution proceedings.

Clause 53 has been introduced to settle a long mooted point upon which there is much diversity of judicial opinion as to whether or not questions as to the liability of ancestral property in the hands of a son or other descendant to whom it has come otherwise than by descent for the payment of the debt for which the decree was passed can be determined under Cl 47 of the present Bill corresponding with S 244 of the existing Code. We think they should be.

Other amendments deserving notice relate to (1) the power to break open the outer door of

We regard the changes made in relation to execution as calculated to materially assist the judgment creditor in recovering the fruits of his judgment.

6 **Arbitration**—Two questions of importance have arisen in connection with this subject. (1) Should any of the sections of the Arbitration Act of 1893 be incorporated into the Code? (2) Should the right of appeal now existing be altered and if so in what direction? We are of opinion that the best course would undoubtedly be to eliminate from the Code all the clauses as to arbitration, and insert them in a new and comprehensive Arbitration Act. There are perhaps difficulties as to this at present. We have determined therefore to leave the arbitration clauses much as they are in the present Code but we have placed them in a Schedule in the hope that at no distant date they may be transferred into a comprehensive Arbitration Act.

In regard to appeals, some change has been suggested by the Judicial Committee as expressed in favour of finality in cases of arbitration will take advantage of every such right in I L R 25 Cal 141 (which followed many other cases in the Calcutta High Court) we have inserted the words "or being otherwise invalid" in Sub-s (c) of S 521 of the present Code. If therefore either party considers the award as invalid on any ground he can apply to have it set aside. We have thought it right to give one appeal from the opinion expressed by the Court.

on a ~~re~~ appeal case under S 517 and to allow one appeal ~~as~~ from order under Ss 521, 523 and 526. And having regard to the rather wide language of the Judicial Committee in *Ghulam's* case we have further thought it advisable to make it clear that an order granting an application either under S 523 or S 526 is not to be deemed a decree within the meaning of the Code, otherwise there would be a wider right of appeal from orders under these sections than from a decree under S 522. The other alterations deal with the text rather than with any question of policy or principle.

7 Suits relating to public matters—We have inserted a clause to enable actions for public necessities to be brought with the consent of the Advocate General irrespective of special damage. It has been represented to us that such a power is needed and we concur in that view.

8 Public Charities—The suggestion has been made on high authority that some express reference should be made in the Code to the power of the Court to apply Cypres doctrine in the carrying of schemes. But this power would appear to exist already within its proper limits (*Mayor of Lyons* etc. L R 3 I A 32) and we do not think it necessary to make express reference to it.

It has been represented to us to by more than one gentleman whose opinion is entitled to weight that the power to enquire into the affairs of public charities should be made more extensive. The clause as it stands gives sufficient powers to the Courts to direct accounts and to frame schemes when once a suit has been instituted but it is said that members of the public interested in any public charity ought to have the means of calling for and inspecting accounts without undertaking the burden of a suit at least in the first instance. We are told that revenues derived from charitable trusts are in some cases very large in amount that no accounts of their expenditure are ordinarily rendered and that there is good ground for believing that a considerable portion is mis-spent or squandered on useless objects.

The Hon ble Dr Rashbehary Ghose supports these views and has submitted a clause to give effect to them. It is in the following terms—

93 A (1) The Court may also upon an application by any two or more persons having the like interest and having obtained the like consent direct any trustee of such charity to cause to be prepared and filed in the Court within such time as may be specified in the order a detailed account of the receipts and disbursements in connection with the trust property for a period not exceeding three years next preceding the date of the application.

(2) Such accounts when filed in Court shall be open to inspection by the public.

(3) A trustee who fails to comply with any such direction shall be removed if a suit for that purpose be instituted unless he can show good cause for such failure.

We have given to the subject our best consideration and desire to record our sympathy with the motives of the proposers. But we have not inserted the clause in the Bill because we think that the question is one of policy on which the public opinion of the communities interested should first be obtained. It affects primarily as we understand the Hindu and to a less extent the Muhammadan community. And we should not feel justified in recommending an amendment of the law on such a subject as this unless the leaders of those communities were to express their support of the proposal in unequivocal terms. If it is eventually decided to adopt the amendment then we think that the clause proposed by Dr Ghose may be accepted.

9 Suits by or against firms—Attention is directed to the new provision in regard to suits by or against firms (O XXX) which will we hope prove acceptable to the commercial community.

10 New procedure—We have given power to provide by Rules for Counter claims Third Party Procedure Summary Procedure in suits for debt or liquidated demands as for instance rent or any other definite sum payable under a contract and originating summons. We are of opinion that these forms of proceeding may usefully be adopted in some cases but that this is a matter which should be left for each High Court to decide.

11 Appeals—As regards appeals from original decrees we have departed but slightly from the existing Code. We have thought it advisable to give legislative sanction to the view that no appeal shall lie from a consent decree or as to costs except by leave of the Court but the ⁷ which renders it obligatory upon a decree to appeal from that decree at once on an appeal from the final decree tending to that which is so desirable,

As regards appeals from appellate decrees the only substantial departure from the existing Code is the insertion of Clause 103. Experience has shown the desirability of this clause the effect of which will be to avoid remands with their consequent delay and expense.

which allow an appeal from any order made under Rules from which an appeal is expressly allowed by Rules. We have gone carefully into the question of the cases in which an appeal should be allowed from these orders and our conclusion is expressed in the Rules themselves.

12 Rules—The distribution of the provisions of the Code between the body of the Bill and the Rules is a matter on which opinions may well differ. The general principle on which we have proceeded has been to keep in the body of the Bill those provisions which appear to be fundamental and those provisions which confer powers operating outside the Province in which the Court is situated. In some cases we have adopted the plan of inserting leading provisions in the Bill stating in general terms the powers of the Court and of leaving the details to Rules in matters of less importance the provisions have been relegated altogether to Rules. The result of this re-arrangement is to reduce the Act as distinct from Schedules to 155 clauses. The existing order of sequence has speaking generally been maintained but the reduced bulk of the Bill has rendered it no longer necessary to reproduce the division into chapters.

It is proposed to vest the power of making Rules in High Courts subject to the control of Local Governments (or in the case of the Calcutta High Court of the Government of India) but we think it most desirable that in exercising this power the Courts should have the advice of representatives of the various branches of the legal profession and we have accordingly provided that in the case of Chartered High Courts and of Chief Courts Rules shall only be made after those Courts have taken the opinion of a Rule Committee on which there will be representatives of the Bar of Vakeels or Pleaders and in Presidency towns of Attorneys. In the case of other High Courts power has been given to establish such Rule Committees as the Governor General in Council may determine. It is believed that Standing Committees of this kind will be of great value. We have thought it better to require the same sanction as is required by the Indian High Courts Act of 1861 in order that the rule making power should correspond with the power conferred under that Act but we are of opinion that in the interest of uniformity it is expedient that all amendments of Rules should be communicated to the Government of India and to other High Courts before sanction is given to them. This we understand can be effected by executive order.

If our proposal is adopted it will probably be useful to publish annually in every Province some manual corresponding to the English Annual Practice containing—

- (1) the Act,
- (2) all Rules of procedure made under it or under other Acts in the Province,
- (3) notes of decisions on the Act and Rules.

13 We are sensible that there may be defects and flaws in the Bill which we append to this Report. The subject is complicated and technical and the time at our disposal has been limited. We do not doubt therefore that much improvement may be made in the Bill before it is finally passed into law. But in our opinion, it is framed on the right lines. We believe for the reasons we have stated that in any reform of Civil Procedure it is essential to introduce some elasticity, to give wider powers of control to the High Courts and to invest them with a larger discretion in regard to the conduct of cases which come before them. Mr. Dikshit

our deliberations and we take from his experience of the working of the present law the acknowledgments of the services of Mr. Law of the Legislative Department who has attended to the clerical and press work to our entire satisfaction.

(Signed) H. ERLE RICHARDS
(") FRANCIS MACLEAN
(") LAWRENCE JENKINS
(") S. ISMAI
(") RASHBEHARY GHOSH

Smta August 31st 1907

NOTES ON CLAUSES

A—CLAUSES OF BILL

Preliminary

Clause 2—The definitions have been rearranged in alphabetical order

Decree—The importance of the definition of the word decree rests on the fact that by reference to it the right of appeal is determined. The Committee have in the main adhered to the existing definition but they have modified it in two respects and this has involved a slight re-casting of the language. The principal modification aims at permitting an appeal from an adjudication which purports to settle the rights of the parties though it does not completely dispose of the suit. Such an adjudication the Committee describe as a preliminary decree.

The explanation is intercalated to make it clear that a decree may be partly final and partly preliminary. Thus a decree for the recovery of possession of immovable property and for the net profits would be of this mixed character.

The word within has been substituted for mentioned or referred to in with a view to bringing within the definition of decree orders against sureties (see Cl 142) and orders as to Court fees in pauper suits (see O XXXIII R 13) and thus providing for appeals therefrom.

The only other modification is for the purpose of excluding a right of appeal from an order of dismissal for default.

Legal representative—We have inserted a definition of legal representative—an expression which has been variously interpreted by the High Courts as would appear from the reported cases which are not easily reconcilable with one another. See S C W N 813 in which almost all the earlier cases are reviewed.

The Committee trust that the definition which has been added by them will set at rest what owing to the absence of any such definition from the present Code is a somewhat debatable point.

Mesne profits—The Committee have altered the definition of mesne profits so as to exclude from the calculation any increased rents and profits due to improvements made by the person in wrongful possession for which he cannot at present claim compensation from the rightful owner either by way of mitigation of damages or otherwise.

Clause 4—The clause as drafted will it is believed effect all the savings covered by S 4 of the Code. The concluding paragraph of that section is believed to be obsolete and has accordingly not been reproduced. On this point the opinions of Local Governments are invited.

Clause 6—In view of the extended scope of Cl 4 the reproduction of Ss 6 and 7 (except as to the final paragraph of S 6) does not appear to be necessary.

The words or proceedings in suits have been introduced in this clause to negative the view that a Court to which a decree is sent for execution has jurisdiction to execute the decree though the amount exceeds the limits of the pecuniary jurisdiction of the Court a point on which there is a conflict of opinion. (I L R 17 Mad 303 I L R 16 Cal 463 464)

Clause 7—The provisions as to Provincial Small Cause Courts have been rearranged in what is hoped is a more convenient form.

PART I—SUITS IN GENERAL

The provisions contained in S 10 of the Code were first enacted by Act XI of 1836 and were reproduced in the Code of 1859 and in subsequent Codes. In the opinion of the Committee their retention is no longer necessary and they have been omitted.

Clause 11—Res judicata—It is not possible to make a complete exposition of a subject so complex as that of *res judicata* within the limits of a section of an Act and the Committee think it better to re-enact S 13 as it stands in the Code with such modifications only as experience has shown to be necessary.

The Committee recognize that a proceeding does not come within the language of that section but they think it better not to deal with this point in express terms for the reason that the applicability of the doctrine of *res judicata* to certain proceedings is not open to doubt, and they foresee that any express reference to proceedings in a crystallised definition might only lead to difficulties (I L R 11 I A 37 and I L R 29 Cal 707).

The word *another* has been substituted for *former* as being more in conformity with Indian decisions

Explanation I is new and is intended to affirm the view that the competence of the jurisdiction of a Court does not depend on the right of appeal from his decision

Explanation VI—The inclusion of *public rights* is to give due effect to suits relating to public nuisances (Cl 91)

Clause 12—This clause is new and is necessitated by the transfer of certain of the provisions of the existing Code to Rules

Clause 13—The provisions as to foreign judgments have been re arranged and as it is hoped stated more clearly

Section 14—The last paragraph has been omitted. It appears to the Committee that it is not possible to maintain this distinction in the case of all Asiatic Courts. The Courts of Japan for instance are entitled to be treated on the same footing as European Courts. They know of no satisfactory distinction which could be drawn so as to give effect to the intention of the existing provisions and they recommend that the paragraph should be omitted and that Courts should rely on the powers given by Cl 13

Place of suing—The provisions under this heading have been collected and re arranged

Clause 16 (a)—The insertion of the words *with or without rent or profits* is intended to remove any difficulty there may be where the defendant does not reside within the local limits of the Court within whose jurisdiction the property is situate

Clause 18—The Committee have added words to this clause in order still further to restrict the taking of technical objections as to jurisdiction

Clause 20—The Committee have omitted *Explanation III* of S 17 which has become unnecessary owing to the addition made to sub cl (c) of the words *wholly or in part* in reference to the cause of action

Clause 24—The words *at any stage* have been added to remove the difficulty created by the view that a suit cannot be transferred after the hearing has once commenced as to which there is a conflict of decision

Clauses 26—35—The provisions in Chapters III to XVIII of the present Code have been in the main relegated to Rules but such general provisions as are believed to be essential have been preserved in Cl 26 to 35

Clause 32—The Committee have omitted the last paragraph of S 136 of the Code as they think unnecessary to impose penal consequences for a default of the class indicated

PART II—EXECUTION

Clauses 36—74—The bulk of the provisions as to execution will be found in the Rule but the main provisions as to the Courts by which decrees may be executed the questions to be determined by Courts executing decrees the limit of time for execution transferees and legal representatives procedure in execution arrest and attachment the relegation to Collectors of power to execute certain decrees the distribution of assets and resistance to execution have been retained in the body of the Bill

Clause 46—Precept—Though a system of execution based on precepts is in the opinion of the Committee open to grave objection they think the idea may be utilized for the purpose of enabling a decree holder to obtain an interim attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. They have for this purpose introduced Cl 46 into the Bill. They think it expedient to fix a time limit for the continuance of this interim attachment but at the same time they have empowered the Court to extend the period to meet the exigencies of particular cases

After careful consideration of the Bill under a precept re attachment necessary. Though at first sight it may not be necessary when the issue of attachment is made after careful consideration of the Bill re attachment, having regard to the agency by which execution is carried into effect

Clause 47—The Committee have omitted sub-cl (a) and (b) of S 244 of the existing Code because they are strongly of opinion that questions regarding the amount of any mesne

profits or interest should be determined by the decree and not in execution. If this view is accepted it will be possible to exercise an effective control over the action taken by Subordinate Courts in dealing with such matters.

The Committee have re-drafted sub-cl (3) and made it compulsory on the Court to determine questions arising as to representatives of parties. In their opinion it is inexpedient that separate suits should be instituted for the decision of such questions. The delay and expense involved are often very great and result in the needless protraction of litigation.

The explanation is intended to put an end to a conflict of judicial decision.

Section 257 A—The Committee think that S 257 A may be omitted with advantage. It was first enacted by Act VII of 1879 with a view to protect the interests of judgment debtors who are decree holders. The section has given rise to confusion of the High Courts is found in practice to be in accordance with the provisions of S 16 of the Indian Contract Act is amended where it is required.

Clause 51—This clause states generally the powers of the Court in regard to execution leaving the details to be determined by rule. It will be observed that the power to direct immediate execution is no longer restricted to one class of suits but that it is now general in term. Any limitation that may be found necessary will be imposed by rules.

Clause 53—Has been added by the Committee in order to set at rest a question on which the High Courts are divided in opinion. It is true that where a son or grandson takes any ancestral property by survivorship he is bound to pay out of such property all debts of his ancestor not incurred for immoral or illegal purposes but whether the creditor can follow the property in the hands of the son or grandson in execution is a debatable point under the Code. The question is merely one of procedure and the Committee have come to the conclusion that any controversy between the parties with regard to the liability of the son or grandson to pay the debts of his ancestor should be determined in execution it being open to them to raise any objection or defence in such proceedings which they might have raised in a separate suit instituted by the creditor. The clause in question not imposing upon them a greater liability than that imposed by the Hindu law.

Clause 54 (1) second proviso—The object of this proviso is to prevent vexatious forms of resistance to execution which constantly obstruct decree holders in the execution of their decrees.

Clause 55 (2)—The sub-clause is intended to cover the case of certain persons or classes of persons whose summary arrest might as in the case of railway servants be attended with danger or inconvenience to the public.

Clause 61—The Committee have reproduced this Clause from the former Bill (C 269 B) in accordance with what they understand to be the wishes of the Government. But the conditions should in their opinion be so modified as to relieve the Courts from fixing the portion to be released from attachment.

To impose this duty on the Courts would materially increase their work in a matter in regard to which they are not in a position to form the best opinion and would probably result in an undesirable lack of uniformity.

Clause 62 The committee have inserted a new provision to authorize the breaking open of the outer door of a judgment debtor's house. They do not think that it would be safe to extend the operation of this provision to the house of a stranger.

Section 268—This section of the present Code first appears in the Code of 1877. It was not suggested by any decided case and the only explanation offered by the Select Committee, by whom it was introduced is as follows—

‘We think that the proclamation of execution sales should state the incumbrances, (if any) to which the interest about to be sold is liable and we have provided that no Judge etc shall be answerable for error in the proclamation, unless it has been committed dishonestly.’

The Committee are of opinion that, having regard to the provisions of Act XVIII of 1850, the section may safely be omitted.

Clause 64—An explanation has been added to make it clear that claims within the protection of this clause include claims for rateable distribution of assets.

The word *another* has been substituted for *former* is being more in conformity with Indian decisions

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The Committee are of opinion that having regard to the provisions of Act XVIII of 1880, the section may safely be omitted.

Clause 64.—An explanation has been added to make it clear that claims within the protection of this clause include claims for rateable distribution of assets.

Clause 69—The provisions as to Collectors have been placed in a separate schedule. They deal with a special matter and are not of general application.

Clause 73—The Committee have slightly altered the wording of this Clause in order to bring it into line with the Transfer of Property Act, 1882, S. 96.

PART III—INCIDENTAL PROCEEDINGS

The general powers of Courts in regard to commissions have been summarised in Cl. 75 and the detailed provision will be found in the First Schedule.

PART IV—SUITS IN PARTICULAR CASES

The bulk of the corresponding part of the present Code will be found in the Rules. The provisions as to suits by aliens, etc., have been retained in the Bill and a few only of the provisions relating to suits by or against the Government. There is a general clause defining the nature of interpleader suits.

Clause 81—The Committee think that the same measure of protection should be afforded to the defendant where Government undertakes the defence as where the Government makes no application for the purpose, and it appears to the Committee that the proper protection should be that the defendant should be exempt from mesne arrest and his property from mesne attachment. They therefore propose to strike out the proviso from Cl. 269 and to alter sub Cl. (a) of Cl. 270 so as to give effect to this.

Clause 86 (2)—The Committee have inserted words in this sub clause to make it clear that the decision of the Government is final and not open to question by the Court. A doubt had been raised on the point.

PART V—SPECIAL PROCEEDINGS

Arbitration and suits relating to public matters have been discussed in the former part of this report.

Clause 92 (Public Charities)—As a doubt has been expressed in at least one reported decision whether S. 539 is or is not mandatory, the Committee have thought it desirable, in order to settle this question, to introduce sub cl. (2).

PART VI—SUPPLEMENTAL PROCEEDINGS

Here again a leading provision has been retained in the Bill, and the details of procedure have been relegated to Rules.

PART VII—APPEALS

Clause 97—The Committee have inserted an express provision to compel litigants to appeal from preliminary decrees, and have estopped them, on their failure to do so, from raising objections to such decrees in appeals from final decrees. On this point they accept the unanimous opinion of the Calcutta High Court. They think it unreasonable that parties should allow proceedings to be carried on to their final stage and large costs to be incurred if they intend to rely upon objections which could be taken at an earlier stage.

Clause 99—The Committee have extended this clause in order to give the Courts a larger discretion in dealing with irregularities in proceedings, and they have inserted express words to meet the point decided in I L R. 26 Bom 259 and I L R. 27 Mad 80 and in a recent decision of the Calcutta High Court.

Clause 100—The Committee have struck out the word 'specified' in the expression "specified law or usage," as being in their opinion redundant.

Clause 105—Though the remarks of the Privy Council in *Moheshur Singh v The Bengal Government* (7 Moo. I A 283) are wide enough to embrace an appeal from an order of remand the Committee think those orders were probably not in their Lordships' contemplation when they condemned the view that a failure to appeal from an interlocutory order

should deprive the person aggrieved of his right to object to such order when subsequently appealing from the decree. And the Committee think there are good reasons on the score of delay and expense for treating an appeal from an order of remand as a special case and precluding an appellant from taking, on an appeal from decree any objection that might have been urged by way of appeal from an order of remand.

The Committee have deleted the word *such* to remove a difficulty it creates (10 Moo L.A. 340, 413 12 Moo I.A. 157)

PART VIII—REFERENCING REVIEW AND REVISION

These provisions are not substantially altered. They are summarised in this Part and the details are in rules.

PART IX—CHARTERED HIGH COURTS

This is not materially altered.

PART X—RULES.

See observations in the former Part of this report.

PART XI—MISCELLANEOUS

The Committee have omitted S. 646 as they see no reason specially to differentiate the case of a Registrar and it is believed that in practice no use is made of the section.

Clause 137—The Committee have inserted the words 'or other person' after the word 'officer' in sub Cl. (b) in order to give the High Court power to relieve the officers of the Courts of the work of administering affidavits in cases in which it may be necessary to do so. It has been represented to them by the Calcutta High Court that this relief is much required.

Clause 140—The terms of S. 583 of the Code do not justify the practice founded on it, and the Committee have therefore recast the section so as to bring it into closer conformity with that practice.

Clauses 145 and 148 to 150 are new. They are intended to enlarge the discretion of Courts.

B—RULES

The Committee think that the division of the rules into orders will be found convenient for the purposes of citation and reference.

Under Cl. 35 the Court has full power to apportion costs. The Committee understand that in practice the provision of S. 26 is not operative in the mufassil and that part of the section which related to costs has not therefore been reproduced.

O I, R. 3 (S. 28)—The Committee realize that the words 'in respect of the same matter' in R. 3 have given rise to great difficulty and they think it advisable to follow the wording of the English rule and to omit them.

O I, Rr. 5 and 7—The Committee thought that it was desirable to add O XVI, Rr. 5 and 7, of the English rules.

O III, R. 2 (S. 37)—The provisions of existing Codes which are represented by this clause are in somewhat different terms and are limited to persons holding general powers of attorney within certain local limits. The Committee think it unnecessary to preserve these limitations and have made the sub clause general. It follows that the present Cl. 37 (b) becomes unnecessary. It is included in sub Cl. (a).

The last paragraph of S. 37 has been omitted as no longer necessary.

O III, R. 4 (S. 33)—The Committee are uncertain whether it is necessary to make a reference to the Court of the Judicial Commissioner of Sindh. The point is one for the Government of Bombay.

[illegible]

0.1 at a time - The other 0.9 are not in the same way

2) - The Commission on the part of the Executive Branch in the Department of the Interior has been directed to conduct a study of the problem of the Indian population in the United States. The study is to be completed by the end of the year. The results of the study will be reported to the President.

The Commission has also given a part of the work in the field of human rights to the Economic and Social Council, which has set up a Commission on Human Rights, which is now working on a draft of a Declaration of the Rights of Man and of the Citizen, which is now being discussed by the General Assembly of the United Nations.

The habeas corpus is not a remedy to be granted by the Executive or the Government, but a remedy to be granted by the Courts. The Government is not bound to grant it, but the Courts are bound to grant it if the Government is not bound to grant it.

O IX S 104 c (b) (1) formed part of a CO of Art VIII of 1902 and in common with that that the Court approved. As a para. 104 however, in leading to a summary of the view of the provision to settle on a general basis of the bill and its proceedings, has not been taken when a decision is not made. I am sure to have been to prove which the Court has made.

(see J. L. 22 11 19)

O I Y J 10-11, Committee have inserted words to make it clear that a decree can be made by the Council of the League of Nations, and that the Council of the League of Nations is the only authority upon the point and the Committee think that the matter is settled in this sense.

O XI—*Is terrojalorus*—The provisions in the Code as to discovery are based on the Rules 111, which procedure in force at the time when it was passed. Since then the English procedure has been amended and is now contained in O XXXI. This order has in effect been adopted in the Rules regulating the procedure on the original side of the High Courts of Calcutta and Bombay and has it is believed been found to work satisfactorily in practice.

On the other hand in mutassil Courts little has yet been made of the machinery to discover and the Committee therefore think the Rules of the Calcutta and Bombay High Courts on the former subject may be easily adopted without risk of disturbing a procedure with which the mutassil Courts have become familiarized.

This will secure uniformity of practice and also the advantage of the commentary on the Rules prescribed by the English decisions.

O XIII—admissions—The Committee think the practice of admissions may with advantage be extended to facts as well as to documents.

The procedure is not compulsory but its adoption would result in cheaper and expediting litigation and it is hoped that its use will be encouraged by the Courts.

O A I R 6 (S 150) — There does not seem to be any real conflict as to whether an appeal lie though at first sight it might appear otherwise. It has therefore been considered unnecessary to provide expressly for an appeal.

O A I R 11 (S 210) — The Committee have added words to sub-rule (1) of this Rule in order to override the ruling of the Bombay High Court in the case of *Pajku Gound Paranjpe v Dipkhai* (I L R 4 Bom 36) as the practice inculcated by that ruling seems to prevail only in the Presidency of Bombay and not in the rest of India.

O A I R 11 (S 214) — The amendments are based on the rulings contained in the decisions of the High Court of Allahabad in I L R 6 All 30455 and I L R 11 All 161.

Having regard to the opinion expressed in I L R 21 Mad at page 463 we have thought it right to make it clear that title vests without an instrument of transfer. To require a transfer now might throw a cloud over numberless titles which rest on the assumption sanctioned by long practice that no instrument of transfer was necessary.

O A I R 18 (S 216) — The Committee have introduced an amendment to give effect to the view that appeals from decrees relating to set off should lie to the Courts to which appeals in respect of the original claim would lie.

O A I R 19 — The Committee have omitted certain words from the last paragraph of S 25 of the Code in order to make it clear that the Court cannot recognize a payment or adjustment which has not been effected for any purpose whatsoever. It follows that an uncertified payment or adjustment cannot operate to prolong the period of limitation for applying for execution under the Limitation Act.

O A I R 3 — The Committee have inserted this rule to provide for cases which they are told are not uncommon of an estate being situated within the jurisdiction of two or more Courts. There are decisions on this point but they are not harmonious and the Committee think it well to determine the law definitely.

O A I R 11 (S 256) — The Committee have omitted the limitation imposed under existing Code on oral applications for immediate execution. They see no reason why this limitation should be preserved.

O A I R 11 (e) — The Committee have not given effect to the suggestion that this should be limited to payments and adjustments which the creditor executing the decree is bound by law to recognize as this would remove a valuable incentive to state truth. What payments have been made (see I L R 20 Bom 286).

O A I R 20 — The Committee have omitted the words "or his or their representatives". This will be covered by the general clause.

O A I R 23 (4) explanation and illustration (d) (S 246) — This addendum has been introduced in accordance with the views of the Calcutta and Allahabad High Courts as expressed in the cases of *Hurji Daj Guho v Din Doyal Guho* (I L R 9 Cal 479) and *Ram Sukh Dass v Fota Bai* (I L R 14 All 337).

O A I R 26 (S 248) — The Committee have omitted the reference to a decree passed on appeal for that is ordinarily the decree to be executed [*Aristo Amhar Roy v Rajah Burroda Saunt Roy* (14 Moo I 1465) and *Muhammad Salaman Khan v Muhammad Lar Khan* (I L R 11 All 267)].

O A I R 32 (S 260) — The Committee have omitted in this rule all reference to a decree for the recovery of a wife for there can be no such decree under the law as a wife cannot be treated as a chattel to be delivered over to the husband. Where any third person prevents the wife from returning to her husband the latter may obtain an injunction against him which may be enforced in case of disobedience either by the imprisonment of the defendant or by the attachment of his property or by both.

O A I R 34 — Section 261 has been recast so as to bring it into conformity with the chronological order of events and a provision has been added to meet the requirements of the Indian Registration Act.

O XXI, Rr 44 and 45—These provisions were inserted in Bill No II with the approval of the Government of India, and the Committee have therefore reproduced them in the present edition of the Bill

O XXI, R 56—The purpose of this Rule is to put an end to doubts which from time to time have arisen as to the continuance of an attachment by reason of the practice of "striking off proceedings" or "removing proceedings from the file" for which there is no justification in the Code

O XXI, R 57 (S 278)—Though the execution of mortgage decree is expressly incorporated in the Code, the Committee still think that claims and objections arising out of the execution of such decrees should not be the subject of summary procedure under this and the following Rules but should be determined in the ordinary course

This does not imply that the procedure under the latter Rules as to resistance to possession or dispossession does not apply

O XXI R 76—In Rr 76 and 83 express reference has been made to a resale so as to make it clear that the default mentioned in those rules will attract the consequence indicated in R. 70. In this connection reference may be made to I L R 7 Cal 337

O XXI R 83—The Committee have altered this Rule in order to prevent its being obligatory on the Court to forfeit the deposit in every case. The Rule as it stands at present has caused hardship in certain circumstances, *vide* the case of *Sambasita Ayyar v Tydnada Sami* (I L R 25 Mad 535)

O XXI, R 88 (S 310 A)—Words have been added so to make it clear that a purchaser acquiring a title before the sale in execution can claim the benefit of the Rule. In other respects the Committee consider it advisable to adhere to the wording of the section

The proposal that the sale should be set aside on payment of the purchase money instead of the amount specified in the proclamation is in their opinion, fraught with danger. It would be obviously useless unless subsequent protection were given to the property and such protection might lead to collusion which would be most prejudicial to the decree holder

O XXI R 89—The Committee have struck out the provisions as to irregularity in attaching the property as such irregularity obviously cannot affect the price

They have introduced the words 'rateable distribution of assets' to clear up a doubt which has been the subject of discussion in several cases.

They have altered the language of the proviso in order to meet the doubts which have been raised as to the evidence upon which the Court can act [*Tasadduk Rasul Khan v Ahmad Husain* (I L R 21 Cal 66)]

O XXI, R 91—The Committee think it proper to retain the provisions of the Code which make it necessary for the Court to confirm the sale in each case

O XXI, R 92 (S 315)—The Committee have added words at the commencement of the clause in substitution of the last paragraph of the section which thus becomes unnecessary

O XXI, R 93 (S 316)—The Committee have preserved the limitation of three years from the date of the certificate as suggested by the Select Committee in Bill No II. This clears up a doubt as to the time from which limitation begins to run which has been discussed on more than one occasion

O XXII, R 1—The Select Committee struck out two of the four illustrations to S. 361, and the Committee think the remaining illustrations may also be deleted as they are too obvious to serve any useful purpose.

O XXI, R 3—The Committee have introduced words in order to conform to the language of the Indian Limitation Act, 1877, as amended

O XXII, R 5 (S 366)—Though *or* is the word used in the Code of 1852 and the Code of 1877, in the Bill of 1877 the word *and* is used, and it appears to the Committee

clear that and is required by the context. If and is not used then the contrast with the preceding section is lost.

The explanation can be omitted having regard to the definition of legal representative inserted by the Committee.

O XXXIII R 3—The Committee have considered it expedient to alter the language of S. 375 so as to recognize the power of a Court to enquire into and to record a disputed compromise.

O XXXI R 1 (3) (S 380)—The Committee have deleted the last words of this sub rule because the nature of the suit excludes the possibility of the property in suit being immoveable.

O LXXIX R 2—The Committee have enlarged the language of the Code so as to allow of service by post on corporations having a registered office and by these means the rule is brought into line with the provisions of the Indian Companies Act. Companies authorized to sue and be sued in the name of an officer or of a trustee must be very few if indeed any exist and they do not appear to the Committee to call for special treatment.

O XXXV R 1—The Committee have adopted with the necessary alterations the English procedure in relation to suits against firms. This new procedure has been in force for some time in the Presidency towns of Calcutta and Bombay and has worked satisfactorily.

It is hoped that its general application will be found useful by the mercantile community, for the rules remove technical obstacles which under the present procedure may seriously impede this class of litigation as where a partner has died.

O XXXVII R 3 (4)—This is based on S. 443. The Committee think it necessary to ensure that notice should reach one interested in the minor's welfare and this rule aims at securing this result. The form of application and of notice in conformity with this sub rule will be inserted in the schedule of forms.

O XXXII R 9—The Committee think it expedient that where a guardian insists on his right to be appointed next friend in the place of another there should be power to require him to become liable or give security for costs in the suit previously incurred.

O LXXXII R 15—The Committee have extended this rule so as to cover the case of a person incapacitated from protecting his interests by reason of his mental weakness or of his being a deaf mute.

O LXXXIII R 1 (S 401)—The Committee have not preserved S. 402. In the light of the case law it is misleading so far as it suggests that a suit will lie for loss of caste or abusive language and they can see no sufficient reason for withholding from a pauper a right to sue as such in respect of defamation or assault.

O LXXXIV R 1—The proviso to S. 85 of the Transfer of Property Act 1882 has given rise to certain doubts which the Committee have sought to remove by substituting for it the words now added with a view to making it clear that a person not a party is not bound by a decree [*Rani Nath Rani v. Lachman Ram* (L R 2 I A 193)].

The explanation has been inserted in order to remove doubts which have arisen from the conflict of authorities on the point.

O LXXXIV R 2 (2)—The Committee have inserted the words if necessary before re transfer as according to mufassil practice a re transfer is not ordinarily required and they think this practice should not be altered.

O LXXXIV R 3—The Committee have omitted the provision as to the defendant paying money to the plaintiff. They think it better that in every case he should pay it into Court.

O LXXXIV, R 9—This rule is new. It is a recognition of existing practice and remedies an obvious omission in the Transfer of Property Act 1882.

O XXXIV, R 11—The Committee have inserted this rule in compliance with the suggestion of the Privy Council in *Gopi Narain Khanna v Bansidhar* (L R 32 I A 123). This clause was in the Transfer of Property Bill, but was omitted by the Select Committee on that Bill on the ground that it ought, to find a place in the Civil Procedure Code.

O XXXV, R 3—The Committee think that the institution of the interpleader suit affords a sufficient reason for the stay of other litigation in reference to the same subject matter and they have modified S 476 so as to give effect to this view.

O XXXVII, R 1—As Chapter XXXIX of the Code is transferred into rules, the Committee have not reproduced paragraph (c) of S. 538 as its appropriate place will be in rules under the Presidency Small Cause Courts Act, 1882.

O XXXVII R 2—The explanation to S 532 was inserted to negative the effect of the meaning, as it stands, is obscure. The Committee have added words in the body of the rule which will remove the ambiguity aimed at.

O XXXVIII, R 6 (S 483)—The Committee have omitted the words "property within the jurisdiction of the Court," as they have caused a conflict of decision and they think, as a matter of policy there should not be the restriction these words suggest.

O XXXVIII, R 13—This rule represents the views of the Government of India as expressed in the former Bill.

O XXXIX, R 6—Words have been added to section 498 so as to empower the Court to order a sale of securities where that state of the market requires such a course.

O XL—Having regard to their standard of efficiency, the Committee see no reason to withhold from Subordinate Judges the power to appoint Receivers. They therefore propose that S 505 of the Code should no longer be retained, for its effect in practice is often to defeat the purpose for which an application is made.

O XLI—S 554 of the Code has been omitted as unnecessary.

O XLI, R 5 (S 545)—The Committee have added words to S 545 in order to make it clear that execution can be stayed by an Appellate Court, the more necessary to have an express power to [Balkishan Sahu v Ahugnu, (I L R 31 Cal 723)]. The Committee have introduced express words authorizing an *ex parte* stay, as the need for such an order constantly arises in practice.

The Committee have modified this rule in order to make it clear that property has previously been taken in execution [See (I L R 33 Cal 927)].

O XLI, R 7—The Committee have added this clause to meet particularly the case where the litigant does not quarrel with the decree but appeals from an order passed in execution of that decree (I L R 28 Cal 734).

O XLI, R 23—After due consideration the Committee have thought it safer not to give legislative sanction to the views enunciated in *Habib Baksh v Baldeo Prasad*, (I L R 23 All 167). The power of reversal and remand is liable to be abused, while the procedure under S. 506 is free from this liability and at the same time furnishes an effectual remedy.

The words at the end of the rule have been added to clear up a doubt which is stated by the Select Committee to exist as to whether evidence recorded at the original trial can be used on the trial after remand.

O XLI, R 34—The Committee consider it most important that an Appellate Court should have the fullest power to do complete justice between the parties.

The illustration indicates a type of case for which provision is intended to be made.

O XLII R 1 (i)—The extension of time for the payment of mortgage money is obviously of much greater moment to the mortgagor than to the mortgagee. Therefore the Committee have provided for an appeal from an order refusing but not from an order granting an extension of time.

O XLIII, R 1 (S 592)—Words have been added to avoid the conclusion at which the Madras High Court has recently arrived (LLR 26 Mad 369)

O XLV, R 1—The words or the construction of a document which construction may affect the merits have been omitted as they appear to be sufficiently covered by the power to refer any question of law

NOTES ON SCHEDULES

SCHEDULE IV

The Committee have amended S 22 of the Limitation Act to supply an omission which has been noticed by the High Courts namely the absence of any provision with regard to a devolution of interest *pendente lite* where it takes place otherwise than by reason of death. The section as amended will include not only cases in which a devolution of interest takes place *pendente lite* owing to death but also to other cases in which such devolution occurs

The Code [S 312] contemplates the confirmation of a sale of immovable property immune strictly on the expiration of the thirty days allowed by Art 166 of the Limitation Schedule. But the period allowed for an application to set aside a sale on the ground that the judgment debtor has no saleable interest therein is sixty days [Art 172]. The result is that in some Provinces the confirmation of a sale is delayed for sixty days whilst in other Provinces sales which have been already confirmed are liable to be set aside. The Committee think that in the matter of limitation an application under S 313 should be brought into line with an application under S 311 and they therefore propose to repeal Article 172 and to amend Article 166 so as to include applications under S 313

SPEECH

OF

The Hon ble Mr ERLE RICHARDS

The Hon ble Mr ERLE RICHARDS—My Lord I have the honour to present the Report of the Select Committee on the Bill to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature and annexed to it a copy of the Bill in which the amendments suggested by the Committee are shown in italicised type

It will be seen from these papers that the Committee recommend no alterations of a radical kind in the Bill as settled by the Committee which sat at Simla during the past summer. There are a number of amendments of detail suggested which taken together effect a substantial improvement but the main lines of the Bill have been accepted

The principal feature of novelty in the Bill as introduced is the re-arrangement of the clauses and the relegation of minor provisions to a schedule which can be amended or added to by High Courts subject to the advice of Rule Committees. The proposal has met with general acceptance. Local Governments and High Courts are at one in thinking that it will effect a valuable improvement in the machinery of our civil procedure and the Committee agree with them

"Two amendments have been introduced in that part of the Bill which deals with the rule making power. The first is the insertion of a proviso that Rules before being made are to be

published with the result that under § 23 of the General Clauses Act there will be an opportunity for the public to criticise any proposals before they become law. This suggestion was put forward by the British Indian Association and the Committee think that it is one of value. The second change is in the composition of the Rule Committees. It has been pointed out that the Rule Committees ought to have among their members some gentlemen in touch with mufassil practice. The Bill as introduced provided that one of the Judges on the Committee should have had mufassil experience but the Committee think that this in itself is hardly sufficient. They suggest therefore that there should be a Subordinate Judge on each Rule Committee and that there should be power also to appoint a Vakil or pleader practising in the mufassil. They further recommend that the Bill should not come into operation at once on passing but that there should be an interval allowed in order that the public and profession may make themselves acquainted with the new arrangement.

The amendments of the other provisions of the Bill do not call for any special mention on the present occasion. Many of them are in the nature of corrections or improvements of drafting. Since the Bill was introduced in this Council it has been once more examined and revised by some of our colleagues and the criticisms on it have been carefully considered and digested in the Legislative Department. In that way the work of the Committee has been much lessened. This is the fourth Committee which has now deliberated on civil procedure and it is safe to say that there is no conceivable point which has not been fully discussed during those deliberations. I would point out my Lord that the present Committee like the Simla Committee are unanimous in their approval of this Bill.

REPORT OF THE SELECT COMMITTEE

We, the undersigned Members of the Select Committee to which the Bill to consolidate
 have submitted

and of all the High Courts in India. In our opinion it will give a much needed elasticity to our judicial procedure and will enable minor defects to be remedied as they arise without resort to the Legislature, and we recommend it to the Council. We have introduced two changes into Part X of the Bill relating to the rule making powers. In the first place we have provided that Rules must be published before they are made, the result will be that S 23 of the General Clauses Act will apply and that there will be an opportunity for the public to offer criticisms on any proposals for alterations of procedure before those proposals are finally passed into law. We have also made a change in the composition of the Rule Committees. It has been suggested by more than one authority that the interests of the mofussil were not sufficiently represented on these Committees as constituted under the Bill. We recognise the force of this criticism and have accordingly provided that there shall be a Subordinate Judge on each Rule Committee and that the Vakil or Pleader on the Committee shall be enrolled, but need not be practising in the High Court, so that a Vakil or Pleader practising in the mofussil will be eligible. We further recommend that the Bill shall not come into operation until the 1st January 1909 in order that the public and the profession may have an opportunity of making themselves familiar with the re-arrangement.

8 We have carefully considered the criticisms on the Bill as introduced and the changes which we recommend are summarised below. It will be observed that we do not advise any departures of importance from the conclusions of the Special Committee which met at Simla during the past summer. That Committee had before it a mass of opinions from judicial and other authorities all over India dealing with every point of civil procedure, and they arrived at their conclusions only after a careful consideration of those opinions. We should not therefore in any case have dissented from them without strong reason, but in our judgment those conclusions are right and we accept them. Since the Bill was introduced it has been again examined and revised by some of our colleagues and the criticisms on it have been digested in the Legislative Department. By these means our deliberations have been much expedited.

CLAUSES

Clause 2 (2)—The definition of "decree" has been generally accepted

Clause 11—We have restored the word 'former' and have inserted explanation I on the suggestion of Sir Bhashyam Iyengar to remove a conflict of authority as to the meaning of the expression "former suit."

Explanation V has been omitted. We think it is liable to misconstruction and that the law is well established apart from the explanation.

Clause 22—We have omitted Cl 22 of the Bill as introduced, as in our opinion it is unnecessary. We think that sufficient provision is made for transfers under the succeeding Clause.

which compelled applications to the High Courts
 rict Court This in our opinion merely duplicates

Clause 25—Cl 25 of the Bill as introduced has been rendered unnecessary by the omission of Cl 22 We have accordingly taken it out and have put in its place a new clause taking Power for the Governor General in Council to transfer cases from one High Court to another
 of the Code of Criminal Procedure 1898

Clause 34—The words not being a decree for the enforcement of a mortgage or charge have been omitted in this clause and also where in order to make it clear that a decree for the payment of money does not include a decree for sale in enforcement of a mortgage or charge

o has obtained an interim attachment
 the determination of the attachment
 ve altered this clause accordingly There

Clause 51—We have added a power to execute a decree by appointing a receiver on the suggestion of the Advocate General of Madras

Clause 54—We have restored S 265 of the existing Code It has been pointed out that the provision in the Bill as introduced was opposed to the practice in some provinces under which all partitions of land paying revenue to Government are effected by the revenue authorities

Clause 55—We have carefully considered the provision as to breaking open dwelling houses and have come to the conclusion that it should be limited to dwelling houses in the occupancy of the judgment debtor

Clause 57—Sub Cls (2) to (6) have been relegated to Rules (O XXI R 39)

Clause 59—The remaining provisions as to the release of judgment debtors have been brought up from the Rules and incorporated in this clause

Clause 60 (1) (g)—We have omitted the words military or civil because they appear to be of no value The word pensioners of itself covers every class of pensioner

The exemption has been extended so as to cover pensions granted out of any service family pension fund notified in that behalf by the Governor General in Council

Clause 60 (1) (i)—This has been extended at the request of the Government of Burma

Clause 61—The words be exempted from liability to attachment or sale in execution of a decree have been substituted for the words be released from attachment and shall be free from liability to sale in execution of a decree in order to make it clear that the exemption extends to produce which has been hypothecated

Clause 62—has been brought into line with Cl 55 as now amended

Clause 66 (1)—The wording has been altered on the suggestion of the Honble Mr Justice Akinin so as to put the meaning beyond doubt

Clause 79 (2)—This saving was accepted by the Select Committee of 1903 and we think it desirable to have it in the Bill in order to avoid possible doubt

Clause 92 (1)—It has been suggested to us by several authorities that Local Governments should be empowered to invest Courts subordinate to District Courts with power to try cases under this clause and we think that this suggestion should be accepted

The necessary words have been added

Clause 96 (3) of the Bill as introduced has been omitted. The case law on the subject is sufficiently clear and considerable objection has been taken to the sub clause.

Clause 98—The wording of the provision has been altered. It now deals only with the decision on the point of law referred.

Clause 101—Sub (C) (1) (i) has been added in order to give a right of appeal against the decision of the Court on a special case. This is in accordance with the recommendation of the Special Committee but appears to have been omitted from the Bill by mistake.

Clause 107—Sub (C) (1) is new. We think it desirable to have in the body of the Code a general provision about the powers of an appellate Court.

Clause 134 is new. It supplies an omission.

Clauses 142 and 143 have been brought up from the Rules. We think they should be in the body of the Code.

Clause 144—Sub (C) (2) has been added on the suggestion of the Calcutta High Court. We agree that re titution which may be obtained by application under this clause should not be made the subject of a separate suit.

SCHEDULE I

Order I

Rules 1 and 3—The words 'act or' have been added before the word 'transaction'.

Rule 3—This has been amplified so as to bring it into line with R. 1.

Rule 5—The words 'cause of action' have been struck out.

They have given rise to considerable difficulty in England.

Rule 8—We have on the suggestion of the Advocate General of Madras added the words 'or for the benefit of' after the words 'on behalf of'.

Order III

Rule 4 (3)—We have adopted the alternative draft suggested by the Simla Committee in their report.

Order VI

Rule 19—We have substituted the words 'he shall not be permitted to amend' as the case may be for the words 'such order to amend' become void.

Order VII

Rule 17 (1)—On the suggestion of the British Indian Association the word 'account' has been substituted for the word 'book'.

Order IX

Rule 4—We have struck out the provisions about limitation contained in this rule. These provisions will be incorporated in the Bill to consolidate and amend the Limitation Act.

Rule 13—We think it necessary to provide specially for cases in which it may not be possible to set aside the decree as against the applicant only.

Order XX.

Rule 18—This Rule has been altered so as to correspond with the amended C1 54.

Order XXI.

Rule 1 (2) —This sub rule has been inserted on the suggestion of the British India Association

Rule 7 —The words "or of the jurisdiction of the Court which passed it" have been omitted. In our opinion a Court executing the decree of another Court ought not to go into any question as to the jurisdiction of the Court which passed it

Rule 20 —This Rule is new. It is inserted in order to make it clear that the provisions as to cross decrees and cross claims apply to the case of mortgage decrees. The Rule also makes it clear that the expressions "decree for the payment of money" and other similar expressions in the Code do not include a decree for sale in enforcement of a mortgage or charge

Rule 45 —We have decided to recommend the omission of this Rule from the Bill. It was taken from the Bill of 1903 but met with considerable criticism, and strong objection has been taken to it by the Madras Board of Revenue and the British India Association. In our opinion the procedure prescribed in this Rule is cumbersome and there would be little or no practical advantage from it

Rule 90 —The words 'or fraud' have been added after the word 'irregularity'. We think that the existing law as contained in S 311 of the present Code is defective, the omission in the section to refer to fraud as a ground for setting aside a sale having led some Courts to hold that an order on an application setting up fraud as a ground for relief is, unlike an order made on an application under S 311, a decree and open to second appeal. This result, which often involves a considerable prolongation of these proceedings, is in our opinion undesirable. We think that applications for the setting aside of sales should, so far as the procedure applicable to them is concerned, stand on the same footing whether they are based on the ground of irregularity or on the ground of fraud

Rules 95 and 96 —We have struck out the provisions about limitations contained in these rules. We agree with the Hon'ble Mr Justice Miller that it would be more appropriate to incorporate them in the Limitation Act, and we have suggested their incorporation in the Bill to amend and consolidate that Act which is now before Council

Order XXII

Rules 3 and 4 —Rr 3 and 4 have been amended so as to provide that if no application for substitution is made within the time allowed by law the suit shall abate. We have struck out the provision that the Court may make an order declaring the abatement as in our opinion it is unnecessary and likely to give rise to difficulty

Rule 6 —The provision as to ante dating the judgment has been struck out and in its stead we suggest a provision to the effect that the judgment shall have the same force and effect as if it had been pronounced before the death took place. In our opinion this is all that is required

Order XXXIV

Some of the Rules in this Order have been re drafted

The Transfer of Property Act does not contain any provision for the passing of a final decree in cases where payment is made in accordance with the terms of the preliminary decree. This is in our opinion an omission and we have provided in Rr 3 (1), 5 (1) and 8 (1) for the passing of final decrees in such cases

We approve of the proposal to repeal the provisions of S 93 of the Transfer of Property Act. We think that those provisions have worked considerable hardship and are not really needed. The first part of the section enacts that a mortgagee shall not bring the mortgaged property to sale otherwise than by instalment. This precludes the mortgagee from selling with the mortgage debt it is in mortgagee to purchase the equity. This is a distinct and separate transaction, and we can see no reason why it should

not be equally competent to him to have it sold in satisfaction of any claim which he may have against the mortgagor unconnected with the mortgage (*Ahmarajmal v Daim* I L R 32 Cal 296, *Lisel v Peete*, 1902 A C 461) In so far as it precludes the mortgagee from selling the property under a judgment for the mortgage debt it serves no useful purpose. We understand that the provision was enacted to prevent mortgagees from suing their mortgagors on the debt as such and in execution selling the mortgagors interest in the property. We however think that no such provision was needed seeing that under the law as it stood prior to the Act the Court never allowed the sale of a bare equity of redemption under a judgment on the covenant (*Syed Iman v Raycoomar* 23 W R 187 *Ahmarajmal v Daim* I L R 32 Cal 246).

Order XL

Rule 4.—We have re-drafted this rule on the lines of S 18 (4) of the Provincial Insolvency Act 1907. We think that the power to imprison receivers is too wide and should be omitted.

Order XLI

Rule 24. We have struck out this rule as in our opinion it is unduly restrictive.

Order XLIII

Rule 1. We suggest that there should be appeals from orders pronouncing judgment against a party under Order VIII Rule 10 Order X Rule 4 and Order XVI Rule 20.

The orders are under the present law appealable as decrees but having regard to the denunciation of a decree in the Code they would no longer be appealable in that way and we think it necessary to make them appealable as orders. We have also given an appeal against an order made under Rule 21 of Order XI.

Appendices.—The forms have been amplified and where necessary re-drafted. We think that as now settled they are an improvement on the forms in the present Code.

6. The publication ordered by the Council has been made as follows:—

In English

Gazette	Date
Gazette of India	7th September 1907
Fort Saint George Gazette	1st October 1907
Bombay Government Gazette	3rd October 1907
Calcutta Gazette	18th September 1907
United Provinces of Agra and Oudh Government Gazette	21st September 1907
Punjab Government Gazette	27th September 1907
Lurma Gazette	28th September 1907
Eastern Bengal and Assam Gazette	26th September, 1907
Central Provinces Gazette	21st September 1907
Coorg District Gazette	2nd January 1908
Sind Official Gazette	26th September 1907

In the Vernaculars

Province	Language	Date
Madras	Tamil	28th January 1908
	Telgu	7th and 28th January 1908
	Kanarese Malayalam	7th January 1908
Bombay	Marathi	
	Gujrati	29th January 1908.
	Kanarese	

<i>Province</i>	<i>Language</i>	<i>Date</i>
Bengal	Bengali .	21st January, 1908
	Hindi	17th December, 1907
	Urdu	27th December, 1907
United Provinces	Urdu	18th January, 1908
Punjab	Urdu	17th January, 1908
Eastern Bengal and Assam	Bengali	8th February 1908
Coorg	Kannada	} 1st February, 1908
	Marathi	

7 We think that the Bill has not been so altered as to require re publication and we recommend that it be passed as now amended

The 12th February 1908

{ H ERLE RICHARDS
MADHO LAL
H A SIM
RASHBEHARY GHOSE
S ISMAI
MG BAH TOO

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- (h) Attachment, order of
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- (i) Award decree on
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- (ii) Appeal—Maintainability — Decree on award—Ground of appeal Sch 2 P 16
- (iii) Appeal if lies—From decree on award on ground that remission of original award for reconsideration was unlawful Sch 2 P 14 N 9
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- (iv) Whether appeal maintainable on ground of invalidity of award
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- (j) Collector orders of
(i) Appeal—Maintainability—From orders of Collector in execution by him
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- (ii) Collector — Execution by — Orders of Collector—Appealability Sch 3 P 7 N 1
- (iii) Order of Collector representing or refusing to represent to Court that public sale of land in execution is not desirable—Appeal, if lies S 72 N 10
- (iv) Order of Collector executing decree, whether appealable S 70 N 7
- (v) Orders of Collector making partition of revenue paying estate, under a decree for partition S 54 N 8
- (k) Commissioner, order as to
(i) Appeal, whether lies from order confirming or varying report of commissioner for partition
O 26 R 14 N 9
- (ii) Appeal whether lies from order giving direction to commissioner in regard to taking accounts in partnership suits
O 20 R 15 N 7
- (iii) Appeal, whether lies from order on application for appointment of Commissioner to work out shares under decree for partition
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- (iv) Appeal, whether lies from orders relating to Commission for examination of adjustment of account O 26 R 11 N 6
- (v) Appeal, whether lies from order relating to issue commission for local investigation O 26 R 9 N 9
- (vi) Appeal, whether lies from order relating to issue of commission for examination of witness
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- (m) Compromise decree
(i) Appeal—Maintainability — From decision of Court where parties have consented to abide by it Sch 2 P 16 N 13
- (ii) Appeal, whether lies — From decree passed by Court where parties have entered into agreement to abide by such decree O 36 R 6 N 1
- (iii) Appeal, whether lies from consent decree S 96 N 15
- (iv) Consent decree — Consent by pleaders on behalf of minor — Decree, whether appealable S 96 N 15
- (v) Consent decree—Consent on behalf of minors—Appeal by minors, whether maintainable S 96 N 15
- (vi) Consent decree—Decree including matters outside scope of suit, whether appealable S 96 N 15
- (vii) Consent decree — Decree on plaintiff agreeing to be bound by defendant's oath, whether appealable S 96 N 15
- (viii) Consent decree—Under what circumstances appealable S 96 N 15
- (ix) Consent decree—Whether appealable on the ground of agreement not being lawful S 96 N 15
- (x) Decree in accordance with agreement to have disputes settled according to decision of Court on issues submitted whether appealable O 14 R 6 N 2
- (xi) Decree passed under agreement to adjust rights in accordance with decision of Court on issues submitted—Whether appealable O 14 R 6 N 1, R 7 N 2
- (xii) Factum of validity of compromise questioned before Court—Decree passed in terms of compromise after deciding dispute, whether appealable
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- (n) Compromise, order as to
(i) Appeal, if lies—Against order made with consent of parties recording a compromise S 108 N 3
- (ii) Appeal, whether and when lies from orders relating to compromise of suit
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- (iii) Appeal whether lies from order recording or refusing to record compromise
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- (iv) Order recording or refusing to record compromise—Whether appealable
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- (o) Consent, if can confer right of appeal
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- (p) Consent order
(i) Appeal, whether lies from consent order —For payment of decretal amount by instalments O 20 R 11 N 11
- (q) Contempt of Court, proceedings for
(i) Appeal — Whether lies from order of committal for contempt O 11 R 21 N 2
- (ii) Attachment—For contempt—Whether appealable S 104 N 13

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(r) Costs order as to

- (i) Appeal—Maintainability—Order as to costs S 35 N 29 O 41 R 23 N 21
 (ii) Appeal whether lies from order as to costs on withdrawal of suit O 23 R 1 N 39

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(s) Court fee order as to—Whether appeal lies O 7 R 11 N 11

- (t) Decree appeal from S 96
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(m) *Mis filia iudicis*

- (a) Appeal—Maintainability—From decree passed on review O 17 R 8 N 3

(b) Appeal whether lies from decree passed on report of commissioner on issues of fact referred by agreement of parties O 14 R 6 N 2

(c) Local inspection—Parties requiring Court to decide on local inspection—Decree whether appealable S 96 N 15

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- (v) Appeal—Whether lies—From order dismissing suit for failure to pay the money on condition of payment of which within certain time suit has been decreed O 20 R 14 N 16

(vi) Appeal—Whether lies—From order dismissing suit with liberty to sue again O 23 R 1 N 39

- (vii) Appeal—Whether lies from order dismissing appeal for default O 41 R 17 N 14

(viii) Appeal—Whether lies from order dismissing appeal on ground of limitation O 41 R 3 N 6

- (ix) Appeal—Whether lies from order dismissing case for default of appearance on adjourned hearing O 17 R 2 N 9

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- (xii) Appeal—Whether lies from order dismissing suit for default of plaintiff ordered to appear in person O 1 R 12 N 3

(xiii) Appeal—Whether lies from order dismissing suit for non appearance of defendant due to failure to serve process on account of default in payment of process fees O 9 R 2 N 5

- (xiv) Appeal—Whether lies from order rejecting appeal for failure to furnish security for costs O 41 R 10 N 11

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(w) Election Court decision of

- (i) From decision of election Court to High Court L P (C1) C1 16 N 2

(x) Evidence order as to

- (i) Appeal—Whether lies from order admitting or rejecting documents after

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(y) Execution proceedings orders in when appealable S 47 N 81 86 S 51 N J

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(i) Arrest of judgment debtor order as to
 (a) Appeal—Whether lies from order allowing or refusing to allow application for arrest of judgment debtor O 21 R 40 N 9

(b) Appeal—Whether lies from order disallowing claim for exemption from arrest S 135 N 10

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(d) Order under S 55 S 55 N 19

(ii) Attachment order as to

(a) Appeal—Whether lies—From an order as to release of property from attachment on decision of claim petition O 21 R 60 N 6

(iii) Award execution of orders in

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- (g) Arrest order of
 - (i) Appeal when lies against an order of arrest S 104 N 18
- (h) Attachment order of
 - (i) Appeal when lies against an order of attachment S 104 N 18
- (i) Award decree on
 - Sch 2 P 16 N 4 Sch 2 P 17 N 15
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 - (ii) Appeal—Maintainability—Decree on award—Ground of appeal Sch 2 P 16
 - (iii) Appeal if lies—From decree on award on ground that remission of original award for reconsideration was unlawful Sch 2 P 14 N 9
 - (iii) Decree on award—Not in accordance with award Sch 2 P 16 N 5
 - (iv) Whether appeal maintainable on ground of invalidity of award Sch 2 P 16 N 6
- (j) Collector orders of
 - (i) Appeal—Maintainability—From orders of Collector in execution by him Sch 3 P 7 N 1
- (k) Commissioner order as to
 - (i) Refusing to represent to Court that public sale of land in execution is not desirable—Appeal if lies S 72 N 10
 - (iv) Order of Collector executing decree whether appealable S 70 N 7
 - (v) Orders of Collector making partition of revenue plying estate under a decree for partition S 54 N 8
- (l) Commissioner order as to
 - (i) Appeal whether lies from order confirming or varying report of commissioner for partition O 26 R 14 N 9
 - (ii) Appeal whether lies from order giving direction to commissioner in regard to taking accounts in partnership suits O 20 R 15 N 7
 - (iii) Appeal whether lies from order on application for appointment of Commissioner to work out shares under decree for partition O 20 R 18 N 9
 - (iv) Appeal whether lies from orders relating to Commission for examination of adjustment of account O 26 R 11 N 6
 - (v) Appeal whether lies from order relating to issue commission for local investigation O 26 R 9 N 9
 - (vi) Appeal whether lies from order relating to issue of commission for examination of witness O 26 R 1 N 7, O 26 R 4 N 7
 - (vii) Whether and when lies from order of commission O 26 R 13 N 4
- (m) Order for
 - any injunction
 - arrest or attachment before judgment wrongfully obtained S 104 N 17

Appeal—Competency—(Contd.)

- (m) Compromise decree
 - (i) Appeal—Maintainability—From decision of Court where parties have consented to abide by it Sch 2 P 16 N 13
 - (ii) Appeal whether lies—From decree passed by Court where parties have entered into agreement to abide by such decree O 36 R 6 N 7
 - (iii) Appeal whether lies from consent decree S 96 N 13
 - (iv) Consent decree—Consent by pleaders on behalf of minor—Decree whether appealable S 96 N 13
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 - (vi) Consent decree—Decree including matters outside scope of suit whether appealable S 96 N 13
 - (vii) Consent decree—Decree on plaintiff agreeing to be bound by defendant's oath whether appealable S 96 N 15
- (n) Decree
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 - (x) Decree in accordance with agreement to have disputes settled according to decision of Court on issues submitted whether appealable O 14 R 6 N 2
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 - (xii) Factum of validity of compromise questioned before Court—Decree passed in terms of compromise after deciding dispute whether appealable S 96 N 15
- (o) Compromise order as to
 - (i) Appeal if lies—Against order made with consent of parties recording a compromise S 103 N 3
 - (ii) Appeal whether and when lies from orders relating to compromise of suit O 23 R 3 N 23 31
 - (iii) Appeal whether lies from order recording or refusing to record compromise O 23 R 3 N 17
 - (iv) Order recording or refusing to record compromise—Whether appealable S 96 N 15
- (p) Consent
 - (i) Consent if can confer right of appeal Ss 96 N 2 Ss 100 C 101 N 2
 - (ii) Consent order S 96 N 13
 - (iii) Appeal whether lies from consent order—For payment of decretal amount by instalments O 20 R 11 N 14
- (q) Contempt of Court proceedings for
 - (i) Appeal—Whether lies from order of commitment for contempt O 11 R 21 N 2
 - (ii) Attachment—For contempt—Whether appealable S 104 N 13

Appeal—Competency—(Contd.)

Appeal—Competency—Dismissal, order as to—Contd.)

(r) Costs order as to

(i) Appeal—Maintainability—Order as to costs S 35 N 29 O 41 R 23 N 21

(ii) Appeal whether lies from order as to costs on withdrawal of suit O 23 R 1 N 39

(iii) Compromise decree—Order for costs in — Appealability S 35 N 29

(iv) Costs — Compensatory costs whether order appealable S 35 A N 3

(v) Costs—Taxation of—Mode of—Whether appeal lies S 35 N 29

(s) Court fee order as to—Whether appeal lies O 7 R 11 N 11

(t) Decree appeal from S 96

(i) Final decree on mortgage O 31 R 3 N 13* O 34 R 5 N 24

(c) In suit for accounts O 20 R 16 N 5

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- (d) Appeal—Whether lies — Against order returning application for execution on ground that decree holder should calculate amount due to him on a different basis O 21 R 17 N 10

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- (j) Execution—Administrative orders in—Appealability S 47 N 86

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- (z10) Legal representatives impleading of, order as to

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 - (i) Appeal—Whether lies—From order refusing leave to appeal to Privy Council O 45 R 6 N 3
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 - (iv) Appeal—Whether lies from order directing notice to be issued before granting injunction O 29 R 3 N 2
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- (ii) Appeal — Whether lies from order rejecting plaint for misjoinder of causes of action O 2 R 4 N 9
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 - (iv) Appeal — Whether lies from order refusing to remove receiver O 40 R 1 N 51
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- (iii) Appeal—Remand under O 41, R 33 — Whether appealable O 41 R 33 N 16
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- (i) Appeal, maintainability against order refusing to restore application for review O 47 R 3 N 2
- (ii) Appeal, maintainability, from order refusing to restore application for review dismissed for default O 47 R 7 N 13

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- (iii) Appeal, whether lies—From order restoring or refusing to restore appeal to file O 41 R 19 N 10
- (iv) Appeal, whether lies, from order refusing to restore proceeding other than suit dismissed for default S 141 N 7
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- (vii) Appeal whether lies from order restoring or refusing to restore suit dismissed for default of appearance of plaintiff O 9 R 9 N 12
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- (z32) Return of plaint, appeal, etc
 - (i) Appeal—Memo of—Return of—For presentation to proper Court—Order for return whether appealable S 141 N 7, O 7 R 10 N 11
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 - (iii) Appeal — Whether lies from order directing security to be given as condition for stay of execution O 21 R 29 N 6
 - (iv) Appeal — Whether lies from order determining the sufficiency or otherwise of security for stay of execution O 41 R 5 N 12, 20
 - (v) Appeal—Whether lies from order discharging surety under the Code S 145 N 12
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- (vii) Appeal—Whether lies from order for security for re titution in case of execution pending appeal
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- (ix) Appeal whether lies from order accepting or refusing to accept security for re titution in case of execution pending appeal
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- (x) Order for security to stay execution if appealable
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- (xi) Small cause matter transferred to original Court—Appeal if lies from decision of Court of transfer
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(xii) Special case decrees

- (i) Agreement to state special case for decision of Court—Appealability of decree
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- (i) Appeal against interlocutory order—Whether lies after decree in the case has been passed
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- (ii) Appeal—Whether lies—After application for review is granted by original Court
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(xiv) Stay of execution order as to

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- (i) Appeal—Whether and when lies from order granting or refusing to grant stay of execution
O 41 R 5 N 19

- (ii) Appeal—Whether lies—From order staying execution
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(xv) Time extension of order as to

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- (i) Appeal—Maintainability against order extending or refusing to extend time for payment under decree for redemption
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- (ii) Appeal—Whether lies from—Order under S 148 S 2 (2) N 6 S 148 N 11

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(xvi) Valuation of suit order as to appealability of

- (i) Suit—Valuation of—Order as to—Whether and when appealable
O 7 R 11 N 11

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- (a) Appeal—Whether lies from order refusing to pass order absolute in mortgage suit for sale
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- (b) Appeal—Whether lies from order allowing or refusing to allow payment of decretal amount by instalments
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- (e) Appeal—Whether lies from order granting or refusing to grant leave to continue suit
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- (f) Appeal—Whether lies from order refusing to frame issues
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- (g) Order as to transfer of case to another Court whether appealable
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- (h) Order rejecting application for leave to join causes of action whether appealable
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- (i) Order striking off defence or refusing to do so for non compliance with order for discovery
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- (a) Legal practitioner consent by to compromise—Decree whether appealable
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- (b) Some defendants confessing judgment—Decree on merits on others—Appeal by latter—Whether entire decree can be reversed or varied
O 41 R 4 N 2

- (c) Whether objections to decree on compromise on behalf of minor can be taken in appeal
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- (d) Consolidation of suit for purposes—Validity
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- (iii) Appeal — Whether lies from order rejecting plaint for misjoinder of causes of action O 2 R 4 N 9
- (226) Power to treat incompetent appeal as application for revision
 - (i) Appeal not being competent — Power of appellate Court to treat it as application for revision S 115 N 19
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- (227) Preliminary and final decrees — If appeal from preliminary decree lies while final decree has been passed O 20 R 16 N 5
- (228) Receiver, order as to
 - (i) Appeal—Orders appointing or removing etc., receiver—Principles
 - (a) to remuneration of Receiver S 47 N 7
 - (ii) Appeal — Whether lies from order appointing Receiver in proceeding under Guardians and Wards Act S 141 N 7
 - (iii) Appeal — Whether lies from order enhancing receiver's remuneration O 40 R 2 N 4
 - (iv) Appeal — Whether lies from order refusing to remove receiver O 40 R 1 N 51
- (229) Remand, appeal from
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 - (a) Appeal—Remand under O 41 R 33 — Whether appealable O 41 R 33 N 16
 - (ii) Appeal — Whether lies from order admitting issues to lower Court for findings O 41 R 25 N 12
- (230) Restitution orders as to — Appeal from whether lies S 144 N 31, 32
- (231) Restoration, order as to
 - (i) Appeal maintainability against order refusing to restore application for review O 47 R 3 N 2
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- (iii) Appeal, whether lies—From order restoring or refusing to restore appeal to file O 41 R 19 N 10
- (iv) Appeal, whether lies, from order refusing to restore proceeding other than suit dismissed for default S 141 N 7
- (v) Appeal, whether lies from order refusing to restore application to restore suit dismissed for default O 9 Gent N 2
- (vi) Appeal, whether lies from order restoring or refusing to restore appeal dismissed for failure to furnish security for costs O 41 R 10 N 14
- (vii) Appeal whether lies from order restoring or refusing to restore suit dismissed for default of appearance of plaintiff O 9 R 9 N 12
- (viii) Appeal whether lies from order restoring suit dismissed for default O 17 R 2 N 9
- (ix) Appeal—Whether lies from order restoring suit dismissed for default of appearance of both parties O 9 R 4 N 8
- (232) Return of plaint, appeal, etc
 - (i) Appeal—Memo of—Return of—For presentation to proper Court—Order for return whether appealable S 141 N 7, O 7 R 10 N 11
 - (ii) Appeal—Whether lies—From orders in respect of return of plaint for presentation to proper Court S 2 (2) N 13, O 7 R 10 N 11
 - (iii) Appeal—Whether lies from order returning application for personal decree in mortgage suit O 34 R 6 N 21
- (233) Review, decree passed on—Appeal — Maintainability O 47 R 7 N 14
- (234) Review, order refusing appeal, maintainability O 47 R 7 N 2
- (235) Scheme decree, whether appealable S 92 N 3
- (236) Scheme decree, orders under S 47 N 86, S 92 N 3
- (237) Security, order as to
 - (i) Appeal—Whether lies from order for refund of security under Code S 145 N 12
 - (ii) Appeal — Whether lies against order requiring defendant to furnish security for production of property O 33 R 5 N 24
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 - (iv) Appeal — Whether lies from order determining the sufficiency or otherwise of security for stay of execution O 41 R 5 N 13, 29
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 - (vi) Appeal — Whether lies from order enforcing or refusing to enforce security bond under Code S 145 N 12

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- (vii) Appeal—Whether lies from order for security for restitution in case of execution pending appeal
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- (viii) Appeal—Whether lies from order requiring security for costs of suit
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- (ix) Appeal whether lies from order accepting or refusing to accept security for restitution in case of execution pending appeal
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- (x) Order for security to stay execution if appealable
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- (xi) Small cause matter transferred to original Court—Appeal if lies from decision of Court of transfer
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- (h) Wrong order for payment of and wrong dis-
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- Meaning of for purpose of power to transfer suits etc S 24 N 5
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- (ii) Rights of parties O 11 R 15 N 1
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**Execution — Sale — Purchase money payment of—
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**Execution — Sale — Purchase money payment of—
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Execution — Sale — Purchase money payment of —
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Execution—Sale—Setting aside—Application for—
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 - Application for postponement of payment or payment by instalments
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 - Application to set aside *ex parte* decree O 5 R 6 N 1, O 9 R 13 N 28
- See also Ex parte decree—Setting aside*
- (a) *Ex parte* order making a person liable under decree against firm O 21 R 50 N 6
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- Arbitration proceedings—Applications in connection with
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 - (a) By person defeated in claim proceedings O 21 R 63 N 6
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